

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION, PETITIONER, VS. POZZOLANIC PHILIPPINES INCORPORATED, RESPONDENT.

G.R. No. 183789. August 24, 2011

Ponente: PEREZ, J.

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PEREZ, J.:

The Case

This petition[1] for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure assails (1) the Decision[2] dated 30 April 2008 of the Regional Trial Court of Quezon City, Branch 96, upholding the validity of respondent's right of first refusal and holding such right binding on petitioner, and (2) the Order[3] dated 27 June 2008 of the same court, denying petitioner's Motion for Reconsideration and Supplemental Motion for Reconsideration of the 30 April 2008 Decision of the trial court in Civil Case No. Q-00-40731.

The Antecedents

Petitioner Power Sector Assets and Liabilities Management Corporation (PSALM) is a government-owned and controlled corporation created by virtue of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA) of 2001.[4] Its principal purpose is to manage the orderly sale, disposition, and privatization of the National Power Corporation's (NPC's) 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.[5]

Respondent Pozzolanic Philippines Incorporated (Pozzolanic) is the local subsidiary of Pozzolanic Australia Pty. Ltd. (Pozzolanic Australia),[6] an Australian corporation which claims to have perfected the techniques in the processing of fly ash for use in the making of cement.[7]

In 1986, Pozzolanic Australia won the public bidding for the purchase of the fly ash generated by NPC's power plant in Batangas.[8] Pozzolanic Australia then negotiated with NPC for a long-term contract for the purchase of all fly ash to be produced by NPC's future power plants. NPC accepted Pozzolanic Australia's offer and they entered into a long-term contract, dated 20 October 1987, denominated as "Contract for the Purchase of Fly Ash of Batangas Coal-Fired Thermal Power Plant Luzon" (the Batangas Contract).[9]

Under Article I of the contract, NPC, referred to therein as the "CORPORATION," granted Pozzolanic Australia, the "PURCHASER," a right of first refusal to purchase the fly ash generated by the coal-fired plants that may be put up by NPC in the future. The specific provision of the contract states:

PURCHASER has first option to purchase Fly Ash under similar terms and conditions as herein contained from the second unit of Batangas Coal-Fired Thermal Plant that the CORPORATION may construct. PURCHASER may also exercise the right of first refusal to purchase fly ash from any new coal-fired plants which will be put up by CORPORATION.[10]

In 1988, while the necessary clearances and approvals were being obtained by Pozzolanic Australia in connection with the operation of its fly ash business in the Philippines, its major stockholders decided that it would be more advantageous for the company to organize a Philippine corporation and to assign to such corporation Pozzolanic Australia's rights to the commercial use of fly ash in the Philippines. Accordingly, in April 1989, respondent Pozzolanic was formally incorporated to take over Pozzolanic Australia's business in the Philippines.[11] Respondent then commenced to exercise its rights under the Batangas contract in June, 1989.[12]

In 1998, the Masinloc Coal-Fired Thermal Power Plant (Masinloc Plant) started operations to provide power for NPC. Late that year, respondent began the installation of its fly ash processing equipment in the Masinloc Plant and began off taking the fly ash produced therein. [13]

Subsequently, on 15 February 1999, NPC and respondent, on an interim basis and prior to the conduct of a public bidding for the contract to purchase the Masinloc Plant's fly ash, executed a contract whereby respondent was given the right to purchase the said fly ash for a period of one year.[14] The fourth and fifth "WHEREAS" clauses of the contract provide:

WHEREAS, under the `Contract for the Purchase of the Fly Ash of Batangas Coal-Fired Thermal Power Plant' dated 20 October 1987, PURCHASER was granted the right of first refusal over any and all fly ash that may be produced by any of NPC's coal-fired power plants in the Philippines;

WHEREAS, NPC intends to bid out the long term contract for the Fly Ash that may be produced by the (Masinloc Coal Fired Thermal Power) Plant subject to the second paragraph of Article I of the original contract between the parties which was signed on 20 October 1987 giving PURCHASER the right of first refusal.[15]

In October 1999, the Sual Coal-Fired Power Plant started providing electricity in the Luzon region.[16] NPC thereafter caused to be published in the Philippine Star and the Manila Bulletin[17] an "Invitation to Pre-Qualify and to Bid," inviting all interested buyers to pre-qualify for the purchase of fly ash from the Masinloc and/or Sual Power Plants.[18]

As a result, respondent sent letters to NPC calling its attention to respondent's right of first refusal under the Batangas Contract. It also demanded that any tender documents to be issued in connection with the bidding on the right to purchase the Masinloc and Sual Plants' fly ash include notices informing prospective bidders of respondent's right of first refusal.

In a letter dated 7 March 2000, NPC informed respondent that it had decided to defer indefinitely the bidding on the right to purchase the Masinloc Plant's fly ash and to proceed first with the bidding on the right to purchase the Sual Plant's fly ash. Thus, on 7 April 2000, NPC released the tender documents for the bidding on the Sual Plant's fly ash, which tender documents made no reference to respondent's right of first refusal.[19]

This prompted respondent to file a complaint[20] (later amended[21]) with the trial court praying that NPC be ordered to allow Pozzolanic to exercise its right of first refusal by permitting it to match the price and terms offered by the winning bidder and by awarding the contract for the purchase of the Sual Plant's fly ash to Pozzolanic if it matches the price and terms offered by said winning bidder.[22]

While the case was pending before the lower court, NPC decided to also dispose of the fly ash from the Masinloc Plant through public bidding, without allowing respondent to exercise its right of first refusal. Thus, respondent filed a Supplementary Complaint[23], dated 8 August 2002, praying for the same reliefs as those prayed for in the amended complaint earlier filed, but as regards the Masinloc Plant.[24]

Meanwhile, on 4 June 2001, Congress enacted the EPIRA (RA 9136) which created PSALM. This resulted in the filing of a Second Supplementary Complaint, dated 5 March 2003, impleading petitioner PSALM as a necessary

and indispensable party.[25]

The litigation became more complicated when petitioner, NPC, and the Department of Energy entered into a Memorandum of Agreement with the Provincial Government of Zambales and several local government units of Zambales, pursuant to which the Provincial Government of Zambales was awarded the exclusive right to withdraw the fly ash from the Masinloc Plant.[26] With this development, respondent filed a Third Supplementary Complaint seeking the annulment of the aforesaid Memorandum of Agreement and other documents related thereto.[27] This complaint was dismissed by the trial court on the ground of forum shopping, it appearing that the Province of Zambales, et al. had previously filed a case against respondent and NPC, claiming exclusive right to withdraw the fly ash of the Masinloc Plant.[28]

Respondent appealed the order of dismissal to the Court of Appeals.

