Republic of the Philippines
Supreme Court
Manila
THIRD DIVISION

SERGIO R. OSMEÑA III,
Petitioner,

- versus -

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION, EMMANUEL R. LEDESMA, JR., SPC POWER CORPORATION and THERMA POWER VISAYAS, INC.,
Respondents.

G.R. No. 212686

Present:

VELASCO, JR., *J.*, *Chairperson*,
PERALTA,
VILLARAMA, JR.,
PEREZ,* and
JARDELEZA, *JJ.*

Promulgated:

September 28, 2015

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DECISION

VILLARAMA, JR., *J.*:

In a direct recourse to this Court, Senator Sergio R. Osmeña III (petitioner) seeks to enjoin the sale of the Naga Power Plant Complex (NPPC) to respondent SPC Power Corporation (SPC) resulting from the latter's exercise of the *right to top* the winning bid of respondent Therma Power Visayas, Inc. (TPVI), and to declare such stipulation in the Lease Agreement as void for being contrary to public policy.

Antecedents

Respondent Power Sector Assets and Liabilities Management Corporation (PSALM) is a government-owned and controlled corporation created by virtue of Republic Act (R.A.) No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA) of 2001. 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

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* Designated Acting Member in lieu of Associate Justice Bienvenido L. Reyes, per Special Order No. 2084 dated June 29, 2015.

objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.[1] Respondent Emmanuel R. Ledesma, Jr. (Ledesma) is the incumbent President and Chief Executive Officer of PSALM.

SPC is a joint venture corporation between Salcon Power Corporation and Korea Power Corporation (Kepco).[2] TPVI is a subsidiary of AboitizPower, the power generation company of the Aboitiz Group.

PSALM provided the following brief description of the two (2) facilities subject of the present controversy:

Facility Name	Naga Power Plant Complex (NPPCx)	Land-Based Gas Turbine (LBGT)
Location	Brgy. Colon, Naga,Cebu	Brgy. Colon, Naga, Cebu
Power Plants Installed	a. 52.5 MW Cebu 1 coal-fired thermal power plant; b. 56.8 MW Cebu 2 coal-fired thermal power plants; and c. 43.8 MW Cebu Diesel Power Plant 1 composed of six (6) 7.3 MW bunker-C fed power units	55-MW Naga LBGT Power Plant
Total Rated Capacity	153.10 MW	55.00 MW
Land Area	209,000.00 [sq. m.]	5,504.02 [sq. m.][3]

The Naga Land-Based Gas Turbine (LBGT) is located inside the same compound as the NPPC.[4]

On October 16, 2009, PSALM privatized the 55-MW Naga Power Plant (LBGT) by way of negotiated sale after a failed bidding in accordance with the LBGT Bidding Procedures.[5] The land underlying the LBGT was also leased out for a period of 10 years. This bidding resulted in SPC's acquisition of the LBGT through an Asset Purchase Agreement (LBGT-APA) and lease of the land under a Land Lease Agreement (LBGT-LLA). The LBGT-LLA would expire on January 29, 2020. The LBGT-LLA contained a provision for SPC's right to top in the event of lease or sale of property which is not part of the leased premises.

On December 27, 2013, the Board of Directors of PSALM approved the commencement of the 3rd Round of Bidding for the sale of the 153.1-

1 Section 50, R.A. No. 9136.
2 *Rollo* (Vol. I), p. 141.
3 *Rollo* (Vol. II), p. 672.
4 Id.
5 Id. at 672, 724.

MW NPPC. Only SPC and TPVI submitted bids. On March 31, 2014, TPVI was declared as the highest bidder. Consequently, a Notice of Award[6] was issued to TPVI on April 30, 2014, subject to SPC's right under Section 3.02 of the LBGT-LLA, as previously stated in Section 1B-20 of the Bidding Procedures.

