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SPECIAL THIRD DIVISION

[G.R. No. 212686. October 05, 2016]

SERGIO R. OSMEÑA III, PETITIONER, VS. POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION, EMMANUEL R. LEDESMA, JR., SPC POWER CORPORATION, AND THERMA POWER VISAYAS, INC., RESPONDENTS.

RESOLUTION

VELASCO JR., J.:

For resolution of the Court is the Manifestation/Motion dated March 16, 2016 of private respondent Therma Power Visayas, Inc. (TPVI). As TVPI expounded,[1] a Notice of Award dated April 30, 2014 was issued in its favor for the purchase of the Naga Power Plant Complex (NPPC). The award, however, was cancelled because of the exercise by SPC Power Corporation (SPC) of its Right to Top. TVPI then implores the Court to clarify the effect on the Notice of Award of the subsequent annulment of the said Right to Top in our September 28, 2015 Decision, and prays for the reinstatement thereof.

The Facts

On December 27, 2013, the Board of Directors of the Power Sector Assets and Liabilities Management Corporation (PSALM) approved the commencement of the 3rd round of bidding for the sale of the 153.1MW NPPC. Respondents SPC Power Corporation (SPC) and TVPI submitted their respective bids for the project.[2] The results of the bidding are as follows:[3]

	TPVI	**SPC**
a. Purchase Price	441,191,500.00	211,391,388.88
b. Rentals	588,735,000.00	588,735,000.00
c. Option Price	58,873,500.00	58,873,500.00
Financial Bid, PhP	**1,088,800,000.00**	**858,999,888.88**

In due course, PSALM issued a Notice of Award dated April 30, 2014 in favor of TPVI,

declaring the latter as the Winning Bidder. The execution of a Land Lease Agreement (LLA) and Assets Purchase Agreement (APA) in favor of TPVI, however, was subject to SPC's non-exercise of its Right to Top. The pertinent portion of the Notice of Award provides:[4]

> In accordance with the bidding procedures for the sale of the 153.1MW Naga Power Plant dated 6 February 2014, the Power Sector Assets and Liabilities Management Corporation (PSALM) Privatization Bids and Awards Committee (PBAC) hereby issues this Notice of Award which declares that TPVI is the Winning Bidder for the Sale of NPP.
>
> PSALM's execution of the APA, however, shall be subject to the second paragraph of Section IB-20 (Award to the Winning Bidder) of the Bidding Procedures, which provides that: "*PSALM's entering into the Asset Purchase Agreement with the Winning Bidder shall be subject to SPC's rights under Section 3.02 of the LLA. Hence, if the exercise of the rights of SPC under Section 3.02 of the LLA is legally and validly consummated, PSALM shall not enter into the Asset Purchase Agreement with the Winning Bidder. Should SPC not exercise its rights under Section 3.02 of the LLA or if the exercise of the rights of SPC under Section 3.02 of the LLA is not legally and validly consummated, upon notice by PSALM, the Winning Bidder must enter into and fully and faithfully comply with the Asset Purchase Agreement.*"

On the assumption that SPC validly exercised its Right to Top, PSALM executed the NPPC-APA and NPPC-LLA in SPC's favor, cancelling TPVI's Notice of Award in the process. The Right to Top and the resultant agreements from its exercise, however, were subsequently nullified by the Court through its September 28, 2015 Decision, the dispositive portion of which reads:

> **WHEREFORE**, the petition is hereby **GIVEN DUE COURSE** and the writ prayed for accordingly **GRANTED**. The right of first refusal (right to top) granted to Saicon Power Corporation under the 2009 Naga LBGT-LLA is hereby declared **NULL and VOID**. Consequently, the Asset Purchase Agreement (NPPC-APA) and Land Lease Agreement (NPPC-LLA) executed by the Power Sector Assets and Liabilities Management Corporation and SPC are **ANNULLED** and **SET ASIDE**.

No costs.

SO ORDERED.

Petitioner Sergio R. Osmeña III (Osmeña) and respondents PSALM and SPC filed their respective motions for reconsideration. Meanwhile, respondent TPVI filed the instant Manifestation/Motion wherein it maintained that the nullification of SPC's Right to Top calls for the reinstatement of the cancelled April 30, 2014 Notice of Award in its favor.