On 18 July 2007, while the appeal was pending, respondent and the Provincial Government of Zambales executed an "Agreement"[29] (the Masinloc Contract) by virtue of which the Province of Zambales awarded to respondent the exclusive right to withdraw the fly ash from the Masinloc Power Plant. Respondent then moved for the dismissal of its appeal in the Court of Appeals. As a result, the assailed Order of the trial court dismissing respondent's Third Supplementary Complaint became final.[30]

Also, previously, on 30 March 2005, respondent and NPC entered into a "Purchase Agreement for the Purchase of Fly Ash of Sual Coal-Fired Thermal Power Plant"[31] (the Sual Contract) whereby NPC awarded to respondent the exclusive right to withdraw the fly ash from the Sual Plant.[32]

As a result, NPC filed, on 4 February 2008, a Motion to Dismiss[33] the Complaint against it on the ground that the issues between it and respondent had become moot and academic. This is in view of the Purchase Agreement executed by NPC and respondent for the fly ash of the Sual Plant and the Agreement between respondent and the Provincial Government of Zambales with respect to the fly ash of the Masinloc Plant.[34]

During the hearing on NPC's Motion to Dismiss held on 7 February 2008, the trial court ordered herein petitioner PSALM and respondent Pozzolanic to comment on the Motion. Petitioner, through counsel, manifested that in addition to commenting on the Motion to Dismiss, it would also like to challenge, through a position paper, the validity of respondent's right of first refusal.[35]

Respondent herein interposed no objection to the Motion to Dismiss.[36] On the other hand, in its Comment[37] dated 14 February 2008, petitioner asserted that the following issues should first be resolved before a resolution on the Motion to Dismiss may be had:

- whether or not fly ash, which is/are [sic] not yet existing, can be considered assets of the government, the disposition of which is subject to government rules particularly public bidding;
- whether or not the alleged right of first refusal of plaintiff is not contrary to law; and
- whether or not PSALM is bound by the said alleged right.[38]

Petitioner thus prayed that resolution on the Motion to Dismiss be held in abeyance pending determination of the issues concerning respondent's alleged right of first refusal.

Pursuant to its manifestation in open court during the 7 February 2008 hearing on NPC's Motion to Dismiss, petitioner submitted its Position Paper[39] on 29 February 2008 raising the same issues as those in its Comment to NPC's Motion to Dismiss. Petitioner prayed that the complaint against it be dismissed and that respondent's right of first refusal contained in the second paragraph, Article 1 of the Batangas Contract be declared void ab initio for being contrary to law and public policy.

In an Order^[40] dated 17 March 2008, the trial court dismissed in toto the Amended Complaint and the First Supplementary Complaint. The Second Supplementary Complaint was PARTIALLY DISMISSED insofar

as it refers to herein respondent's complaint against NPC only. Thus, on 30 April 2008, the trial court rendered the herein assailed Decision declaring respondent's right of first refusal valid and binding on petitioner. The Motion for Reconsideration and Supplemental Motion for Reconsideration filed by petitioner seeking a reversal of the decision of the trial court were both denied for lack of merit.^[41]

Hence, this petition.

The Issues

Petitioner PSALM prays for the reversal of the challenged decision on the following grounds:

- THE TRIAL COURT WAS DIVESTED OF JURISDICTION AFTER IT ISSUED THE ORDER DATED 17 MARCH 2008 DISMISSING WITH PREJUDICE THE AMENDED COMPLAINT AND THE FIRST SUPPLEMENTARY COMPLAINT. THUS, THE "DECISION" DATED 30 APRIL 2008 RENDERED SUBSEQUENT TO SUCH DISMISSAL IS NULL AND VOID; AND
- EVEN ASSUMING THAT THE TRIAL COURT WAS NOT DIVESTED OF JURISDICTION, THE RIGHT OF FIRST REFUSAL IS NOT VALID, AND THEREFORE, WITHOUT BINDING EFFECT, FOR BEING CONTRARY TO PUBLIC POLICY.

The Court's Ruling

On whether or not the trial court was divested of jurisdiction

Petitioner contends that by virtue of the Order of the trial court dated 17 March 2008, respondent's Amended Complaint was dismissed with prejudice; and, since no motion for reconsideration or appeal was filed by any of the parties in the lower court, the Order attained finality. Thus, petitioner argues, the trial court can no longer take any further action since it had lost all power or authority over the case. The Order of dismissal effectively deprived it of jurisdiction.^[42]

We cannot subscribe to petitioner's argument. Petitioner is barred by the doctrine of estoppel from challenging the lower court's authority to render the 30 April 2008 Decision since it was petitioner itself which called for the exercise of such authority. In its Comment to NPC's Motion to Dismiss, it raised the following issues:

- whether or not fly ash, which is/are [sic] not yet existing, can be considered assets of the government, the disposition of which is subject to government rules particularly public bidding;
- whether or not the alleged right of first refusal of plaintiff is not contrary to law; and
- whether or not PSALM is bound by the said alleged right.

Then, again, in its Position Paper, it reiterated the aforesaid issues and petitioned the trial court to dismiss herein respondent's complaint against it and to invalidate respondent's right of first refusal as contained in the Batangas Contract. Clearly, petitioner invoked the court's jurisdiction by seeking to obtain a definite pronouncement from it. Having thus called upon the court to settle the issues it has raised, petitioner cannot now repudiate that same jurisdiction it has invoked in the first place.

This Court has consistently held that "a party cannot invoke the jurisdiction of a court to secure affirmative relief against his opponent and after obtaining or failing to obtain such relief, repudiate or question that same

jurisdiction." [43] The Supreme Court frowns upon the undesirable practice of a party submitting his case for decision and then accepting the judgment only if favorable, and attacking it for lack of jurisdiction if adverse. [44] If a party invokes the jurisdiction of a court, he cannot thereafter challenge the court's jurisdiction in the same case. To rule otherwise would amount to speculating on the fortune of litigation, which is against the policy of the Court. [45]

Petitioner maintains that it had tried to prevent the current situation wherein a decision was rendered by the trial court without a standing complaint. According to petitioner, in its Comment to NPC's Motion to Dismiss, it prayed for a deferral of the court's action on the Motion until after the resolution of the issues it has raised. Thus, petitioner claims, it cannot be faulted for the lower court's own procedural lapse in dismissing the Amended Complaint despite petitioner's prayer. [46]

Again, we cannot sustain petitioner's contention.

