

THIRD DIVISION

G.R. No. 212686 (*Sergio R. Osmeña III vs. Power Sector Assets and Liabilities Management Corporation, et al.*)

Promulgated:

September 28, 2015

X-----*Wilfredo V. Lapitan*-----X

CONCURRING OPINION

VELASCO, JR., J.:

I concur with the ruling in the *ponencia*.

Jurisprudence is clear that “right to top” stipulations are weighed with the taint of invalidity for contravening the policy requiring government contracts to be awarded through public bidding.¹ These clauses are cleansed of the stain only in the narrow instance wherein the right is founded on the beneficiary’s interest on the object over which the right is to be exercised,² and only when the government stands to benefit from the stipulation.³

There is no quibbling, in the case at bar, that SPC Power Corporation’s (SPC’s) right to top falls not within the narrowly carved exception. It is the requirement that the alleged beneficiary must first prove a subsisting interest in the object in order to avail of the right to top. In this case, however, SPC’s alleged right is contained in the **Land-Based Gas Turbine-Land Lease Agreement (LBGT-LLA)** that the company inked with Power Sector Assets and Liabilities Management Corporation (PSALM).⁴ As such, it cannot be deemed applicable to give SPC an undue advantage against the other bidders in PSALM’s privatization of the **Naga Power Plant Complex (NPPC)**, which is a project distinct and separate from LBGT.⁵ Stated in the alternative, SPC does not possess the requisite interest over NPPC that would have justified its right to top, for it only has a subsisting one in LBGT.

¹ *LTFRB v. Stronghold Insurance Company, Inc.*, G.R. No. 200740, October 2, 2013, 706 SCRA 675, 688.

² Such as 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; see *LTFRB v. Stronghold Insurance Company, Inc.*, id. at 690: The grant of right is a means to protect the beneficiary’s interest. See also *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines, Inc.*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 234.

³ *LTFRB v. Stronghold Insurance Company, Inc.*, supra at 690.

⁴ 3.02 Exclusive Right of LESSOR

Nothing in this Agreement shall limit the right of the LESSOR to sell, lease, alienate or encumber any property in the vicinity of the Leased Premises which is not part of the Leased Premises to any Person; provided, the LESSEE shall have the right to top the price of the winning bidder for the sale or lease of such property.

⁵ Installed in the NPPC are three (3) power plants, namely: Cebu 1 Coal-fired thermal power plant, Cebu 2 Coal-fired thermal power plant, and Cebu Diesel Power Plant 1, with an aggregate capacity of 153.10 MW. In contrast, the LBGT facility only involves one (1) power plant -- the Naga LBGT power plant, with a rated capacity of 55.0 MW; Decision, p.2.

Having failed to prove its existing interest in the NPPC, SPC's improved proposal for its acquisition, although better than that of the highest bidder, Therma Power Visayas, Inc. (TVPI), becomes of no weight and significance, and the fact that the government stands to additionally benefit by a margin of Php54,440,000.00⁶ from SPC's enhanced offer, irrelevant and of no importance.

Notwithstanding my concurrence in the result, I would nevertheless like to express my misgivings anent the interchangeable use of the terms "right of first refusal" and "right to top," and "right to match" for that matter, in our jurisprudence. Indeed, they all bear the same taint of invalidity for they constitute undue advantage to their beneficiary that discourages others from participating in the bidding process. Additionally, they share the same requirement of a subsisting interest in the object of their exercise as a precondition for their validity. Be that as it may, there is variance in the stage of the bidding process they may be exercised, and in the basis of the contract price at which the project will be offered to the clauses' beneficiary.

To elucidate, the "right of first refusal," as the phrase itself connotes, requires that the contract be offered first to the beneficiary before being offered to the public. In order to have full compliance with the contractual right granting a party the first option to purchase, the sale of the properties for the price for which they were finally sold to a third person should have likewise been first offered to the former. Further, there should be identity of the terms and conditions to be offered to the buyer holding a right of first refusal if such right is not to be rendered illusory.⁷

The concept of "right of first refusal" is not irreconcilable with the national policy requiring government disposition to be subject to public bidding. In fact, public bidding is an essential first step in the exercise of the right because it is only after the public bidding that the Government will have basis with which to offer the beneficiary the option to accept or reject the terms of the subject of procurement.⁸ If the beneficiary so participates, he will automatically be awarded the project so long as he is eligible and meets the minimum requirements outlined in the bid documents. In awarding the project, the procuring entity, in effect, disregards the offers from other bidders, regardless of whether or not they are more advantageous to the government.

In contradistinction, the "right to match" and "right to top" can only be exercised once the best or highest bid is determined. The "right to match" grants the beneficiary the right to offer the same amount as the highest bid to beat the highest bidder, while the "right to top" accords the beneficiary the right to offer a higher amount to beat the highest bid.⁹

There lies the distinction. While the "right of first refusal" entails the right to be offered the project first, the "right to match" and "right to top" can be seen as

⁶ SPC's improved offer of Php1,143,240,000.00 less TVPI's offer of Php1,088,800,000.00.


⁷ *Tanay Recreation Center and Development Corp. v. Fausto*, G.R. No. 140182, April 12, 2005, 455 SCRA 436, 445.

⁸ *JG Summit Holdings, Inc. v. Court of Appeals*, G.R. No. 124293, September 24, 2003, 412 SCRA 10, 34.

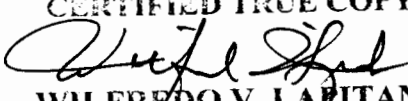
⁹ *LTFRB v. Stronghold Insurance Company, Inc.*, supra.

the right to be offered last. Moreover, in exercising the right of first refusal, the contract price is dictated primarily by the bid documents and the offer by the beneficiary need not exceed the minimum requirements set by the government. On the other hand, the contract price, in the exercise of the right to match or right to top, is dependent on the highest bid from the participants in the bidding process.

Having clarified the conceptual differences between the three, I vote to **GRANT** the petition.



PRESBITERO J. VELASCO, JR.
Associate Justice

CERTIFIED TRUE COPY

WILFREDO V. LAPITAN
Division Clerk of Court
Third Division
NOV 06 2015