The Court resolved to deny with finality SPC's motion on December 9, 2015,[5] and those of Osmeña and PSALM on April 6, 2016. Notwithstanding the denial with finality of their respective motions, they were nevertheless required to comment on TPVI's Manifestation/Motion that remained unresolved.[6] For their part, respondents SPC and PSALM contend that the Decision resulted in the material alteration of the terms of the public bidding and called for the conduct of another in its stead.

Our Ruling

TPVI's motion is impressed with merit.

The Bidding Procedures contain a severability clause that allows the award in favor of TPVI to survive

Section IB-20 of the PSALM Bidding Procedures pertinently provides:[7]

> Anything in these bidding procedures notwithstanding, PSALM's entering into the Asset Purchase Agreement with the Winning Bidder shall be subject to SPC's rights under Section 3.02 of the LLA. Hence, if the exercise of the rights of SPC under Section 3.02 of the LLA **is legally and validly consummated**, PSALM shall not enter into the Asset Purchase Agreement with the Winning Bidder. **Should SPC not exercise its rights under Section 3.02 of the LLA or if the exercise of the rights of SPC under Section 3.02 of the LLA is not legally or validly consummated**, upon Notice by PSALM, the Winning Bidder must enter into and fully and faithfully comply with the Asset Purchase Agreement. (emphasis added)

Tucked at the end of the guidelines, however, is a **severability clause** that reads:[8]

> **IB-28 General Conditions**
>
> x 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.** (emphasis added)

Contrary to the postulations of respondents PSALM and SPC, the nullification of the Right to Top did not change the complexion of the bidding. By no means should this be considered an alteration of the terms of the public bidding, let alone a material one, for it was clearly a contingency expressly covered by the provisions of the Bidding Procedure as evidenced by the severability clause.

The afore-quoted severability clause conveys the clear intention to isolate and detach any invalid provision from the rest so that the latter may continue to be in force and effect. It operates to salvage the surviving provisions of the Bidding Procedures as valid, legal, and enforceable, despite the nullity of a component part.

Our Decision nullifying SPC's Right to Top ought not then be construed as the nullification of the entire third round of the public bidding. It merely called for the application of the severability clause to prevent PSALM, as much as possible, from having to repeat the process for the fourth time. Consistently, the Court never expressly declared the third round of bidding as invalid. Clear from the language of the dispositive portion of the Court's Decision is that the nullification was limited only to SPC's Right to Top and the NPPC-LLA and NPPC-APA in its favor, nothing more. The results of the prior conducted bidding process should then be upheld, and the Notice of Award dated April 30, 2014, reinstated.

The Notice of Award dated April 30, 2014 is a perfected contract between PSALM and TPVI.[9] As can be recalled, it states that the obligation of PSALM to execute the NPPC-APA and NPPC-LLA in favor of TPVI is conditioned on SPC's non-exercise or failure to legally and validly exercise its Right to Top. This agreement is the law between the contracting parties with which they are required to comply in good faith.[10]

In view of the Court's Decision, however, the condition in the Notice of Award should be deemed as not written, and the obligation to award the NPPC-LLA and NPPC-APA to TPVI, due and demandable. Furthermore, the mutual obligation of the parties to abide by their covenant in good faith remains, entitling TPVI to demand compliance from PSALM, including the award of the purchase contracts in its favor. This is but the proper application of the severability clause.

Articles 1181 and 1185 of the Civil Code find application in this case

The award of the NPPC-LLA and NPPC-LLA to TPVI further finds justification under Arts. 1181 and 1185 of the Civil Code, viz:

> **Article 1181.** In conditional obligations, the acquisition of rights, as well as the extinguishment or loss of those already acquired, shall depend upon the happening of the event which constitutes the condition.
>
> x x x x
>
> **Article 1185. The condition that some event will not happen at a determinate time shall render the obligation effective** from the moment the time indicated has elapsed, or **if it has become evident that the event cannot occur**. x x x (emphasis added)

The Court explained in *The Wellex Group, Inc. v. U-Land Airlines, Co., Ltd*.[11] that, under Art. 1185, if an obligation is conditioned on the non-occurrence of a particular event at a determinate time, that obligation arises (a) at the lapse of the indicated time, or (b) if it has become evident that the event cannot occur. To illustrate:[12]

> Petitioner Wellex and respondent U-Land bound themselves to negotiate with each other within a 40-day period to enter into a share purchase agreement. If no share purchase agreement was entered into, both parties would be freed from their respective undertakings.
>
> It is the non-occurrence or non-execution of the share purchase agreement that would give rise to the obligation to both parties to free each other from their respective undertakings. This includes returning to each other all that they