It must be noted that petitioner did not raise the foregoing argument in its Comment on NPC's Motion to Dismiss. Neither was it mentioned in the Position Paper it filed before the trial court. Not even in its Motion for Reconsideration of the herein challenged Decision did petitioner discuss the issue. The matter was raised for the first time in its Supplemental Motion for Reconsideration, thereby giving credence to respondent's contention that the same was just an afterthought [47] on the part of petitioner.

If petitioner's claim is to be accepted as true, it should have raised the issue regarding the trial court's jurisdiction at the very first opportunity, which was, at the time of its receipt of the 17 March 2008 Order dismissing the Amended and First Supplementary Complaints in toto and only partially dismissing the Second Supplementary Complaint wherein petitioner was impleaded. At that point, petitioner should have been forewarned that the proceedings, as against it, have not been terminated. Then, too, as far as the issues it raised in its Comment and Position Paper were concerned, no pronouncement had, as yet, been made by the court at the time. Obviously, there were still matters that needed to be resolved by the court. Thus, if petitioner truly believed that the court had lost its jurisdiction after it dismissed the Amended Complaint, it should have questioned the 17 March 2008 Order of the court which failed to completely dispose of the case. Instead, it waited for the court to issue the questioned Decision, and only then did petitioner broach the subject. Clearly, under the circumstances, petitioner is estopped from questioning the court's jurisdiction.

On the validity of respondent's
right of first refusal

We hold the right of first refusal granted to respondent in the Batangas Contract invalid for being contrary to public policy as the same violates the requirement of competitive public bidding in the award of government contracts, for the following reasons:

One: The grant to respondent of the right of first refusal constitutes an unauthorized provision in the contract that was entered into pursuant to the bidding.

By respondent's own admission, the right of first refusal granted to it was "contractually bargained for and acquired from NPC" [48] after it won the public bidding for the purchase of the fly ash produced by the Batangas Power Plant. [49] This clearly indicates that the right of first refusal was not included in the bid documents presented to the other bidders who participated in the bidding. As a result, the contract signed by NPC and respondent is different from that which was bid out.

It has been held that the three principles in public bidding are: (1) the offer to the public; (2) an opportunity for competition; and (3) a basis for the exact comparison of bids. A regulation of the matter which excludes any of

these factors destroys the distinctive character of the system and thwarts the purpose of its adoption.[50]

Thus, in the case of *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*[51] (PIATCO), the Supreme Court declared as null and void, for being contrary to public policy, the Concession Agreement entered into by the government with PIATCO because it contained provisions that substantially departed from the draft Concession Agreement included in the bid documents.[52]

Also, in *Commission on Audit v. Link Worth International, Inc.*,[53] the Court affirmed the respective decisions of the trial court and the Court of Appeals annulling the award of a procurement contract to a bidder whose technical proposal varied from the bid specifications. It appears that during the post-qualification stage, the Bids and Awards Committee of the Commission on Audit considered some factors in the verification and validation of the winning bidder's proposal which were extraneous to and not included in the bid documents.[54] Thus, the Court emphasized that the function of post-qualification is to verify, inspect and test whether the technical specifications of the goods offered comply with the requirements of the contract and the bidding documents. It does not give occasion for the procuring entity to arbitrarily exercise its discretion and brush aside the very requirements it specified as vital components of the goods it bids out.[55]

In *Caltex (Philippines), Inc., et al. v. Delgado Brothers, Inc. et al.*,[56] the Supreme Court likewise affirmed a decision of the trial court declaring as null and void the amendment to an arrastre contract for the reason that the same was done without public bidding. Citing the appealed decision, the Court held that:

x x x the said agreement of June 1, 1951 executed and entered into without previous public bidding, is null and void, and can not adversely affect the rights of third parties, x x x and of the public in general. x x x the due execution of a contract after public bidding is a limitation upon the right of the contracting parties to alter or amend it without another public bidding, for otherwise what would a public bidding be good for if after the execution of a contract after public bidding, the contracting parties may alter or amend the contract, or even cancel it, at their will? Public biddings are held for the protection of the public, and to give the public the best possible advantages by means of open competition between the bidders. He who bids or offers the best terms is awarded the contract subject of the bid, and it is obvious that such protection and best possible advantages to the public will disappear if the parties to a contract executed after public bidding may alter or amend it without another previous public bidding.[57]

Finally, in *Information Technology Foundation of the Philippines v. Commission on Elections*,[58] the Court nullified the award by the Commission on Elections (COMELEC) of a contract for the automation of the counting and canvassing of the ballots in the 2004 elections on the ground, among others, that it permitted the winning bidder to change and alter the subject of the contract, in effect allowing a substantive amendment without public bidding.[59] Said the Supreme Court therein: "it is contrary to the very concept of public bidding to permit a variance between the conditions under which the bids are invited and those under which proposals are submitted and approved; or, as in this case, the conditions under which the bid is won and those under which the awarded contract will be complied with. The substantive amendment of the contract bidden out, without any public bidding - after the bidding process had been concluded - is violative of the public policy on public biddings, x x x. The whole point in going through the public bidding exercise was completely lost. The very rationale of public bidding was totally subverted by the Commission." [60]

By its very nature, public bidding aims to protect public interest by giving the public the best possible advantages through open competition. Thus, competition must be legitimate, fair and honest. In the field of government contract law, competition requires not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, and the same undertaking, but also that it be legitimate, fair and honest and not designed to injure or defraud the government.[61] An essential element of a publicly bidden contract is that "all

bidders must be on equal footing, not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, but more importantly, on the contract bidden upon. Each bidder must be able to bid on the same thing."^[62]

As pointed out by the Court in *Agan*, if the winning bidder is allowed to later include or modify certain provisions in the contract awarded such that the contract is altered in any material respect, then the essence of fair competition in the public bidding is destroyed. A public bidding would be a farce if, after the contract is awarded, the winning bidder may modify the contract and include provisions which are favorable to it that were not previously made available to the other bidders.^[63] The government cannot enter into a contract with the highest bidder and incorporate substantial provisions beneficial to him, not included or contemplated in the terms and specifications upon which the bids were invited.^[64]

Aside from protecting public interest by giving the public the best possible advantages through open competition, "[a]nother self-evident purpose of public bidding is to avoid or preclude suspicion of favoritism and anomalies in the execution of public contracts."^[65] Such bias or partiality and irregularities may be validly presumed if, as in this case, after a contract has been awarded, the parties carry out changes or make amendments thereto which gives the winning bidder an edge or advantage over the other bidders who participated in the bidding, or which makes the signed contract unfavorable to the government. Thus, there can be no substantial or material change to the parameters of the project, including the essential terms and conditions of the contract bidden upon, after the contract award.^[66]