The results of the NPPC bidding are as follows:

	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**[7]

In a letter dated April 29, 2014, PSALM notified SPC of TPVI's winning bid which covers the purchase of the NPPC and lease of the land. It also advised SPC that under the terms of LBGT-LLA (Sections 2.01 and 3.02), the lease of the land (as governed by the LBGT-LLA) will likewise expire on January 29, 2020.[8] In a letter-reply dated May 7, 2014, SPC confirmed that it is exercising the right to top the winning bid of TPVI and will pay the amount of Php1,143,240,000.00 on the understanding that the term of the lease is 25 years from Closing Date. SPC argued that –

> 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 of ten (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**.[9]

PSALM then wrote the Office of the Government Corporate Counsel (OGCC) requesting for legal opinion or confirmation of its position that the term of the lease of the NPPC upon SPC's exercise of its right to top would be for the remaining period of the lease of the land of the Naga LBGT Power Plant, which will expire in 2020.[10]

On May 21, 2014, the OGCC rendered Opinion No. 098, Series of 2014 which upheld PSALM's position that SPC may exercise the right to

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6 Id. at 919.
7 Id. at 679.
8 Id. at 920-921.
9 Id. at 922-923.
10 Id. at 924-931.

top under the LBGT-LLA provisions, the source of such right. It explained that the NPPC-LLA is a separate and distinct transaction which is inapplicable with respect to SPC's right to top.[11]

However, upon re-evaluation of the arguments in the position papers submitted by SPC and PSALM, the OGCC submitted its study and recommendation to Secretary of Justice Leila M. De Lima. The study concluded that the right to top exercised by SPC in the NPPC bidding is a right to top on a sale, which must then be separately governed by the NPPC-APA, and implemented in accordance with the NPPC-APA and LLA provisions.[12]

On June 16, 2014, the present petition was filed in this Court praying that (1) a temporary restraining order (TRO) be issued *ex parte*, and after hearing the parties, a writ of preliminary injunction be issued enjoining PSALM from implementing SPC's exercise of its right to top in connection with the NPPC bidding; (2) SPC's right to top as provided in Section 3.02 of the LBGT-LLA be declared void; and (3) a permanent injunction be issued enjoining respondents Ledesma and PSALM from committing any act in furtherance of SPC's exercise of the right to top.[13]

SPC, TPVI and PSALM filed their respective Comments on the petition, while SPC filed a Reply to TPVI's Comment and petitioner his Reply to PSALM's Comment.

On August 7, 2014, SPC filed a Manifestation with Motion informing this Court that on July 28, 2014, PSALM advised that PSALM's Board of Directors has already declared SPC as the winning bidder for the privatization of NPPC. It thus contended that with this development, the present petition had become moot.[14]

On August 11, 2014, petitioner filed a Supplemental Petition with Motion for Early Resolution of the Application for Temporary Restraining Order and/or Writ of Preliminary Injunction.[15] According to petitioner, the transfer and possession to SPC of the NPPC and of the land on which it is built should be deferred until after this Court has ruled on his petition due to the following reasons: (1) there seems to be no urgency for PSALM to rush the award of the NPPC; (2) by the execution of the subject NPPC-APA and LLA in favor of SPC, PSALM has invalidly awarded a government property without the requisite public bidding; and (3) there are practical difficulties and expense that will be incurred in order to reverse acts that are committed before any provisional or preventive relief is issued, such as transfer of ownership and/or possession of the properties in SPC's name or to third parties, and potential liability of the Government under suit for damages to

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11 *Rollo* (Vol. I), pp. 121-125.
12 *Rollo* (Vol. II), pp. 951-962.
13 *Rollo* (Vol. I), p. 34.
14 Id. at 488-492.
15 *Rollo* (Vol. II), pp. 578-583.

be filed by any interested party.

On November 11, 2014, PSALM filed a Manifestation in Lieu of Comment to the Supplemental Petition,[16] stating that: (1) PSALM's Board of Directors, in a meeting held on July 25, 2014, taking into consideration the OGCC's letter dated June 13, 2014 and the DOJ's opinion-letter dated June 23, 2014, declared SPC as the winning bidder for the sale of 153.1-MW NPPC; (2) PSALM issued on July 28, 2014 the Notice of Award and Certificate of Effectivity in favor of SPC; (3) the NPPC-APA and LLA were already signed and delivered to SPC; and (4) PSALM turned over the properties to SPC last September 25, 2014.