> received in pursuit of entering into the share purchase agreement.
>
> At the lapse of the 40-day period, the parties failed to enter into a share purchase agreement. This lapse is the first circumstance provided for in Article 118.5 that gives rise to the obligation. Applying Article 1185, the parties were then obligated to return to each other all that they had received in order to be freed from their respective undertakings.
>
> However, the parties continued their negotiations after the lapse of the 40-day period. They made subsequent transactions with the intention to enter into the share purchase agreement. Despite that, they still failed to enter into a share purchase agreement. Communication between the parties ceased, and no further transactions took place.
>
> It became evident that, once again, the parties would not enter into the share purchase agreement. This is the second circumstance provided for in Article 1185. Thus, the obligation to free each other from their respective undertakings remained.

In the case at bar, PSALM's obligation to award the contract in TPVI's favor was dependent on the non-occurrence of an event: SPC's legal and valid exercise of its Right to Top. As phrased by PSALM: "*the approval of the sale to TPVI was a conditional one, the consummation of which is dependent on the non-exercise by SPC of its right to top.*"[13] It has become apparent, however, that such event will never occur. SPC can never legally and validly invoke its Right to Top in view of its nullity. The condition, therefore, is deemed complied with by operation of law, and the obligation to execute the purchase contracts in favor of TPVI, due and demandable.

There was genuine competition when the public bidding was conducted

In *JG Summit Holdings, Inc. v. Court of Appeals*,[14] the Court enumerated the three principles of public bidding, thusly: (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.

In the case at bar, respondents PSALM and SPC challenge the conduct of the bidding process for allegedly violating the second principle. They posit that SPC's Right to Top

prevented genuine competition by discouraging other corporations from submitting their respective bids.

PSALM and SPC's contentions are untenable.

It bears stressing on the outset that the severability clause under IB-28, paragraph 26 was known to the bidders, as it was embodied in the Bidding Procedures itself. Thus, any interested party had prior knowledge of the possibility of the eventual nullification of SPC's Right to Top and of its repercussions.

That aside, the allegation that the Right to Top discouraged parties from participating in the bidding process is speculative. There is no guarantee that conducting another round of bidding will increase the number of bidders.

To put the situation into perspective, it is well to recall that SPC's right to top can be found in IB-20 of the Bidding Procedure. Thus, parties interested in buying the NPPC would only know of SPC's Right to Top if they availed of the bid documents. There is no showing, however, that there is a disparity between the number of parties who purchased the bid documents, on the one hand, and the number of parties who actually submitted their respective bids, on the other. Only then could PSALM and SPC have possibly, but not even conclusively, established that the Right to Top dissuaded other parties from submitting their bids.

It is likewise worthy to note that this is already the third round of bidding for the purchase of NPPC and in this round, only two companies participated: respondents SPC and TPVI. It may then be that the properties subjected to bidding are just really not attractive assets to begin with so as to appeal to the public.

Furthermore, almost three (3) years had already elapsed since the third round of bidding commenced, and even longer since the first. NPPC's assets, by now, have already significantly depreciated and may no longer fetch the same price as that offered by TPVI. It is not entirely implausible, therefore, that the new bids would even be lower than TPVI's winning bid.

Similarly, there is no assurance that the new winning bid would be higher than TPVI's proposal, for it is possible that the Right to Top even encouraged TPVI to maximize its bid in this third round. It could even be said that the existence of the Right to Top drove the interested parties to bid an amount that would have been difficult, if not impossible, for SPC

to meet, if not exceed.

To pursue the argument that other parties were dissuaded by the Right to Top would be to consider its exercise as an absolute eventual certainty rather than a mere possibility. This would run counter to the clear language of the Bidding Guidelines that the contract will be awarded to the winning bidder "*should SPC not exercise its right*."

Neither can SPC claim that its Right to Top influenced its bid. That SPC mistakenly rested chiefly on its Right to Top is no one's fault but its own. To recall, SPC's Right to Top is embodied in Sec. 3.02 of the LBGT-LLA.[15] The same document, however, likewise contains a severability clause that mirrors that in paragraph 26 of IB-28 of the Bidding Procedure:[16]

> 14.16. Severability
>
> If any one or more of the provisions of this Agreement is declared invalid or unenforceable in any respect under any Philippine Law, the validity, legality or enforceability of the remaining provisions contained herein shall not in any way be affected or impaired.