The Court acknowledges that a winning bidder is not precluded from modifying or amending certain provisions of the contract bidden upon. However, such changes must not constitute substantial or material amendments that would alter the basic parameters of the contract and would constitute a denial to the other bidders of the opportunity to bid on the same terms. Hence, the determination of whether or not a modification or amendment of a contract bidden out constitutes a substantial amendment rests on whether the contract, when taken as a whole, would contain substantially different terms and conditions that would have the effect of altering the technical and/or financial proposals previously submitted by other bidders. The alteration and modifications in the contract executed between the government and the winning bidder must be such as to render such executed contract to be an entirely different contract from the one that was bidden upon.^[67]

The grant of the right of first refusal in this case did not only substantially amend the terms of the contract bidden upon, so that resultantly, the other bidders thereto were deprived of the terms and opportunities granted to respondent after it won the public auction, it so altered the bid terms - the very admission by all parties that the disposal of fly ash must be through public bidding - by effectively barring any and all true biddings in the future. The grant of first refusal was a grant to respondent of the right to buy fly ash in all coal-fired plants of NPC. Proceeding from the afore-cited jurisprudence, the Batangas Contract is, consequently, a nullity.

Two: The right to buy fly ash precedes and is the basis of the right of first refusal, and the consequent right cannot be acquired together with and at the same time as the precedent right.

The right of first refusal has long been recognized, both legally and jurisprudentially, as valid in our jurisdiction. It is significant to note, however, that in those cases where the right of refusal is upheld by both law and jurisprudence, the party in whose favor the right is granted has an interest on the object over which the right of first refusal is to be exercised. In those instances, the grant of the right of first refusal is a means to protect such interest.

Thus, Presidential Decree (P.D.) No. 1517,^[68] as amended by P.D. No. 2016,^[69] grants to qualified tenants of land in areas declared as urban land reform zones, the right of first refusal to purchase the same within a

reasonable time and at a reasonable price.[70] The same right is accorded by Republic Act No. 7279[71] (Urban Development and Housing Act of 1992) to qualified beneficiaries of socialized housing, with respect to the land they are occupying. Accordingly, in *Valderama v. Macalde*,[72] *Parañaque Kings Enterprises, Inc. v. Court of Appeals*,[73] and *Conculada v. Court of Appeals*,[74] the Supreme Court sustained the tenant's right of first refusal pursuant to P.D. 1517.

In *Polytechnic University of the Philippines v. Court of Appeals*[75] and *Polytechnic University of the Philippines v. Golden Horizon Realty Corporation*[76], this Court upheld the right of refusal of therein respondent private corporations concerning lots they are leasing from the government.

In the case of *Republic v. Sandiganbayan*, [77] the Presidential Commission on Good Government (PCGG) sought to exercise its right of first refusal as a stockholder of Eastern Telecommunications Philippines, Inc. (ETPI), a corporation sequestered by the PCGG, to purchase ETPI shares being sold by another stockholder to a non-stockholder. While the Court recognized that PCGG had a right of first refusal with respect to ETPI's shares,[78] it nevertheless did not sustain such right on the ground that the same was not seasonably exercised.[79]

Finally, in *Litonjua v. L & R Corporation*,[80] the Supreme Court recognized the validity and enforceability of a stipulation in a mortgage contract granting the mortgagee the right of first refusal should the mortgagor decide to sell the property subject of the mortgage.

In all the foregoing cases, the party seeking to exercise the right has a vested interest in, if not a right to, the subject of the right of first refusal. Thus, on account of such interest, a tenant (with respect to the land occupied), a lessee (vis-à-vis the property leased), a stockholder (as regards shares of stock), and a mortgagor (in relation to the subject of the mortgage), are all granted first priority to buy the property over which they have an interest in the event of its sale. Even in the *JG Summit Case*,[81] which case was heavily relied upon by the lower court in its decision and by respondent in support of its arguments, the right of first refusal to the corporation's shares of stock - later exchanged for the right to top - granted to KAWASAKI was based on the fact that it was a shareholder in the joint venture for the construction, operation, and management of the Philippine Shipyard and Engineering Corporation (PHILSECO).

In the case at bar, however, there is no basis whatsoever for the grant to respondent of the right of first refusal with respect to the fly ash of NPC power plants since the right to purchase at the time of bidding is that which is precisely the bidding subject, not yet existent much more vested in respondent.

KAWASAKI's situation is different from that of respondent in that the former has an established interest in the shares subject of the right of first refusal. In the words of the Court in that case: "KAWASAKI is not a mere non-bidder. It is a PARTNER in the joint venture x x x." [82] (Emphasis supplied).

Further, in the *JG Summit Case*,[83] what was involved was not merely a right to match but a right to top by five percent (5%) the highest bid for the shares subject of the public bidding.[84] Undoubtedly, such an arrangement is truly advantageous to the government. Here, aside from respondent not having a vested interest in the subject matter of the public bidding, its right of first refusal allows it to merely match the highest bid offered at the public auction. This agreement clearly makes a farce of the bidding process, as the government will merely go through the motion of holding a public bidding and declaring a highest bidder only to award the contract to respondent, who did not even participate in the bidding.

It is significant to note that, in the tender documents for the bidding of the fly ash of the Masinloc Power Plant, NPC gave respondent the opportunity to top the highest bid by fifteen percent (15%). Respondent protested this,

however, as an infringement upon its alleged right of first refusal to purchase the Masinloc fly ash, as supposedly guaranteed by the Batangas Contract.[85]

In effect, therefore, in asserting its right of first refusal, what respondent is asking is that it be given undue advantage over any other party interested to purchase the fly ash of NPC's power plants. Obviously, this cannot be countenanced. It is inherent in public biddings that there shall be a fair competition among the bidders. The specifications in such biddings provide the common ground or basis for the bidders. The specifications should, accordingly, operate equally or indiscriminately upon all bidders.[86]

It should also be pointed out that while respondent maintains that it never sought to disallow the public bidding of the fly ash in question, the records of this case, nevertheless, disclose that the right to withdraw the fly ash of the Sual and Masinloc Plants was awarded to respondent without the benefit of a public auction.[87] Thus, the grant to respondent of the right of first refusal in the Batangas Contract paved the way for respondent to obtain the right to withdraw fly ash from the aforementioned power plants without public bidding. The second and third "WHEREAS" clauses of the Sual Contract are particularly telling on this score:

WHEREAS, in the Contract for the Purchase of Fly Ash of BCFTPP provides for the "Right of First Refusal" to PURCHASER to purchase fly ash from any new coal-fired plants which will be put up by NPC;

WHEREAS, NPC owns the fly ash generated by the two (2) units of 1,200 MW Sual Coal-Fired Thermal Power Plant (SCFTPP) located at Barangay Pangascasan, Sual, Pangasinan, hereinafter referred to as the Plant;[88]

With respect to the Masinloc Plant, it will be recalled that the right to

withdraw the fly ash from the same was the subject of the Third Supplementary Complaint, filed by respondent before the trial court to enforce the right of first refusal provision in the Batangas Contract, which complaint was, however, dismissed on the ground of forum shopping. Nevertheless, while the order of dismissal was on appeal in the Court of Appeals, the right to withdraw the fly ash of the Masinloc Plant was granted to respondent by the Provincial Government of Zambales, by virtue of which, respondent moved for the dismissal of its appeal, thereby resulting in the finality of the order of dismissal of the trial court.