Petitioner's Arguments

Petitioner asserts that the right to top provision in the LBGT-LLA is an option contract which must be supported by a consideration separate from the lease contract and may be withdrawn at any time by PSALM in the absence of such consideration. He submits that SPC's preferential right to buy or lease "any property in the vicinity of the Leased Premises which is not part of the Leased Premises" was a gratuitous concession to SPC, and most likely was part of a scheme to bar any competition to SPC and to restrict the production of energy. Citing *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*,[17] petitioner argues that the right of first refusal is upheld only in cases where the holder of such right holds an existing, or at least, a vested interest in the object for which the right is to be exercised. Thus, even if SPC has a legal interest in the vicinity lots, its right to top can no longer be exercised because it is not operating the Naga LBGT itself.

Another legal ground for the nullity of the option raised by petitioner pertains to the policy requiring competitive public bidding in all government contracts. Petitioner contends that by granting SPC the right to top, PSALM violated the express provisions of R.A. No. 9136 (EPIRA Law) and R.A. No. 9184 (Procurement Law) on public bidding by failing to maintain bidders on equal footing in order to give the government the best possible and available offer for public assets being sold or leased. He posits that SPC's exercise of its right to top is disadvantageous to the Government and that the provision enables SPC to skirt around eligibility requirements for a qualified bidder.

Alleging an anomalous track record for SPC since 1994 when as then Salcon Power Corporation it entered into a 15-year contract to "Rehabilitate, Operate, Maintain and Manage" a coal plant, petitioner argues that the 2009 Naga LBGT contract should have been terminated for SPC's failure to comply with its obligations. Under the 2009 Naga LBGT, not only does SPC enjoy an invalid option or preferential right unsupported by any

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16 Id. at 978-981.

17 671 Phil. 731 (2011).

consideration, such right to top is also without a determinate object and founded on illegal cause considering that it was merely intended to maintain SPC's dominance and to assist SPC in restricting competition.

Respondents' Arguments

At the outset, SPC questions petitioner's legal standing to file the present petition, having failed to establish any personal benefit in the event relief is granted, and there being no expenditure of public funds involved that would impress upon the petition the character of a taxpayer's suit. Neither could petitioner invoke his office as a Senator because legislators may only be accorded standing to sue if there is a claim that official action complained of infringes upon their prerogative as legislators. Petitioner could also not have anchored his standing upon his status as a citizen as he failed to demonstrate how he would suffer personal injury as a result of respondents' acts and erroneously invoked this Court's jurisdiction to rule on a policy issue relating to the manner PSALM carries out its mandate, even as he failed to cite specific provision in the law and in EPIRA which was supposedly violated by the petitioner.

On procedural grounds, SPC seeks the dismissal of the petition as there is no basis for annulling PSALM's acts by way of a petition for certiorari or prohibition, and said petition was not filed within the 60-day reglementary period from the time the Naga LBGT contract incorporating the right to top was awarded to SPC in 2009 and the issuance of DOJ opinion dated January 9, 2013 wherein SPC's right to top was held to be valid and not disallowed by law.

SPC asserts that even on substantive grounds, the petition should still be dismissed as the right to top is clearly not an option contract and the Naga LBGT was validly awarded to SPC through a public bidding. Citing *JG Summit Holdings, Inc. v. Court of Appeals*,[18] SPC maintains that the right to top granted under the LBGT-LLA and exercised by it did not violate the rules of competitive bidding. The implementation of such right to top, moreover, does not place the Government in a disadvantaged position but rather assures the Government of an additional 5% of the highest reasonable bid. SPC thus argues that the right to top provision in the LBGT-LLA is consistent with public policy and there is no law that invalidates such provision, such that SPC's vested right should not be disregarded.

On its part, PSALM notes that similar right to top provisions are found in several other land lease agreements in its privatization undertakings. In the 2013 Bidding Procedures for the 3rd Round of Bidding for the NPPC, PSALM duly disclosed to the potential bidders the right to top provision under the LBGT-LLA (Sections 1B-05 and 1B-20 and Form of Certificate Closing for Seller). PSALM avers that it simply complied with the opinions rendered by the DOJ and the second opinion of the OGCC,

[18] 458 Phil. 581 (2003).

which have been held persuasive and hence it acted in good faith in subsequently allowing SPC to exercise its right to top the winning bid for the purchase of NPPC and lease of the land.