Thus, SPC was fully aware of the possibility that the Land-Based Gas Turbine (LBGT)-LLA provisions, the Right to Top included, would not necessarily be upheld by the courts at every turn.

Moreover, the Court was also not remiss in reminding bidders of government contracts against their blind reliance on their alleged preferential rights. As held in *LTFRB v. Stronghold*:[17]

> In the field of public contracts, **these stipulations are weighed with the taint of invalidity** for contravening the policy requiring government contracts to be awarded through public bidding. Unless clearly falling under statutory exceptions, government contracts for the procurement of goods or services are required to undergo public bidding "to protect the public interest by giving the public the best possible advantages thru open competition." x x x
>
> **These clauses escape the taint of invalidity only in the narrow instance where the right of first refusal (or "right to top") is founded on the**

> **beneficiary's "interest on the object over which the right of first refusal is to be exercised"** (such as a "tenant with respect to the land occupied, a lessee vis-a-vis the property leased, a stockholder as regards shares of stock, and a mortgagor in relation to the subject of the mortgage") and the government stands to benefit from the stipulation. x x x (emphasis added)

The above disquisition served as nothing less than a warning. The clear message conveyed is that **the advantage granted is generally viewed as invalid**, in consonance with the more fundamental principle that all government procurement must undergo public bidding under equal terms. It must first be established that the beneficiary has an existing interest in the object of the contract before his preferential right can "*escape the taint of invalidity*.

In this case, however, SPC had knowledge that it did not possess the requisite subsisting interest in the NPPC project. It was then aware that its Right to Top under the LBGT contract, which involves a separate and distinct power plant from that in the NPPC project, could not possibly be able to withstand judicial scrutiny.

In view of the foregoing circumstances—the Severability Clause in Sec. 14.16 of the LBGT-LLA and in IB-28 of the Bidding Procedure, the Court's warning in *Stronghold*, and SPC's knowledge of its lack of subsisting interest—SPC should, therefore, be bound by its initial bid of P858,999,888.88. It was never deprived of a fair chance to bid, notwithstanding the Court's subsequent nullification of its Right to Top. It was simply mistaken when it put much premium on its alleged Right to Top when it calculated its bid, even though it knew or ought to have known of its defect.

SPC did not legally and validly exercise its Right to Top

Regardless of whether or not the Right to Top was nullified, however, the award of the purchase contracts to TPVI would still be in order, for it appears that SPC did not validly exercise its erstwhile advantage.

The exercise of the Right to Top is no different from the manner of perfecting any other sales contract. It is perfected by mere consent, upon a meeting of the minds on the offer and the acceptance thereof based on subject matter, price and terms of payment.[18]

In the case at bar, PSALM Chief Emmanuel R. Ledesma, Jr., on April 29, 2014, wrote to SPC informing the latter that it has the right to top the winning bid of TPVI for a 10-year lease on

NPPC that will expire on January 29, 2020. The letter likewise directed SPC to pay within thirty (30) days should it exercise the said right. This is constitutive of a defmite offer.

In reply, SPC wrote to PSALM in the following wise:[19]

> As SPC also participated in the bidding, the bid for the lease component clearly computed on the basis of, and was for twenty-five (25) years. However, by now **stating in your letter that the *"lease has a Term often (10) years and will expire on 29 January 2020,"*** SPC would effectively have less than six (6) years from today to use the property, which is extremely short for the lease component computed and based on the twenty-five (25) year term that was offered during the bidding. While we are aware that the second paragraph of Section 3.02 of the LLA-LBGT provides that the property covered by the right to top will be "governed" by the LLA-LBGT, we are of the reasonable belief that this does not include "Term" under Section 2.01 thereof considering that the "Draft Land Lease Agreement for the 153.1-MW Naga Power Plant," which formed part of the bid documents, specifically provided for a "Term" of twenty-five (25) years.
>
> On the basis of the foregoing, **SPC confirms that it is exercising its right to top the winning bid of TPVI** and will pay the amount of P1,143,240,000.00 **on the understanding that the Term of the lease is twenty-five (25) years from closing date**.