It can be easily deduced from the foregoing that the Masinloc Contract was likewise sourced from respondent's supposed right of first refusal, thereby giving respondent preferential right to the fly ash of the Masinloc Plant and allowing it to withdraw the Plant's fly ash without having to go through a public bidding. Had the Masinloc Contract not been drafted, it is clear that respondent's complaint for the enforcement of the provision granting it the right of first refusal would have continued. The Masinloc Contract, then, is a virtual recognition of respondent's alleged right of first refusal.

The rationale behind the requirement of a public bidding, as a mode of awarding government contracts, is to ensure that the people get maximum benefits and quality services from the contracts. More significantly, strict compliance with the requirement of public bidding echoes the call for transparency in government transactions and accountability of public officers. Public biddings are intended to minimize occasions for corruption and temptations to abuse discretion on the part of government authorities in awarding contracts.[89]

Based on the afore-quoted "WHEREAS" clauses of the Sual Contract, the right to purchase the fly ash from the Sual Plant was granted to respondent, without having to undergo a public auction, on the basis of its right of first refusal embodied in the Batangas Contract. This negates respondent's claim that the right of first refusal granted to it does not preclude a public bidding. The right of first refusal provision was used to subvert the rule that all government contracts should be awarded after competitive public bidding. This demonstrates the iniquity of

allowing the provision to prevail over requirements of public policy. Thus, the evil precisely sought to be prevented by the requirement of public bidding came to pass in this case: the Sual and Masinloc Contracts were awarded to respondent without any public bidding having been conducted.

Three: The right of first refusal is against the public policy that contracts must be awarded through public bidding.

Respondent would have us sustain its right of first refusal on the ground that Article 1159 of the New Civil Code provides that "obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith." Hence, respondent argues, the Batangas Contract is binding upon NPC and respondent and their respective successors-in-interest.[90]

True, it is a fundamental rule that contracts, once perfected, bind both contracting parties and a contract freely entered into should be respected since a contract is the law between the parties.[91] However, it must be understood that contracts are not the only source of law that govern the rights and obligations between parties. More specifically, no contractual stipulation may contradict law, morals, good customs, public order or public policy.[92]

The principle of party autonomy in contracts is not an absolute principle. The rule in Article 1306 of our Civil Code is that the contracting parties may establish such stipulations as they may deem convenient provided they are not contrary to law, morals, good customs, public order or public policy. Thus, counter-balancing the principle of autonomy of contracting parties is the equally general rule that provisions of applicable laws, especially provisions relating to matters affected with public policy, are deemed written into the contract. Put a little differently, the governing principle is that parties may not contract away applicable provisions of law, especially peremptory provisions dealing with matters heavily impressed with public interest.[93]

In this jurisdiction, public bidding is the established procedure in the grant of government contracts. The award of public contracts through public bidding is a matter of public policy.[94]

Public policy has been defined as that principle under which freedom of contract or private dealing is restricted for the good of the community.[95] Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will not recognize or uphold a transaction when its object, operation, or tendency is calculated to be prejudicial to the public welfare, to sound morality or to civic honesty.[96]

Consistent with the principle that public auction in the conferment of government contract involves public policy, Congress enacted various laws governing the procedure in the conduct of public bidding and prescribing policies and guidelines therefor. With respect to the disposal of government assets and property, of particular application in this case are Circular Nos. 86-264[97] and 89-296[98] of the Commission on Audit, dated 16 October 1986 and 27 January 1989, respectively. Both circulars provide that the divestment or disposal of government property shall be undertaken primarily through public auction.[99]

Respondent puts forth the argument that fly ash is a waste product[100] and therefore cannot be considered as an asset of the government within the contemplation of the laws governing disposal of government property.

The peculiarity of fly ash as property of the government is that, from its inception, it is already a residual product. Unlike the government properties subject of P.D. 1445[101] and the Government Auditing and Accounting Manual, fly ash is not property previously utilized by the government in its operations which has become unserviceable. Justifiably, the government did not foresee the possibility of any use for and, much less, of deriving profit from it. Hence, the lack of a specific law governing its disposal and its non-inclusion in existing laws on the divestment of government property. There is no doubt, however that fly ash is property - and more importantly, asset - of the government. Fly ash is produced by power plants owned by the government and both

the government and respondent derive profit from it. Besides, the fact that respondent is fighting tooth and nail for the right to withdraw the same from NPC's power plants is indubitable proof of its value. Its sale is, therefore, subject to the rules on the disposal of government assets and property. Applicable laws form part of, and are read into, contracts without need for any express reference thereto; more so, to a government contract which is imbued with public interest.[102]

In the case of *Ongsiako v. Gamboa*,[103] this Court declared that an agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with the morals of the time.[104]

Thus, respondent's right of first refusal cannot take precedence over the dictates of public policy.

The right of first refusal of respondent being invalid, it follows that it has no binding effect. It does not create an obligation on the part of petitioner to acknowledge the same. Neither does it confer a preferential right upon respondent to the fly ash of NPC's power plants.

How, then, does the invalidation of respondent's right of first refusal affect the Sual and Masinloc Contracts which were executed pursuant to such right?

As discussed above, the right of first refusal granted to respondent in the Batangas Contract paved the way for the award to respondent of the Sual Contract without any public bidding having been conducted therefor. In a long line of cases, this Court has pronounced that government contracts shall not be entered into or renewed without public bidding.[105] Thus, the Supreme Court has struck down contracts and agreements entered into in violation of this requirement.

