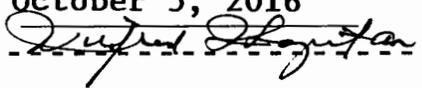


G.R. No. 212686 – SERGIO R. OSMEÑA, III v. POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION, EMMANUEL R. LEDESMA, JR., SPC POWER CORPORATION AND THERMA POWER VISAYAS, INC.

Promulgated:

October 5, 2016

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DISSENTING OPINION

JARDELEZA, J.:

I vote to **DENY** the Manifestation and Motion¹ dated March 16, 2016 filed by respondent Therma Power Visayas, Inc. (TPVI).

In its Manifestation and Motion, which I treat as a Motion for Clarification,² TPVI prayed that the Notice of Award³ dated April 29, 2014 given to it be reinstated and that respondent Power Sector Assets and Liabilities Management Corporation (PSALM) be ordered to execute the Asset Purchase Agreement, Land Lease Agreement, and other documents to implement TPVI's acquisition of the Naga Power Plant Complex (NPPC).

The Court's Decision of September 28, 2015 indeed omitted to state the effect of the nullity of SPC's right to top on the Notice of Award dated April 29, 2014 in favor of TPVI. I dissent, however, from the Resolution granting TPVI's Manifestation and Motion. In my view, the whole bidding process has already been rendered invalid as a consequence of this Court's September 28, 2015 Decision.

The nullification of SPC's right to top likewise invalidated the entire bidding process.

In *JG Summit Holdings, Inc. v. Court of Appeals*,⁴ we laid down the three principles of public bidding: (1) the offer to the public; (2) an opportunity for competition; and (3) a basis for comparison of bids. As long as these three principles are complied with, the public bidding can be considered valid and legal.

¹ *Rollo*, pp. 1647-1653.

² *Mahusay v. B.E. San Diego, Inc.*, G.R. No. 179675, June 8, 2011, 651 SCRA 533, 539-540.

³ *Rollo*, pp. 447, 919. In the Decision dated September 28, 2015, the date of TPVI's Notice of Award was erroneously indicated as April 30, 2014.

⁴ G.R. No. 124293, November 20, 2000, 345 SCRA 143.



In our September 28, 2015 Decision, we held that the bidding lacked the second requisite as SPC's right to top the winning bid prevented genuine competition. We said that:

In light of the foregoing, we hold that the grant of right to top to SPC under the LBGT-LLA is void as it is not founded on the said lessee's legitimate interest over the leased premises. SPC's argument that the privatization of NPPC was even more advantageous to the Government, simply because it resulted in a higher price (Php54 million more) than TPVI's winning bid, is likewise untenable. Whatever initial gain from the higher price obtained for the NPPC compared to the original bid price of TPVI is negated by the fact that SPC's right to top had discouraged more potential buyers from submitting their bids, knowing that even their most reasonable bid can be defeated by SPC's exercise of its right to top. In fact, only SPC and TPVI participated in the 3rd Round of Bidding. Attracting as many bidders to participate in the bidding for public assets is still the better means to secure the best bid for the Government, and achieve the objective under the EPIRA to private NPC's assets in the most optimal manner.⁵

I agree with SPC that since the existence of the right to top was a material and operative fact in the bidding for the NPPC, its nullification likewise nullified the entire bidding process. Thus, it is as if there was no bid and no Notice of Award to TPVI:

6. In fact, it can be reasonably assumed that all potential bidders, including TPVI, calculated their possible bids taking into consideration SPC's RTT. In other words, the existence of the RTT was a material and operative fact in the bidding which substantially affected the entire bidding process for the NPPC. The existence of the RTT prior to its nullification had consequences on the entire bidding process that cannot be ignored.

7. If, as prayed for, the NOA in favor of TPVI is reinstated, it will give rise to the anomalous situation where it was able to bid on the project under circumstances materially different from the current situation. Worse, it perpetuates the perceived "defect" in the bid where, as this Honorable Court ruled, the "best price" was not availed of because of the existence of the RTT. This Honorable Court ruled that "SPC's [RTT] had discouraged more potential buyers from submitting their bids, knowing that even the most reasonable bid can be defeated by SPC's exercise of the [RTT]." Presumably, therefore this Honorable Court was of the impression that more bidders would have participated were it not for SPC's RTT. Following this Honorable Court's conclusion, therefore, the NOA of TPVI

⁵ *Rollo*, p. 1155. Underscoring supplied.

was itself a product of a bidding wherein potential bidders were “discouraged” to participate.

8. In short, while TPVI claims that the RTT was invalid, it wishes to have the whole bidding process, which took the RTT into consideration, to be validated. If only for consistency, this should not be countenanced.⁶

Also, as argued by PSALM, SPC’s right to top is one of the major factors considered by potential bidders:

15. As earlier mentioned, the condition of the bidding of the Naga Power Plant Complex involved SPC’s right to top the winning bid as one of the major parameters and considerations factored in by potential bidders on two points: (i) on whether to participate or not in the said bidding; and (ii) in the preparation of their bids for submission. In the event that there is a winning bidder, such bidder could only acquire the generation asset if and only if SPC chooses not to exercise its right to top.

16. All throughout the privatization of the Naga Power Plant Complex, SPC’s right to top was a major feature therein that influenced the outcome of the public bidding as well as in the participation or non-participation of bidders.

17. Invalidating the right to top, which was present since the commencement of the privatization of the Naga Power Plant Complex, would change the complexion of the whole bidding process itself as it would no longer be one of the considerations to be factored in by potential bidders in participating in the bidding for the Naga Power Plant Complex and in the submission of the bid itself therein.⁷

TPVI cites the severability clause in the PSALM Bidding Procedures, as follows:

IB-28 General Conditions

x x x

26. If any one or more of the provisions of the Bidding Procedures or any part of the Bidding Package is held to be invalid, illegal or unenforceable, the validity, legality, or enforceability of the remaining provisions will not be affected thereby and shall remain in full force and effect.⁸

I am not persuaded. The nullity of the right to top, which was an essential and major parameter in the bidding, carried with it the nullity of the whole bidding process. It is significant that *JG Summit* referred to the

⁶ *Id.* at 1686-1687. Emphasis and citations omitted.

⁷ *Id.* at 1676.

⁸ *Id.* at 876.

distinctive character of the bidding as a “system” which can be thwarted if it excludes “any” of the three principles of public bidding.⁹ The totality of the system would be destroyed if invalidation of one of its principles does not result in the invalidation of the whole process. A rebidding of the NPPC without SPC being accorded a right to top would encourage the participation of several other bidders to secure the best bid for the government.

As the whole bidding process has, in my view, already been rendered invalid, I see no need to further discuss the other arguments raised by TPVI.


FRANCIS H. JARDELEZA
Associate Justice

⁹ *Supra* note 18 at 162.