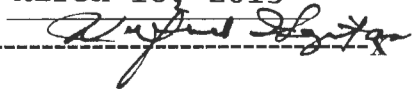


SPECIAL THIRD DIVISION

G.R. No. 203655 – SM LAND, INC., Petitioner, v. BASES CONVERSION AND DEVELOPMENT AUTHORITY AND ARNEL PACLANO D. CASANOVA, Esq., in his official capacity as President and CEO of BCDA, Respondents.

Promulgated:

March 18, 2015



x-----

DISSENTING OPINION

LEONEN, J.:

I dissent.

There was no valid agreement that gave petitioner SM Land, Inc. (petitioner SMLI) a right to a completed competitive challenge. Respondent Bases Conversion and Development Authority (respondent BCDA) did not and may not give consent to any provision that limits the process for selecting respondent BCDA's joint venture partner to competitive challenge especially when it was shown that such process would be against public interest.

The Certificate of Successful Negotiation¹ and the Terms of Reference² do not show a clear meeting of the minds to limit the whole selection process to a completed competitive challenge. While these documents state that petitioner SMLI and respondent BCDA had “reached an agreement on the purpose, terms and conditions on the [joint venture] development . . . which shall become the terms for the Competitive Challenge[.]”³ respondent BCDA did not make a binding commitment to enter into a joint venture agreement with petitioner SMLI or to limit the selection process to a completed competitive challenge. The Certificate of Successful Negotiation was worded in a manner that implied that the terms agreed upon by petitioner SMLI and respondent BCDA shall apply only if

¹ *Rollo*, pp. 64–72.

² *Id.* at 74–88.

³ *Id.* at 65.



they decided to proceed with the joint venture development and the competitive challenge.⁴

Similarly, the Terms of Reference contained no such commitment. It only described the competitive challenge procedure should both parties decide to proceed with it. It even contained provisions that confirmed respondent BCDA's authority to reconsider and terminate the selection process and later adopt other selection processes.

III. GENERAL INFORMATION

....

4. **Amendment of these TOR.** *The information and/or procedures contained in these TOR may be amended or replaced at any time, at the discretion of the JV-SC, subject to the approval/confirmation of the BCDA Board, without giving prior notice or providing any reason.* Should any of the information and/or procedures contained in these TOR be amended or replaced, the JV-SC shall inform and send Supplemental Notices to all PSEs. . . .

....

VIII. QUALIFICATIONS AND WAIVERS

....

3. *BCDA further reserves the right to call off this disposition prior to acceptance of the proposal(s) and call for a new disposition process under amended rules, and without any liability whatsoever to any or all the PSEs, except the obligation to return the Proposal Security.*⁵ (Emphasis supplied)

Petitioner SMLI cannot invoke the principle of estoppel against respondent BCDA. This is not just because of the principle that the government is not bound by its agents' mistakes. This is because the principle of estoppel presupposes that false representations were made — which is not the case. The Certificate of Successful Negotiation and the Terms of Reference do not state that respondent BCDA shall limit the

⁴ Id. at 64–65.
CERTIFICATION OF SUCCESSFUL NEGOTIATION

....

NOW THEREFORE, for and in consideration of the foregoing, BCDA and SMLI have, *after successful negotiations pursuant to Stage II of Annex C - Detailed Guidelines for Competitive Challenge Procedure for Public-Private Joint Ventures of the NEDA JV Guidelines, reached an agreement on the purpose, terms and conditions on the JV development of the subject property, which shall become the terms for the Competitive Challenge* pursuant to Annex C of the JV Guidelines, as follows: (Emphasis supplied)

⁵ Id. at 77–87.

process of selecting the joint venture partner to a completed competitive challenge. The existence of qualifications and waivers in the Terms of Reference further negates allegations that there was such a representation.

However, even granting that there was such representation, respondent BCDA was not acting out of capriciousness when it decided to terminate the competitive challenge. It terminated the competitive challenge because petitioner SMLI's offer was incompatible with public interest and, therefore, void. Moreover, the whole process that led to the issuance of a Certificate of Successful Negotiation was highly irregular.