In the case of *National Food Authority v. Court of Appeals*,[106] the Court ruled against the legality of negotiated security contracts awarded by the National Food Authority (NFA) to several private security agencies in default of a public bidding. According to the Court, the NFA's manifest reluctance to hold a public bidding and award a contract to the winning bidder smacks of favoritism and partiality toward the security agencies to whom it awarded the negotiated contracts and cannot be countenanced.[107]

Likewise, in *Manila International Airport Authority v. Mabunay*,[108] the Supreme Court dismissed a petition for review seeking the annulment of a decision of the lower court declaring that under the laws and regulations, it is necessary for the Manila International Airport Authority to contract for security services through public bidding. The Court reiterated the basic principle that in the execution of all government contracts, public bidding is the accepted method for arriving at a fair and reasonable price. [I]t ensures that overpricing and favoritism, and other anomalous practices are eliminated or minimized.[109]

In *Chavez v. Public Estates Authority*,[110] the Amended Joint Venture Agreement (JVA) entered into between the Public Estates Authority and the Amari Coastal Bay and Development Corporation (AMARI) was declared null and void ab initio because it, among others, sought to convey to AMARI, a private entity, reclaimed public lands without the benefit of a public bidding. The Court cited Section 79 of Presidential Decree (P.D.) No. 1445, otherwise known as the Government Auditing Code, which requires the government to sell valuable government property through public bidding.[111] The Court stated further that the Commission on Audit implements Section 79 of the Government Auditing Code through Circular No. 89-296[112] dated 27 January 1989. This circular emphasizes that government assets must be disposed of only through public auction.[113] In denying respondents' Second Motions for Reconsideration and sustaining the invalidity of the Amended JVA, this Court reiterated that the JVA is a negotiated contract which clearly contravenes Section 79 of P.D. 1445.[114]

Section 79 of P.D. 1445 and COA Circular No. 89-296, among others, were also relied upon by the Supreme Court in declaring as inexistent and void ab initio the Compromise Agreement between the Philippine National Construction Corporation and Radstock Securities Limited in the case of Strategic Alliance Development Corporation v. Radstock Securities Limited.[115] Under the Compromise Agreement in that case, the PNCC shall dispose of substantial parcels of land, by way of dacion en pago, in favor of Radstock, a private corporation incorporated in the British Virgin Islands.[116] Citing the aforementioned case of Chavez v. Public Estates Authority,[117] the Court echoed the necessity of a public bidding for the disposal of government properties.[118]

Finally, in Gana v. Triple Crown Services Inc.,[119] the Supreme Court declared as null and void the negotiated contract for janitorial and maintenance services between the Manila International Airport Authority (MIAA) and Goodline Staffers & Allied Services, Inc. According to the Supreme Court, the constitutional right of Olongapo Maintenance Services, Inc. (OMSI) and Triple Crown Services, Inc. (TCSI), the incumbent service contractors, to equal protection of the law was violated by MIAA and its general manager when no public bidding was called precisely because the latter were going to award the subject service contracts through negotiation. Worse, the Court continued, the acts of MIAA and Gana smack of arbitrariness and discrimination as they not only did not call for the required public bidding but also did not even accord OMSI and TCSI the opportunity to submit their proposals in a public bidding.[120]

By the very language of the Sual Contract, the same was entered pursuant to respondent's right of first refusal and in consideration of respondent's conformity to withdraw its complaint against NPC. The pertinent provisions of the Sual Contract are herein below quoted:

WHEREAS, NPC and PURCHASER [Pozzolanic] entered into a Contract for the Purchase of Fly Ash of Batangas Coal Fired Thermal Power Plant (BCFTPP) on October 20, 1987 and Contract for the Purchase of Fly Ash of Masinloc Coal Fired Thermal Power Plant (MCFTPP) dated February 10, 1999;

WHEREAS, in the Contract for the Purchase of Fly Ash of BCFTPP provided for the 'Right of First Refusal' to PURCHASER to purchase fly ash from any new coal-fired plants which will be put up by NPC;

WHEREAS, NPC owns the fly ash generated by the two (2) units of 1,200 MW Sual Coal-Fired Thermal Power Plant (SCFTPP) located at Barangay Pangascasan, Sual, Pangasinan, hereinafter referred to as the Plant;

X X X

WHEREAS, PURCHASER filed a case for Specific Performance with Injunction under Civil Case No. Q-00-40731 before the Branch 90 of the Regional Trial Court of Quezon City and which Court issued a Preliminary Injunction against NPC on the public bidding and sale of Fly Ash of MCFTPP and Sual Coal Fired Thermal Power Plant (SCFTPP);

WHEREAS, in a letter dated December 2, 2004, NPC and PURCHASER have agreed that in order to settle the issue, NPC fully recognizes and honors the 'Right of First Refusal' of PURCHASER to the fly ash produced at SCFTPP in lieu of the fly ash produced at MCFTPP;

WHEREAS, in consideration of NPC's recognition of the 'Right of First Refusal' in said letter dated 2 December 2004 and the execution of this Purchase Agreement, PURCHASER waives any and all claims to the fly ash produced at MCFTPP and arising out of its rights under the 'Contract for the Purchase of Fly Ash of the Masinloc Coal-Fired Thermal Power Plant' dated February 10, 1999;

X X X

ARTICLE VI
WAIVER

NPC hereby fully recognizes and honors the 'Right of First Refusal' of PURCHASER to the fly ash produced at SCFTPP in lieu of the fly ash produced at the Masinloc Plant.

X X X

It is agreed that within thirty (30) days from and after execution of this Agreement, NPC and PURCHASER will jointly, together with PSALM Corporation move for the dismissal, with prejudice of Civil Case No. Q-00-40731 at the Regional Trial Court, Branch 90 of Quezon City.

The pertinent 'Motion' for the dismissal of Civil Case No. Q-00-40731, to be filed in Branch 90 of the Regional Trial Court of Quezon City, or before any other Court who may then be hearing the above case, shall include therein a complete textual copy of this Purchase Agreement, duly signed by all the parties hereto, which shall become an integral part of the compromise, for the dismissal of the said case, to be approved by the Trial Court.

X X X[121] (Emphases supplied).

Based on the foregoing, the Sual Contract is clearly a negotiated contract by virtue of which, NPC awards to respondent the right to withdraw the fly ash of the Sual Plant - without public bidding - in exchange for which, respondent (1) waives its rights to the fly ash of the Masinloc Plant and (2) consents to withdraw its case against NPC. As a result, the Sual Contract is invalid for failure to comply with the rules on public bidding.

The foregoing principles on the necessity of a public bidding for all government contracts obviously apply to the Masinloc Contract as well, the same being a public contract since one of the parties thereto is a government entity. While its terms do not expressly provide that the same was executed pursuant to the right of first refusal granted to respondent under the Batangas Contract, the circumstances under which it was drafted, as narrated above, clearly indicate that the Masinloc Contract is a recognition of the challenged right of first refusal. The case filed by respondent for the recognition and enforcement of its right of first refusal was settled only after the execution of the Masinloc Contract, pursuant to which, respondent was awarded the exclusive right to withdraw the fly ash of the Masinloc Power Plant without the benefit of a public bidding.

