

## EN BANC

[ G.R. No. 192088, October 09, 2012 ]

**INITIATIVES FOR DIALOGUE AND EMPOWERMENT THROUGH ALTERNATIVE LEGAL SERVICES, INC. (IDEALS, INC.), REPRESENTED BY ITS EXECUTIVE DIRECTOR, MR. EDGARDO LIGON, AND FREEDOM FROM DEBT COALITION (FDC), REPRESENTED BY ITS VICE PRESIDENT REBECCA L. MALAY, AKBAYAN CITIZEN'S ACTION PARTY, REPRESENTED BY ITS CHAIR EMERITUS LORETTA ANNE P. ROSALES, ALLIANCE OF PROGRESSIVE LABOR, REPRESENTED BY ITS CHAIRPERSON, DANIEL L. EDRALIN, REP. WALDEN BELLO, IN HIS CAPACITY AS DULY-ELECTED MEMBER OF THE HOUSE OF REPRESENTATIVES, PETITIONERS, VS. POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION (PSALM), REPRESENTED BY ITS ACTING PRESIDENT AND CHIEF EXECUTIVE OFFICER ATTY. MA. LUZ L. CAMINERO, METROPOLITAN WATERWORKS AND SEWERAGE SYSTEM (MWSS), REPRESENTED BY ITS ADMINISTRATOR ATTY. DIOSDADO M. ALLADO, NATIONAL IRRIGATION ADMINISTRATION (NIA), REPRESENTED BY ITS ADMINISTRATOR CARLOS S. SALAZAR, KOREA WATER RESOURCES CORPORATION, REPRESENTED BY ITS CHIEF EXECUTIVE OFFICER, KIM KUEN-HO AND/OR ATTORNEYS-IN-FACT, ATTY. ANNA BIANCA L. TORRES AND ATTY. LUTHER D. RAMOS, FIRST GEN NORTHERN ENERGY CORP., REPRESENTED BY ITS PRESIDENT, MR. FEDERICO R. LOPEZ, SAN MIGUEL CORP., REPRESENTED BY ITS PRESIDENT, MR. RAMON S. ANG, SNABOITIZ POWER-PANGASINAN INC., REPRESENTED BY ITS PRESIDENT, MR. ANTONIO R. MORAZA, TRANS-ASIA OIL AND ENERGY DEVELOPMENT CORPORATION, REPRESENTED BY ITS PRESIDENT AND CEO, MR. FRANCISCO L. VIRAY, AND DMCI POWER CORP., REPRESENTED BY ITS PRESIDENT, MR. NESTOR DADIVAS, RESPONDENTS.**

## DECISION

**VILLARAMA, JR., J.:**

Before us is a petition for certiorari and prohibition seeking to permanently enjoin the sale of the Angat Hydro-Electric Power Plant (AHEPP) to Korea Water Resources Corporation (K-Water) which won the public bidding conducted by the Power Sector Assets and Liabilities Management Corporation (PSALM).

### The Facts

Respondent PSALM is a government-owned and controlled corporation created by virtue of Republic Act No. 9136,<sup>[1]</sup> otherwise known as the "Electric Power Industry

Reform Act of 2001" (EPIRA). The EPIRA provided a framework for the restructuring of the electric power industry, including the privatization of the assets of the National Power Corporation (NPC), the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities. Said law mandated PSALM to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and Independent Power Producer (IPP) contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner, which liquidation is to be completed within PSALM's 25-year term of existence.<sup>[2]</sup>

Sometime in August 2005, PSALM commenced the privatization of the 246-megawatt (MW) AHEPP located in San Lorenzo, Norzagaray, Bulacan. AHEPP's main units built in 1967 and 1968, and 5 auxiliary units, form part of the Angat Complex which includes the Angat Dam, Angat Reservoir and the outlying watershed area. A portion of the AHEPP -- the 10 MW Auxiliary Unit No. 4 completed on June 16, 1986 and the 18 MW Auxiliary Unit No. 5 completed on January 14, 1993 -- is owned by respondent Metropolitan Waterworks and Sewerage System (MWSS).<sup>[3]</sup> The main units produce a total of 200 MW of power while the auxiliary units yield the remaining 46 MW of power. The Angat Dam and AHEPP are utilized for power generation, irrigation, water supply and flood control purposes. Because of its multi-functional design, the operation of the Angat Complex involves various government agencies, namely: (1) NPC; (2) National Water Resources Board (NWRB); (3) MWSS; (4) respondent National Irrigation Administration (NIA); and (5) Philippine Atmospheric, Geophysical and Astronomical Services Administration (PAG-ASA).