Respondents BCDA and its President, Arnel Paciano D. Casanova (Casanova), point to the alleged dubious process that led to the naming of petitioner SMLI as the original proponent. They formally submit that as much as ₱13 billion pesos may be lost to the government.⁶

According to respondents BCDA and Casanova, the Joint Venture Selection Committee's recommendation and BCDA Board's approval of using competitive challenge, instead of the usual public bidding process,⁷ are themselves questionable. Respondents BCDA and Casanova cited the April 28, 2010 minutes of respondent BCDA's special Board meeting to show that the choice of disposition process had already been a concern within respondent BCDA even before petitioner SMLI was declared the original proponent:

5.1.3. Vice Chairman Abaya expressed concern that BCDA might be questioned later on why it opted to go via Annex 'C' and not the Annex 'A' mode of disposition. In order to justify BCDA going via Annex 'C' mode, *it should be made clear to the interested proponents that there are already offers higher than the JUSMAG property. . . .*⁸

Petitioner SMLI was not the first developer that submitted a proposal to respondent BCDA. Robinsons Land Corporation had submitted its proposal as early as October 8, 2009 or more than two (2) months before petitioner SMLI submitted its initial proposal of ₱16,350.00/square meter on December 14, 2009.⁹ Both proposals were

⁶ Id. at 1049. Respondents BCDA and Casanova stated in their Motion to Resolve with Motion for Reconsideration that:

The proposal of SMLI juxtaposed with the Cuervo appraisal shows the relative value of the offer vis-à-vis market prices to be as follows:

	Per Square Meter	Value for the Entire Property
SMLI Tender	Php38,500	Php12,743,500,000
Cuervo Appraisal	Php78,000	Php25,843,537,000

⁷ Exec. Order No. 62 (1993) provides that "[a]s a general rule, the privatization process should be conducted through public bidding."

⁸ *Rollo*, p. 1040.

⁹ Id. at 1039 and 1048.

already rejected by respondent BCDA for non-compliance with the set parameters for disposition.¹⁰ Instead of terminating the disposition through competitive challenge, however, the Joint Venture Selection Committee “remained in contact with the proponents and even actively solicited their submission of ‘Unsolicited Proposals.’”¹¹ This, respondents BCDA and Casanova argue, gave Robinsons Land Corporation and petitioner SMLI “. . . an unfair advantage over all other developers as it effectively limited the selection process to the two invitees.”¹²

Respondents BCDA and Casanova also implied that there was an irregularity when the Joint Venture Selection Committee was able to make an evaluation and come up with a recommendation only within three hours from petitioner SMLI’s submission of its unsolicited proposal:

DEAL RUSHED DURING THE ELECTION PERIOD

On 4 May 2010, merely six days before the Presidential Elections, SMLI submitted its 3 May 2010 Unsolicited Proposal to BCDA. This Unsolicited Proposal was opened at 9:00 a.m. during the BCDA Business Development Board Committee Meeting in the presence of SMLI representatives. The 3 May 2010 Unsolicited Proposal was thereafter forwarded to BCDA’s Reception Desk where it was stamped as having been received at 9:25 a.m. and then endorsed for inclusion in the Agenda of the BCDA Board Meeting set at 12:00 noon of the same day.

In a span of about three hours, the JV-SC received, opened, evaluated and recommended the acceptance of SMLI’s Unsolicited Proposal for the privatization and development of the 33.1 hectare subject Property for Php32,501/sq. m. in Net Present Value (NPV) using a 10% discount rate; and the pursuit of detailed negotiations on the terms and conditions of the Joint Venture under Annex “C” of the NEDA JV Guidelines. This circumstance was not lost to some BCDA Directors. As reflected in the Minutes of the Board Meeting:

- 5.2.23. Director Sangil said that the Board was only given a few hours to evaluate the revised proposal by SLI, considering that copies of the same were given only shortly before the Board Meeting started. As such, the Board may not be able to come up with a wise decision on the matter.¹³ (Emphasis and underscoring in the original, citations omitted)

Respondents BCDA and Casanova also mentioned that before the issuance of a Certificate of Successful Negotiation, there had been concerns

¹⁰ Id. at 1040.