As adverted to above, the disposal of NPC power plants' fly ash is governed by COA Circular Nos. 86-264 and 89-296.[122] These circulars direct that public auction shall be the primary mode of disposal of assets of the government and sale through negotiation shall be resorted to only in case of failure of public auction.[123] For failure to abide by the requirement of a public bidding in the disposal of government assets, this Court is left with no option but to likewise declare the Sual and Masinloc Contracts null and void.

In conclusion, this Court stresses that although a right of first refusal is a contractual prerogative recognized by both law and jurisprudence, the grant of such right in this case is invalid for being contrary to public policy.

WHEREFORE, we GRANT the petition for review on certiorari. The Decision dated 30 April 2008 and Order dated 27 June 2008 of the Regional Trial Court of Quezon City, Branch 96 in Civil Case No. Q-00-40731 are hereby REVERSED AND SET ASIDE. Further, the Batangas, Sual and Masinloc Contracts are hereby declared NULL AND VOID for being contrary to law and public policy. Petitioner is hereby ordered to conduct a bidding of the right to purchase the fly ash produced by the Batangas, Masinloc and Sual Power Plants within thirty (30) days from the finality of this Decision.

SO ORDERED.

Carpio, (Chairperson), Velasco, Jr.[*] Peralta,**] and Mendoza, JJ., [***]concur.

- [*] Per Special Order No. 1006-D dated 10 June 2011.
- [**] Per Special Order No. 1067 dated 23 August 2011.
- [***] Per Special Order No. 1066 dated 23 August 2011.
- [1] Rollo, pp. 3-32.
- [2] Id. at 33-54 penned by Judge Afable E. Cajigal.
- [3] Id. at 55-63.
- [4] Id. at 6. Petition for Review.
- [5] Section 50, Republic Act No. 9136 (Electric Power Industry Reform Act of 2001).
- [6] Rollo, p. 34, Decision of the trial court.
- [7] Id. at 146. 2nd Supplementary Complaint filed by respondent before the trial court.
- [8] Id.
- [9] Id. at 147.
- [10] Id. at 65.
- [11] Id.
- [12] Id. at 148-149.
- [13] Id. at 149.
- [14] Id.
- [15] Id. at 150.
- [16] http://www.teamenergy.ph/about01_sual.php. Official website of Team Energy, the IPP of the Sual Plant. See p. 7, no. 10 of Petition for Review, rollo, p. 9.
- [17] Records, Vol. 1, p. 353.
- [18] Rollo, p. 150. 2nd Supplementary Complaint filed by respondent before the trial court.
- [19] Id. at 151.
- [20] Records, Vol. 1, pp. 1-17.
- [21] Id. at 175-201.
- [22] Id. at 198. Pozzolanic's Amended Complaint before the trial court.
- [23] Id., Vol. 4, pp. 2214-2235.
- [24] Rollo, p. 37 and 136. Decision dated 30 April 2008 of the trial court and Supplementary Complaint of respondent.
- [25] Id. at 9. Petition for Review.
- [26] Id. at 37. 30 April 2008 decision of the trial court. See also Memorandum of Agreement, Annex "C" of Third

Supplementary Complaint, Records, Vol. 8, p. 3766.

[27] Id. at 38.

[28] Id.

[29] Records, Vol. 10, pp. 76-82.

[30] Rollo, pp. 38-39. 30 April 2008 decision of the trial court.

[31] Id. at 188-197.

[32] Id. at 39. 30 April 2008 decision of the trial court.

[33] Id. at 198-201.

[34] Id. at 39. 30 April 2008 decision of the trial court.

[35] Id. at 40.

[36] Id. at 202. Comment of Pozzolanic dated 8 February 2008.

[37] Id. at 207-210.

[38] Id. at 209.

[39] Id. at 216-225.

[40] Id. at 253-257.

[41] Id. at 55-63. Order dated 27 June 2008.

[42] Id. at 14. Petition for Review.

[43] Province of Bulacan v. Court of Appeals, G.R. No. 126232, 27 November 1998, 299 SCRA 442, 452-453 citing Lee v. Presiding Judge, 145 SCRA 408 (1986).

[44] Id. at 453 citing Zamboanga Electric Cooperative, Inc. v. Buat, 243 SCRA 47 (1995).

[45] Lu v. Lu Ym, Sr., G.R. No. 153690, 26 August 2008, 563 SCRA 254, 277 citing Heirs of Bertuldo

Hinog v. Melicor, G.R. No. 140954, 12 April 2005, 455 SCRA 460, 473.

[46] Rollo, p. 16. Petition for Review.

[47] Id. at 411. Respondent's Comment to Petition for Review.

[48] Rollo, pp. 246 and 428. Pozzolanic's Position Paper filed before the trial court, reiterated in its Comment to the Petition for Review.

[49] Records, Vol. 1, p. 176.

[50] Malaga v. Penachos, Jr., G.R. No. 86695, 3 September 1992, 213 SCRA 516, 526, citing Hannan v. Board of Education, 25 Okla. 372.

[51] G.R. No. 155001, 5 May 2003, 402 SCRA 612.

[52] Id. at 654.

[53] G.R. No. 182559, 13 March 2009, 581 SCRA 501.

[54] Id. at 516.

[55] Id. at 515.

[56] 96 Phil. 368 (1954).

[57] Id. at 375.

[58] G.R. No. 159139, 13 January 2004, 419 SCRA 141.

[59] Id. at 200.

[60] Id. at. 200-201.

[61] Agan, Jr. v. Philippine International Air Terminals Co., Inc., supra note 51 at 654 citing Danville Maritime, Inc. v. Commission on Audit, G.R. No. 85285, 28 July 1989, 175 SCRA 701

[62] Id. at 654-655.

[63] Id. at 655.

[64] Id.

[65] Danville Maritime, Inc. v. Commission on Audit, G.R. No. 85285, 28 July 1989, 175 SCRA 701, 711citing Fernandez, B.C, Treatise on Government Contracts Under Philippine Law, pp. 63 and 64, and Cobacha and Lucenario, Law on Public Bidding and Government Contracts, 1961 Ed., pp. 6 and 8-9.

[66] Agan, Jr. v. Philippine International Air Terminals Co., Inc., supra note 51; Resolution on the Motions for Reconsideration of the 5 May 2003 Decision of the Court, G.R. No. 155001 21 January 2004, 420 SCRA 575, 592.