TPVI concurs with the allegations in the petition which it said are sufficient to vest standing upon petitioner as citizen, taxpayer, Senator and Chairman of the Joint Congressional Power Committee (Committee). It likewise finds the petition for certiorari as the proper remedy in view of the grave abuse of discretion committed by PSALM in determining the terms of reference of the public bidding to be conducted, as well as in determining the qualifications of the bidders. As to the timeliness of the petition, TPVI points out that SPC exercised its right to top only on May 29, 2014 and therefore the 60-day period within which to file a petition for certiorari under Rule 65 started only from that date.

Citing *LTFRB v. Stronghold Insurance Company, Inc.*,[19] TPVI argues that the right of first refusal and right to top provisions contravene the public policy on competitive public bidding and are valid only in specific cases. In this case, SPC owns a power generation asset (LBGT) and has interest only over the land on which the LBGT is located. TPVI underscores that the right to top in the LBGT does not stand in the same footing as the right to top granted under the other Land Lease Agreements entered into by PSALM, considering the nature of the gas turbine facility it owns. TPVI further contends that aside from SPC's continuous breach of its obligation to operate the Naga LBGT, the right to top provision in the LBGT-LLA provides SPC with the ability to prevent any entity from successfully bidding for and ultimately owning the LBGT and leasing the land. Hence, the Government does not stand to benefit from the right to top provision in the LBGT-LLA.

Assuming the right to top is valid, still TPVI maintains that SPC failed to timely exercise the same within the period provided therefor, or until May 30, 2014. Moreover, SPC's letter dated May 7, 2014 and subsequent deposit in PSALM's account of the amount to cover the right to top is not the exercise sanctioned under the LBGT-LLA, and SPC's insistence on a 25-year term instead of the remaining term of the LBGT-LLA is an erroneous and invalid exercise of such right to top.

Replying to TPVI's arguments, SPC contends that the right to top is valid and its validity was upheld by the DOJ in its Opinion dated January 9, 2013. Contrary to the averment that the right to top was a gratuitous concession, SPC clarified that it participated and won in the bidding conducted for the sale of LBGT and lease of the land which included the right to top provision, of which TPVI was well aware. During the bidding for the NPPC, all bidders were given an equal chance of winning and none of them challenged SPC's right to top which was duly disclosed to them. SPC further asserts that the right to top is more advantageous to the

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

Government considering that the bidders tend to offer only competitive bids knowing that their bids can be "topped out" by SPC, and hence the Government is assured of receiving an offer even better than the best bid tendered during the bidding proper.

As to the alleged lack of interest over the object of the right to top, SPC points out that it was the bidders' concern that the buyer of the power plant obtain reasonable access to properties or lands in close proximity to the power plant for purposes of security, right of way or other operational requirements. SPC further avers that it has timely exercised the right to top as can be gleaned from its May 20, 2014 letter informing PSALM that SPC already wired to PSALM the winning bid of Php1,143,240,000.00, which is equivalent to the amount tendered by the winning bidder plus 5%.

Issues

From the foregoing, the issues may be summarized as follows: (1) Is certiorari the proper remedy and was it timely filed?; (2) Does petitioner possess legal standing to institute the present action questioning the validity of SPC's right to top?; (3) Do right to top provisions in the land lease agreements entered into by PSALM contravene public policy on competitive bidding?; and (4) Did PSALM gravely abuse its discretion in allowing SPC's exercise of the right to top under the LBGT-LLA?

Our Ruling

The petition is meritorious.

Propriety of Certiorari

The Constitution under Section 1, Article VIII expressly directs the Judiciary, as a matter of power and duty, not only to settle actual controversies involving rights which are legally demandable and enforceable but, to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or *instrumentality* of the Government. We thus have the duty to take cognizance of allegations of grave abuse of discretion in this case,[20] involving the sale by PSALM of a power plant, which supposedly contravenes the policy on competitive public bidding.