On December 15, 2009, PSALM's Board of Directors approved the Bidding Procedures for the privatization of the AHEPP. An Invitation to Bid was published on January 11, 12 and 13, 2010 in three major national newspapers. Subject of the bid was the AHEPP consisting of 4 main units and 3 auxiliary units with an aggregate installed capacity of 218 MW. The two auxiliary units owned by MWSS were excluded from the bid.

The following terms and conditions for the purchase of AHEPP were set forth in the Bidding Package:

#### IB-05 CONDITION OF THE SALE

The Asset shall be sold on an "AS IS, WHERE IS" basis.

The Angat Dam (which is part of the Non-Power Components) is a multi-purpose hydro facility which currently supplies water for domestic use, irrigation and power generation. The four main units of the Angat Plant release water to an underground trailrace that flows towards the Bustos Dam which is owned and operated by the National Irrigation Administration ("NIA") and provides irrigation requirements to certain areas in Bulacan. The water from the auxiliary units 1, 2 and 3 flows to the Ipo Dam which is owned and operated by MWSS and supplies domestic water to Metro Manila and other surrounding cities.

**The priority of water usage under Philippine Law would have to be observed by the Buyer/Operator.**

The Winning Bidder/Buyer shall be requested to enter into **an operations and maintenance agreement with PSALM for the Non-Power Components** in accordance with the terms and conditions of the O & M Agreement to be issued as part of the Final Transaction Documents. The Buyer, as Operator, shall be required to operate and maintain the Non-Power Components at its own cost and expense.

PSALM is currently negotiating a water protocol agreement with various parties which are currently the MWSS, NIA, the National Water Resources Board and NPC. If required by PSALM, **the Buyer will be required to enter into the said water protocol agreement as a condition to the award of the Asset.**

The Buyer shall be responsible for securing the necessary rights to occupy the land underlying the Asset.<sup>[4]</sup> (Emphasis supplied.)

All participating bidders were required to comply with the following: (a) submission of a Letter of Interest; (b) execution of Confidentiality Agreement and Undertaking; and (c) payment of a non-refundable fee of US\$ 2,500 as Participation Fee.<sup>[5]</sup> After holding pre-bid conferences and forum discussions with various stakeholders, PSALM received the following bids from six competing firms:

K-Water	US\$
	440,880,000.00
First Gen Northern Energy Corporation	365,000,678.00
San Miguel Corporation	312,500,000.00
SN Aboitiz Power-Pangasinan, Inc.	256,000,000.00
Trans-Asia Oil & Energy Development Corporation	237,000,000.00
DMCI Power Corporation	188,890,000.00

On May 5, 2010, and after a post-bid evaluation, PSALM's Board of Directors approved and confirmed the issuance of a Notice of Award to the highest bidder, K-Water.<sup>[6]</sup>

On May 19, 2010, the present petition with prayer for a temporary restraining order (TRO) and/or writ of preliminary injunction was filed by the Initiatives for Dialogue and Empowerment Through Alternative Legal Services, Inc. (IDEALS), Freedom from Debt Coalition (FDC), AKBAYAN Citizen's Action Party (AKBAYAN) and Alliance of Progressive Labor.

On May 24, 2010, this Court issued a *Status Quo Ante* Order directing the respondents to maintain the *status quo* prevailing before the filing of the petition and to file their respective Comments on the petition.<sup>[7]</sup>

**Arguments of the Parties**

Petitioners contend that PSALM gravely abused its discretion when, in the conduct of the bidding it disregarded and violated the people's right to information guaranteed under the Constitution, as follows: (1) the bidding process was commenced by PSALM without having previously released to the public critical information such as the terms and conditions of the sale, the parties qualified to bid and the minimum bid price, as laid down in the case of *Chavez v. Public Estates Authority*<sup>[8]</sup>; (2) PSALM refused to divulge significant information requested by petitioners, matters which are of public concern; and (3) the bidding was not conducted in an open and transparent manner, participation was indiscriminately restricted to the private sectors in violation of the EPIRA which provides that its provisions shall be "construed in favor of the establishment, promotion, preservation of competition and people empowerment so that the widest participation of the people, whether directly or indirectly, is ensured."<sup>[9]</sup>

Petitioners also assail the PSALM in not offering the sale of the AHEPP to MWSS which co-owned the Angat Complex together with NPC and NIA. Being a mere co-owner, PSALM cannot sell the AHEPP without the consent of co-owners MWSS and NIA, and being an indivisible thing, PSALM has a positive obligation to offer its undivided interest to the other co-owners before selling the same to an outsider. Hence, PSALM's unilateral disposition of the said hydro complex facility violates the Civil Code rules on co-ownership (Art. 498) and Sec. 47 (e) of the EPIRA which granted PSALM the legal option of transferring possession, control and operation of NPC generating assets like the AHEPP to another entity in order "to protect potable water, irrigation and all other requirements imbued with public interest."