[67] Id. at 655-656.

[68] Proclaiming Urban Land Reform in the Philippines and providing for the Implementing Machinery Thereof, signed by then President Ferdinand E. Marcos on 11 June 1978.

[69] Prohibiting the Eviction of Occupant Families from Land Identified and Proclaimed as Areas for Priority Development [APD] or as Urban Land Reform Zones and Exempting Such Land from Payment of Real Property Taxes, signed by President Marcos on 23 January 1986.

[70] Section 6, P.D. 1517.

[71] "An Act to Provide for a Comprehensive and Continuing Urban Development and Housing Program, Establish the Mechanism for its Implementation, and for Other Purposes, which took effect on 24 March 1992.

[72] G.R. No. 165005, 16 September 2005, 470 SCRA 168.

[73] G.R. No. 111538, 26 February 1997, 268 SCRA 727.

[74] G.R. No. 130562, 11 October 2001, 367 SCRA 164.

[75] G.R. No. 143513, 14 November 2001, 368 SCRA 691.

[76] G.R. No. 183612, 15 March 2010, 615 SCRA 478.

[77] G.R. No. 128606, 4 December 2000, 346 SCRA 760.

[78] Id. at 762-763.

[79] Id. at 767.

[80] G.R. No. 130722, 9 December 1999, 320 SCRA 405.

[81] JG Summit Holdings, Inc. v. Court of Appeals, G.R. No. 124293, 24 September 2003, 412 SCRA 10.

[82] Id. at 34.

[83] Supra note 81.

[84] Id. at 15.

[85] Records, Vol. 1, p. 221.

[86] Cobacha and Lucenario, Law on Public Bidding and Government Contracts, 1960, p. 13, citing a decision of the Auditor General of the Philippines dated 10 August 1954.

[87] See "Agreement" between the Provincial Government of Zambales and Pozzolanic and the "Purchase Agreement for the Purchase of Fly Ash of Sual Coal-Fired Thermal Power Plant" between NPC and Pozzolanic. Records, Vol. 10, pp. 76-82; rollo, pp. 188-197.

[88] Rollo, p. 188. Purchase Agreement for the Purchase of Fly Ash of Sual Coal-Fired Thermal Power Plant.

[89] Manila International Airport Authority v. Olongapo Maintenance Services, Inc., G.R. Nos. 146184-85, 31 January 2008, 543 SCRA 269, 275.

[90] Rollo, p. 236. Pozzolanic's Position Paper filed before the trial court, reiterated in its Comment to the Petition for Review.

[91] Halagueña v. Philippine Airlines, Incorporated, G.R. No. 172013, 2 October 2009, 602 SCRA 297, 313.

[92] National Housing Authority v. Grace Baptist Church, G.R. No. 156437, 1 March 2004, 424 SCRA 147, 152, citing Article 1306 of the Civil Code.

[93] Halagueña v. Philippine Airlines, Incorporated, supra note 91.

[94] Danville Maritime, Inc. v. Commission on Audit, supra note 65.

[95] Ollendorff v. Abrahamson, 38 Phil. 585, 590-591 (1918) citing People's Bank v. Dalton, 2 Okla. 476.

[96] Cui v. Arellano University, No. L-15127, 30 May 1961, 2 SCRA 205, 209.

[97] General Guidelines on the divestment or disposal of assets of government-owned and/or controlled corporations, and their subsidiaries, signed by then Chairman Teofisto T. Guingona, Jr.

[98] Audit Guidelines on the Divestment or Disposal of Property and Other Assets of National Government Agencies and Instrumentalities, Local Government Units and Government-Owned or Controlled Corporations and their Subsidiaries, signed by then Chairman Eufemio C. Domingo and then Commissioners Alberto P. Cruz and Bartolome C. Fernandez, Jr.

[99] No. 3.1 of Circular No. 86-264 and No. V (1) of Circular No. 89-296.

[100] Rollo, p. 234 and 425, Position Paper of Pozzolanic, reiterated in its Comment to the Petition for Review.

[101] Ordaining and Instituting a Government Auditing Code of the Philippines, issued by then President Marcos on 11 June 1978.

[102] Sargasso Construction & Development Corporation/Pick & Shovel, Inc./Atlantic Erectors, Inc. (Joint Venture) v. Philippine Ports Authority, G.R. No. 170530, 5 July 2010, 623 SCRA 260, 279- 280.

[103] 86 Phil. 50 (1950).

[104] Id. at 56.

[105] Andres v. Commission on Audit, G.R. No. 94476, 26 September 1991, 201 SCRA 780, 787, cited in Manila International Airport Authority v. Olongapo Maintenance Services, Inc., supra note 89 at 291-292.

[106] G.R. Nos. 115121-25, 9 February 1996, 253 SCRA 470.

[107] Id. at 481.

[108] G.R. No. 126151, 20 January 2000, 322 SCRA 760.

[109] Id. at 768, citing Tantuico, Jr., State Audit Code of the Philippines, 1982 ed., p. 450.

[110] G.R. No. 133250, 9 July 2002, 384 SCRA 152.

[111] Id. at 227.

[112] Audit Guidelines on the Divestment or Disposal of Property and Other Assets of National Government Agencies and Instrumentalities, Local Government Units and Government-Owned or Controlled Corporations and their Subsidiaries, signed by then Chairman Eufemio C. Domingo and then Commissioners Alberto P. Cruz and Bartolome C. Fernandez, Jr.

[113] Chavez v. Public Estates Authority, supra note 110 at 228.

[114] Id., Resolution on the Second Motions for Reconsideration, G.R. No. 133250, 11 November 2003, 415 SCRA 403, 426.

[115] G.R. No. 178158, 4 December 2009, 607 SCRA 413.

[116] Id. at 514.

[117] Supra note 110.

[118] Id. at 227.

[119] G.R. No. 161117, 31 January 2008, 543 SCRA 269.

[120] Id. at 297.

[121] Rollo, pp. 188-189 and 191-192.

[122] General Guidelines on the divestment or disposal of assets of government-owned and/or controlled corporations, and their subsidiaries, signed by then Chairman Teofisto T. Guingona, Jr. and Audit Guidelines on the Divestment or Disposal of Property and Other Assets of National Government Agencies and Instrumentalities, Local Government Units and Government-Owned or Controlled Corporations and their Subsidiaries, signed by then Chairman Eufemio C. Domingo and then Commissioners Alberto P. Cruz and Bartolome C. Fernandez, Jr.

[123] No. 3.2 of Circular No. 86-264 and No. V (2) of Circular No. 89-296.

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