R.A. No. 9136 created PSALM for the principal purpose of undertaking the mandated privatization of all disposable assets of the NPC as well as IPP contracts in an optimal manner.[21] Such disposition is made subject to all existing laws, rules and regulations. Thus, the implementing rules of R.A. No. 9136 provided guidelines in the privatization to be

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20 *Belongilot v. Cua*, 650 Phil. 392, 402-403 (2010).
21 Sec. 50, R.A. No. 9136.

conducted by PSALM, among which are:

> (a) The Privatization value to the National Government of the NPC generation assets, real estate, other disposable assets as well as IPP contracts shall be **optimized;**
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> x x x x
>
> (d) All assets of NPC **shall be sold in an open and transparent manner through public bidding**, and the same shall apply to the disposition of IPP contracts;
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> x x x x[22] (Emphasis supplied)

Specifically Section 51 (m) of the EPIRA empowered PSALM "[t]o restructure the sale, privatization or disposition of NPC assets and IPP contracts and/or their energy output based on such terms and conditions which shall optimize the value and sale prices of said assets." Any act of PSALM that violates these provisions and other applicable laws may constitute grave abuse of discretion. There is grave abuse of discretion (1) when an act is done contrary to the Constitution, the law or jurisprudence; or (2) when it is executed whimsically, capriciously or arbitrarily out of malice, ill will or personal bias.[23]

However, the implementation of EPIRA may not be restrained or enjoined except by order issued by this Court.[24] Petitioner's resort to this Court to obtain an order enjoining PSALM's privatization of the NPPC through SPC's invalid exercise of its right to option, was therefore proper and justified.

Legal Standing

We have held that legislators have the standing to maintain inviolate the prerogatives, powers and privileges vested by the Constitution in their office and are allowed to sue to question the validity of any official action which they claim infringes their prerogatives as legislators.[25] In this case, there was no allegation of usurpation of legislative function as petitioner is suing in his capacity as Chairperson of the Committee created pursuant to Section 62 of R.A. No. 9136. Such position by itself is not sufficient to vest petitioner with standing to institute the present suit. Notably, the enumerated functions of the Committee under the aforesaid provision are basically "in aid of legislation."

Notwithstanding, the Court leans on the doctrine that "the rule on standing is a matter of procedure, hence, can be relaxed for nontraditional

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22 Sec. 4, Rule 23, IRR of R.A. No. 9136.

23 *Information Technology Foundation of the Philippines v. Commission on Elections,* 464 Phil. 173, 190 (2004).

24 Sec. 78, R.A. No. 9136.

25 *Pimentel, Jr. v. Office of the Executive Secretary,* 501 Phil. 303, 312-313 (2005).

plaintiffs like ordinary citizens, taxpayers, and legislators when the public interest so requires, such as when the matter is of transcendental importance, of overreaching significance to society, or of paramount public interest."[26] When the proceeding involves the assertion of a public right, the mere fact that the petitioner is a citizen satisfies the requirement of personal interest.[27]

The privatization of power plants in a manner that ensures the reliability and affordability of electricity in our country pursuant to the EPIRA is an issue of paramount public interest. Petitioner has underscored the effect of the right to top provision in preventing a competitive public bidding for the NPPC. While the alleged detrimental result referred to the severe power shortage that occurred in only one region, PSALM had admitted that the right to top provisions are also found in several other land lease agreements.

In the light of the foregoing considerations, we hold that petitioner possesses the requisite legal standing to file this case.

Validity of Right to Top provision in LBGT-LLA

The provision in the LBGT-LLA which is assailed in the present petition reads:

> 3.02 Exclusive Right of LESSOR
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> 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. In exercising the right to top, the LESSEE must exceed the bid of the winning bidder by five percent (5%). The right to top granted to the LESSEE must be exercised and paid within a period of thirty (30) days from the receipt of written notice from the LESSOR notifying the LESSEE of the result of the bidding or negotiation and the price of the winning bid.
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> In the event of a lease, upon the exercise by the LESSEE of the right to top granted herein, the property covered by it shall form part of the Leased Premises and shall be governed by this Agreement. In the event of a sale, upon the exercise by the LESSEE of the right to top granted herein, the property covered by the sale shall not form part of the Leased Premises.[28]

A *right to top* is a variation of the right of first refusal often incorporated in lease contracts. When a lease contract contains a right of first refusal, the lessor is under a legal duty to the lessee not to sell to

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[26] *Biraogo v. The Philippine Truth Commission of 2010*, 651 Phil. 374, 441 (2010).