It is clear from the tenor of SPC's letter that its acceptance of PSALM's offer can never be categorized as unqualified. Instead, what SPC communicated was its counter-offer for a longer lease period. This is further made evident by our pronouncement in *Development Bank of the Philippines v. Medrano* (*Medrano*),[20] to wit:

> Under the law, a contract is perfected by mere consent, that is, from the moment that there is a meeting of the offer and the acceptance upon the thing and the cause that constitute the contract. The law requires that the offer must be certain and **the acceptance absolute and unqualified**. An acceptance of an offer may be express and implied; a qualified offer constitutes a counter-offer. Case law holds that an offer, to be considered certain, must be definite, while **an acceptance is considered absolute and unqualified when it is identical in**

> **all respects with that of the offer so as to produce consent or a meeting of the minds**. We have also previously held that the ascertainment of whether there is a meeting of minds on the offer and acceptance depends on the circumstances surrounding the case.

As applied, it can readily be seen that there is no identity between what was offered and what was accepted. There is a glaring difference not only in the term of the lease but also in its reckoning period. It cannot then meet the criteria of an "*unqualified acceptance*" as discussed in the *Medrano* case.

Furthermore, whether the lease should only be until 2020 or 25 years from closing date was an issue that reached the Office of the Government Corporate Counsel (OGCC). Through Opinion No. 98, Series of 2014,[21] dated May 21, 2014, the OGCC opined in the following wise:[22]

> We agree with PSALM's position that SPC's Right to Top should be consistent with the 2009 LLA provisions. It is established that the 2009 LLA is the source of SPC's Right to Top and explicitly provides that such right is to be exercised in accordance with its provisions.
>
> Section 3.02 of the 2009 LLA is clear. If SPC opts to exercise the Right to Top, the property will form part of the Leased Premises and shall be subject to the LLA's provisions. Section 2.01 of the LLA is explicit that the lease shall expire on 29 January 2020. Should SPC opt to exercise the Right to Top, it must do so within the 2009 LLA's parameters.

Thus, when the 30-day period to exercise the Right to Top was about to lapse, the standing offer to SPC was for a lease expiring on January 29, 2020. Without SPC communicating its unqualified acceptance of such offer before the Right to Top expired, the award of the purchase contracts to TPVI became due.

Although the Department of Justice eventually found for SPC on June 23, 2014,[23] the 30-day period to exercise the Right to Top has already elapsed, and the said right, by then, could no longer be validly or legally consummated. It was incumbent upon SPC to seek judicial intervention to toll the running of the 30-day period pending the resolution of the issue. No recourse, however, was interposed by SPC.

The finality of Decision prevents the Court from departing from the clear language of the ruling

Lastly, in treating the Manifestation/Motion, due regard must be given to the finality of the judgment accorded to the Court's September 28, 2015 ruling. Jurisprudence teaches that a decision that has acquired finality becomes immutable and unalterable, and may no longer be modified in any respect, even if the modification is meant to correct erroneous conclusions of fact and law, and whether it be made by the court that rendered it or by the Highest Court of the land.[24]

The dispositive portion of the September 28, 2015 Decision is clear. Only SPC's Right to Top and the documents executed pursuant to its exercise were nullified by the Court. **The Court never invalidated the entire bidding process** since it was not established that there was a deviation from the procedure outlined in Republic Act No. 9184, otherwise known as the *Government Procurement Reform Act*, nor from the bidding guidelines. The acts of the procuring agency prior to SPC's exercise of its Right to Top, therefore, subsist. Consequently, there is merit in TPVI's motion that the Notice of Award dated April 30, 2014 be reinstated and the purchase contracts in its favor ordered executed.

This should in no way be construed as a departure from the express wording of the Court's Decision. On the contrary, it adheres to the plain wording of its *fallo*: that only SPC's Right to Top and the NPPC-LLA and NPPC-APA in its favor were declared null and void.

Furthermore, it bears stressing in this case that the finality of the September 28, 2015 Decision extends only to petitioner Osmeña and respondents SPC and PSALM. Noticeably, while their respective motions for reconsideration have already been denied with finality, the Court has yet to resolve TPVI's pending Manifestation/Motion. The Court even ordered the other parties to Comment thereon, thereby reserving the power to grant the same. The Court can still, therefore, grant TPVI's motion and uphold the validity of the prior-conducted bidding process.