As to the participation in the bidding of and award of contract to K-Water which is a foreign corporation, petitioners contend that PSALM clearly violated the constitutional provisions on the appropriation and utilization of water as a natural resource, as implemented by the Water Code of the Philippines limiting water rights to Filipino citizens and corporations which are at least 60% Filipino-owned. Further considering the importance of the Angat Dam which is the source of 97% of Metro Manila's water supply, as well as irrigation for farmlands in 20 municipalities and towns in Pampanga and Bulacan, petitioners assert that PSALM should prioritize such domestic and community use of water over that of power generation. They maintain that the Philippine Government, along with its agencies and subdivisions, have an obligation under international law, to recognize and protect the legally enforceable human right to water of petitioners and the public in general.

Petitioners cite the Advisory on the "Right to Water in Light of the Privatization of the Angat Hydro-Electric Power Plant"<sup>[10]</sup> dated November 9, 2009 issued by the Commission on Human Rights (CHR) urging the Government to revisit and reassess its policy on water resources vis-à-vis its concurrent obligations under international law to provide, and ensure and sustain, among others, "safe, sufficient, affordable and convenient access to drinking water." Since investment in hydropower business is primarily driven by generation of revenues both for the government and private sector, the CHR warns that once the AHEPP is privatized, there will be less accessible water supply, particularly for those living in Metro Manila and the Province of Bulacan and nearby areas which are currently benefited by the AHEPP. The CHR believes that the management of AHEPP is better left to MWSS being a government body and considering the public interest involved. However, should the decision to

privatize the AHEPP become inevitable, the CHR strongly calls for specific and concrete safeguards to ensure the right to water of all, as the domestic use of water is more fundamental than the need for electric power.

Petitioners thus argue that the protection of their right to water and of public interest requires that the bidding process initiated by PSALM be declared null and void for violating such right, as defined by international law and by domestic law establishing the State's obligation to ensure water security for its people.

In its Comment With Urgent Motion to Lift *Status Quo Ante* Order, respondent PSALM prayed for the dismissal of the petition on the following procedural grounds: (a) a petition for certiorari is not the proper remedy because PSALM was not acting as a tribunal or board exercising judicial or quasi-judicial functions when it commenced the privatization of AHEPP; (b) the present petition is rendered moot by the issuance of a Notice of Award in favor of K-Water; (c) assuming the petition is not mooted by such contract award, this Court has no jurisdiction over the subject matter of the controversy involving a political question, and also because if it were the intent of Congress to exclude the AHEPP in the privatization of NPC assets, it should have clearly expressed such intent as it did with the Agus and Pulangui power plants under Sec. 47 of the EPIRA; (d) petitioners' lack of standing to question the bidding process for failure to show any injury as a result thereof, while Rep. Walden Bello likewise does not have such legal standing in his capacity as a duly elected member of the House of Representatives as can be gleaned from the rulings in *David v. Arroyo*<sup>[11]</sup> and *Philippine Constitutional Association v. Enriquez*.<sup>[12]</sup>

On the alleged violation of petitioners' right to information, PSALM avers that it conducted the bidding in an open and transparent manner, through a series of events in accordance with the governing rules on public bidding. The non-disclosure of certain information in the invitation to bid was understandable, such as the minimum or reserve price which are still subject to negotiation and approval of PSALM's Board of Directors. The ruling in *Chavez v. Public Estates Authority*<sup>[13]</sup> is inapplicable since it involved government property which has become unserviceable or was no longer needed and thus fell under Sec. 79 of the Government Auditing Code whereas the instant case concerns a hydroelectric power plant adjacent to a dam which still provides water supply to Metro Manila. In the bidding for the AHEPP, PSALM claims that it relied on the Rules and Regulations Implementing the EPIRA, as well as COA Circular No. 89-296 on the general procedures for bidding by government agencies and instrumentalities of assets that will be divested or government property that will be disposed of. PSALM likewise avers that it was constrained to deny petitioner IDEALS' letter dated April 20, 2010 requesting documents relative to the privatization of Angat Dam due to non-submission of a Letter of Interest, Confidentiality and Undertaking and non-payment of the Participation Fee. With regard to IDEALS' request for information about the winning bidder, as contained in its letter dated May 14, 2010, the same was already referred to respondent K-Water's counsel for appropriate action. In any case, PSALM maintains that not all details relative to the privatization of the AHEPP can be readily disclosed; the confidentiality of certain matters was necessary to ensure the optimum bid price for the property.

PSALM further refutes the assertion of petitioners that the Angat Complex is an