¹¹ Id. at 1041.

¹² Id.

¹³ Id. at 1042.

about the disregard of other more favorable offers to the government for the property. Respondent BCDA quoted a letter from Ayala Land Inc.:

We now formally request that you reconsider your decision and conduct a bidding for the property consistent with the precedent set by BCDA for the Bonifacio South lots with its disposition of the JUSMAG site in February on account of its receipt of a number of offers from various proponents including ours. We believe that BCDA should pursue the best price for the property to uphold public interest and avoid the loss of public funds and revenues. The sudden change in BCDA's disposition mode as our government transcends to a new administration might also be questionable.¹⁴

Respondents BCDA and Casanova also quoted the July 20, 2010 minutes of the regular BCDA Board meeting, showing the same concerns from some BCDA directors over the disposition of the property:

4.4.31. Director Valencia recalled that in the disposition of the JUSMAG property, the Board could not decide on whether or not to declare ALI as the original proponent. However, subsequent proposals came along which compelled BCDA to dispose of the property through public bidding over a period of two years. Given this example, he suggested that the Board could perhaps defer its decision on the matter until such time that the new administration appoints new BCDA Board Members. He also expressed his concern about the ALI letter which alleges that the BCDA's mode of disposition might be questionable.

....

4.4.40 Director Valencia said that the ALI offer for the subject property was reduced to its present value, same with the SMLI offer. Regardless of the underlying assumptions for the offers, the value of the property is the same and the peso represented today is the same as that being represented by other proponents. Given this fact, it is prudent for BCDA to wait until new BCDA Directors are appointed by the new administration to avoid the suspicion that BCDA is rushing the disposition of the subject property.

....

4.4.52 Director Seno suggested the possibility of elevating the matter to the Office of the President (OP) as far as the Board's decision is concerned, explaining the process involved and the actions of the Board every step of the way. The professionalism of the BCDA Board will be

¹⁴ Id. at 1043.

questioned if it does not exercise prudence on the matter.¹⁵
(Underscoring in the original)

Instead of deciding whether to declare Ayala Land Inc. as the original proponent, the Joint Venture Selection Committee asked petitioner SMLI to give an offer that was better than Ayala Land Inc.'s. Petitioner SMLI submitted its improved offer. The BCDA Board of Directors, upon recommendation of the Joint Venture Selection Committee, declared petitioner SMLI as the original proponent.¹⁶

These are allegations of possible irregularities that should not be dismissed so easily. They involve the conduct of persons entrusted to operate respondent BCDA. They also involve the government's and our taxpayers' money.

The President, who exercises control and supervision over respondent BCDA, should be able to correct errors and address irregularities whenever they come to his attention. He took an oath to faithfully execute our laws and to "consecrate [himself] to the service of the Nation."¹⁷ Republic Act No. 7227 provides for our policy to enhance the benefits derived from respondent BCDA-administered properties.¹⁸ Respondent BCDA's projects should be implemented in a manner that would "maximize the use of military camps[.]"¹⁹ It would be a violation of the President's oath and a grave abuse of discretion on his part if, despite his knowledge, he disregards the irregularities, causing losses to the government. Inaction on his part is, in effect, allowing the government and the taxpayers to suffer the losses.

Thus, the President decided to refer the disposition of BCDA-administered property to the Office of the Chief Presidential Legal Counsel for study.²⁰ Respondent BCDA also conducted a new evaluation of petitioner SMLI's proposal.²¹ This resulted in a finding that petitioner SMLI's proposal would not yield the best value for the government and a recommendation to terminate the competitive challenge and proceed with the usual bidding process.²² Eventually, the President decided to subject the BCDA-administered property to public bidding instead.²³ This decision is consistent with our policy to maximize the benefits that can be derived from BCDA-administered properties²⁴ and our policy in favor of public bidding.²⁵ I reiterate:

¹⁵ Id. at 1043–1045.