In any event, the Court is not precluded from rendering a *nunc pro tunc* judgment to amend the dispositive portion of the September 28, 2015 Decision for it to truly reflect the action of the Court.[25] The lack of directive in the *fallo* on how to proceed from the nullification of SPC's Right to Top and its NPPC-APA and NPPC-LLA contracts, nothing more, left the parties at a quandary, prompting them to seek judicial intervention anew. The Court must, therefore, supply herein what was inadvertently omitted in the Decision—the natural and

logical consequence of our September 28, 2015 ruling. Otherwise, a rejection of the plea of TPVI will only spawn a multiplicity of suits and clogging of the court docket. Such event is without a doubt contrary to the established policy of the Court to provide in its rules of procedure a just, speedy, and inexpensive disposition of every action and proceeding.[26]

WHEREFORE, premises considered, the Manifestation/Motion dated March 16, 2016 of respondent TPVI is hereby **GRANTED**. The Entry of Judgment is **LIFTED**. The *fallo* of the September 28, 2015 Decision is hereby amended to include a directive that the April 30, 2014 Notice of Award in favor of said respondent be **REINSTATED**, excluding the portion therein granting to SPC the Right to Top. Respondent PSALM is further directed to execute the NPPC-APA and NPPC-LLA in favor of respondent TPVI with dispatch. As amended, the *fallo* of said Decision shall read:

> **WHEREFORE**, the petition is hereby **GIVEN DUE COURSE** and the writ prayed for accordingly **GRANTED**. The right of first refusal (right to top) granted to Salcon Power Corporation (now SPC Power Corporation) under the 2009 Naga LBGT-LLA is hereby declared **NULL and VOID**. Consequently, the Asset Purchase Agreement (NPPC-APA) and Land Lease Agreement (NPPC-LLA) executed by the Power Sector Assets and Liabilities Management Corporation and SPC are **ANNULLED** and **SET ASIDE**. The Notice of Award dated April 30, 2014 in favor of Therma Power Visayas, Inc. is hereby **REINSTATED**, excluding the portion therein granting to SPC the Right to Top. Respondent PSALM is directed to execute the NPPC-APA and NPPC-LLA in favor of TPVI with dispatch.
>
> No costs.

SO ORDERED.

Perez, and *Reyes, JJ.*, concur.
Peralta, J., I join the opinion of J. Jardeleza.
Jardeleza, J., see dissenting opinion.

October 10, 2016

NOTICE OF JUDGMENT

Sirs / Mesdames:

Please take notice that on October 5, 2016 a Resolution, copy attached hereto, was rendered by the Supreme Court in the above-entitled case, the original of which was received by this Office on October 10, 2016 at 3:26 p.m.

Very truly yours,
(SGD)
WILFREDO V. LAPITAN
Division Clerk of Court

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[1] *See* Manifestation dated July 19, 2016.

[2] *Rollo*, pp. 1139-1140.

[3] Id. at 1140.

[4] Id. at 1161-1162.

[5] Id. at 1407.

[6] Id. at 1647-1648.

[7] Id. at 866-867.

[8] Id. at 876.

[9] G.R. No. 147410, February 5, 2004, 422 SCRA 148. This is without prejudice to the rights and remedies available to the procuring agency under bidding guidelines and the procurement law, see *SM Land, Inc. v. Bases Conversion Development Authority*, G.R. No. 203655, March 18, 2015.

[10] *See* CIVIL CODE, Art. 1159. Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.

[11] G.R. No. 167519, January 14, 2015.

[12] Id.

[13] *Rollo*, p. 1668.

[14] G.R. No. 124293, September 24, 2003.

[15] *Rollo*, p. 94; id. at 359-360.

[16] Id. at 380.

[17] G.R. No. 200740, October 2, 2013, 706 SCRA 675.

[18] *Alcantara-Dam v. Spouses de Leon*, G.R. No. 149750, June 16, 2003, 404 SCRA 74.

[19] *Rollo*, pp. 922-923.

[20] G.R. No. 167004, February 7, 2011, 641 SCRA 559; citing *Traders Royal Bank v. Cuison Lumber Co., Inc.*, G.R. No. 174286, June 5, 2009, 588 SCRA 690, 701, 703.

[21] *Rollo*, pp. 121-125.

[22] Id. at 123-124.

[23] Id. at 963-974.

[24] *Gadrinab v. Salamanca*, G.R. No. 194560, June 11, 2014, 726 SCRA 315.

[25] *Briones-Vasquez v. Court of Appeals*, G.R. No. 144882, February 4, 2005, 450 SCRA 482.

[26] RULES OF COURT, Rule 1, Sec. 6.

DISSENTING OPINION

JARDELEZA, J.:

I vote to **DENY** the Manifestation and Motion[1] 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 Award[3] 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.

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 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 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.

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[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.

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

[6] Id. at 1686-1687. Emphasis and citations omitted.

[7] Id. at 1676.

[8] Id. at 876.

[9] *Supra* note 18 at 162.

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