¹⁶ Id. at 1046.

¹⁷ CONST., art. VII, sec. 5.

¹⁸ Rep. Act No. 7227 (1992), sec. 2.

¹⁹ Exec. Order No. 62 (1993), sec. 1.4.

²⁰ *Rollo*, p. 574.

²¹ Id. at 633–635.

²² Id. at 635.

²³ Id. at 637.

²⁴ Rep. Act No. 7227 (1992), sec. 2; Exec. Order No. 62 (1993), secs. 1.4 and 1.5.

BCDA's acceptance of SMLI's unsolicited proposal, the issuance of the certificate of successful negotiations, and terms of reference, should be read in light of the preference given to public bidding, the policy in favor of maximized use of properties, and national interest. Any person who deals with the government also accepts the condition that the government is not bound by any provision or interpretation that is against the law, government policies, and national interest. The government may not agree to contract stipulations that are disadvantageous to it. These are conditions that are deemed incorporated in dealings with BCDA.²⁶

Even the government may not renege on its contractual obligations. However, there was no clear contractual provision in this case that could limit the President's power to terminate the competitive challenge procedure. Respondent BCDA's acceptance letter of petitioner SMLI's proposal,²⁷ the Certificate of Successful Negotiation,²⁸ and the Terms of Reference²⁹ contained no provision to that effect.³⁰ Meanwhile, the procedure for competitive challenge under Annex C of the Joint Venture Guidelines is a mere guideline. It is not law. It is subject to modifications that should be consistent with law and public policy. It applies only if the parties clearly and validly agreed to adopt competitive challenge as a procedure. Any modification or contractual provision that is marred by any form of illegality will not vest any right. Respondent BCDA has no authority to agree to a provision that is inconsistent with law or public policy.

A decision to accommodate petitioner SMLI's interest at the expense of the government might give the wrong message that we advocate coddling of private interest. It also gives a wrong message that the President may turn a blind eye on irregularities in actions of government representatives to the detriment of public interest. This is especially true since there is even no clear agreement that the disposition process is limited to a specific procedure or that petitioner SMLI is entitled to the completion of that procedure.³¹ "Public office is a public trust."³² We expect the President and all persons in

²⁵ Exec. Order No. 62 (1993), sec. 4.3; Rep. Act No. 9184 (2002), sec. 3(a), 3(b), and 10; Exec. Order No. 423 (2005), secs. 1 and 8; Exec. Order No. 40 (2001), sec. 2.

²⁶ J. Leonen, Dissenting Opinion in *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, August 13, 2014
<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/august2014/203655_leonen.pdf> 12 [Per J. Velasco, Jr., Third Division].

²⁷ *Rollo*, p. 351. The letter was dated May 12, 2010.

²⁸ *Id.* at 65 and 70.

²⁹ *Id.* at 74-87.

³⁰ J. Leonen, Dissenting Opinion in *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, August 13, 2014
<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/august2014/203655_leonen.pdf> 3-8 [Per J. Velasco, Jr., Third Division].

³¹ *See* J. Leonen, Dissenting Opinion in *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, August 13, 2014
<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/august2014/203655_leonen.pdf> 3-8 [Per J. Velasco, Jr., Third Division].

³² CONST., art. XI, sec. 1.

public service to uphold the public interest. We, therefore, expect the President to act whenever irregularities and actions that are detrimental to the public interest come to his attention.

The public interest involved in this case is the ₱13 billion (approximation) that the government stands to lose if it is forced to dispose respondent BCDA-administered property at the price proposed by petitioner SMLI.³³ This value is not speculative. According to respondents BCDA and Casanova, the property's value is already pegged at ₱100,000.00/square meter, ₱78,000.00/square meter, and ₱500,000.00/square meter by the Bureau of Internal Revenue, Cuervo Appraisers, and the Government Service Insurance System, respectively.³⁴ Petitioner SMLI's offer of ₱38,500.00/square meter is way below the property's market value. It is true that through competitive challenge, this price can be increased. However, proceeding with the competitive challenge at this floor price means that the government will be bound by a winning offer that, though higher than ₱38,500.00/square meter, is below the property's market value. Unlike competitive challenge, "public bidding allows the government to set the minimum contract price[.]"³⁵ which could more or less ensure that the government will get the maximum benefits from the disposition of its properties.

We are not saying that government properties can be disposed exclusively through public bidding. We are saying that this is the general rule, and other processes are exceptions. Competitive challenge may apply if there are no other parties interested in the government property or if there is a great need to attract the interest of private sector entities.³⁶ It may also apply if there is a clear showing that it would be the process that would provide more benefits to the government. The figures above show that competitive challenge would not be the most beneficial in this case. Proceeding with the less advantageous procedure would diminish the benefits that may be obtained for legitimate government purposes.

Since Section 8 of Republic Act No. 7227 provides that portions of revenues obtained from the privatization of Metro Manila military camps shall go to the Armed Forces of the Philippines' modernization program, the housing loan program for the homeless, and other projects, this case will have an impact on community welfare including public security. Respondents BCDA and Casanova also raised a possible business implication of this case:

³³ *Rollo*, p. 1049.

³⁴ *Id.*

³⁵ J. Leonen, Dissenting Opinion in *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, August 13, 2014
<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/august2014/203655_leonen.pdf> 10 [Per J. Velasco, Jr., Third Division].

³⁶ *Id.* at 10–11.

The Honorable Court's Decision will likewise affect the manner and way by which the government and the private sector conduct joint ventures. The current administration advocates Public-Private Partnership, one of the models of which is a joint venture, and it is to the people's best interest that the Court determines pressing issues on the construction of NEDA JV Guidelines such as this one that BCDA presents.

In its 13 August 2014 Decision, the Court stated that "the issue in this case boils down to whether or not the BCDA gravely abused its discretion in issuing Supplemental Notice 5, in unilaterally aborting the Competitive Challenge, and in subjecting the development of the project to public bidding."

A definitive ruling as to the extent of applicability of the NEDA JV Guidelines, which is the governing law for joint ventures with the government, will affect not only the Bonifacio South Property subject of this Petition but also the conduct of on-going and future joint ventures with the government.³⁷ (Citation omitted)

These are matters and concerns that could have been acted upon by this court En Banc. Rule 2, Section 3 of the Internal Rules of the Supreme Court³⁸ provides that this court En Banc shall act on matters involving "huge financial impact on businesses or [affecting] the welfare of a community[.]" Thus:

SEC. 3. *Court en banc matters and cases.* – The Court *en banc* shall act on the following matters and cases:

....

- (1) Division cases where the subject matter has a huge financial impact on businesses or affects the welfare of a community[.]

Respondents BCDA and Casanova, therefore, properly filed a Motion³⁹ dated May 14, 2013, asking for leave of court to refer the case to this court En Banc.

However, on June 3, 2013, the Third Division denied respondents BCDA and Casanova's Motion on the ground that "the Court *en banc* is not an appellate court to which decisions or resolutions of a Division may be appealed pursuant to SC Circular No. 2-89 dated February 7, 1989, as amended by Resolution dated November 18, 1993."⁴⁰

³⁷ *Rollo*, pp. 1031–1032.

³⁸ As amended in the Resolutions dated July 6, 2010, August 3, 2010, and September 18, 2012.

³⁹ *Rollo*, pp. 854–859.

⁴⁰ *Id.* at 860-B.

The issues raised in this case should have been properly addressed and could have been sufficiently deliberated by this court had the case been elevated to this court En Banc.

ACCORDINGLY, I vote to **GRANT** the Motion for Reconsideration.



MARVIC M.V.F. LEONEN
Associate Justice