[27] *Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS, INC.) v. Power Sector Assets and Liabilities Management Corporation (PSALM)*, G.R. No. 192088, October 9, 2012, 682 SCRA 602, 633, citing *Francisco, Jr. v. The House of Representatives*, 460 Phil. 830, 896 (2003).

[28] *Rollo* (Vol. I), pp. 94-95.

anybody at any price until after he has made an offer to sell to the latter at a certain price and the lessee has failed to accept it. The lessee has a right that the lessor's first offer shall be in his favor.[29] While sometimes referred to as a "first option to buy" or "option of first refusal," a right of first refusal is not an option contract. We explained the distinction between a right of first refusal and option to purchase in *Spouses Vasquez v. Ayala Corporation*,[30] to wit:

> The Court has clearly distinguished between an option contract and a right of first refusal. An option is a preparatory contract in which one party grants to another, for a fixed period and at a determined price, the privilege to buy or sell, or to decide whether or not to enter into a principal contract. It binds the party who has given the option not to enter into the principal contract with any other person during the period designated, and within that period, to enter into such contract with the one to whom the option was granted, if the latter should decide to use the option. It is a separate and distinct contract from that which the parties may enter into upon the consummation of the option. It must be supported by consideration.
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> In a right of first refusal, on the other hand, while the object might be made determinate, the exercise of the right would be dependent not only on the grantor's eventual intention to enter into a binding juridical relation with another but also on terms, including the price, that are yet to be firmed up.[31]

We disagree with petitioner's theory that SPC's right of first refusal should be declared void as it was not supported by a separate consideration. As we held in *Polytechnic University of the Philippines v. Golden Horizon Realty Corporation*[32]:

> Indeed, basic is the rule that a party to a contract cannot unilaterally withdraw a right of first refusal that stands upon valuable consideration. We have categorically ruled that **it is not correct to say that there is no consideration for the grant of the right of first refusal if such grant is embodied in the same contract of lease. Since the stipulation forms part of the entire lease contract, the consideration for the lease includes the consideration for the grant of the right of first refusal.** In entering into the contract, the lessee is in effect stating that it consents to lease the premises and to pay the price agreed upon provided the lessor also consents that, should it sell the leased property, then, the lessee shall be given the right to match the offered purchase price and to buy the property at that price.[33] (Emphasis supplied)

Stipulations on right of first refusal over the leased premises have been held to be valid as they are commonly inserted in contracts of lease for

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29 *Polytechnic University of the Philippines v. Court of Appeals*, 420 Phil. 781, 796-797 (2001).

30 485 Phil. 612 (2004).

31 Id. at 640-641, citing *Litonjua v. L & R Corporation*, 385 Phil. 538, 550 (2000); *Carceller v. Court of Appeals*, 362 Phil. 332, 338-339 (1999); *Equatorial Realty Development, Inc. v. Mayfair Theater, Inc.*, 332 Phil. 525, 555 (1996); and *Ang Yu Asuncion v. Court of Appeals*, G.R. No. 109125, December 2, 1994, 238 SCRA 602, 615.

32 629 Phil. 462 (2010).

33 Id. at 481-482, citing *Polytechnic University of the Philippines v. Court of Appeals*, supra note 29, at 791 and *Lucrative Realty and Development Corporation v. Bernabe, Jr.*, 441 Phil. 207, 214 (2002).

the benefit of lessees who wanted to be assured that they shall be given the first crack or the first option to buy the property at the price which the owner is willing to accept. Where such right of first refusal is incorporated in lease contracts involving public assets, however, courts go beyond ascertaining and giving effect to the intent of the contracting parties. For 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.[34]

In the award of government contracts, the law requires a competitive public bidding, which aims to protect the public interest by giving the public the best possible advantages thru open competition. It is a mechanism that enables the government agency to avoid or preclude anomalies in the execution of public contracts.[35]

In *JG Summit Holdings, Inc. v. Court of Appeals*,[36] this Court was presented with the issue of validity of right of first refusal granted to both parties under a joint venture agreement between a government corporation (National Investment and Development Corporation) and private firm (Kawasaki Heavy Industries, Ltd. of Kobe, Japan) should either of them decide to sell, assign or transfer its interest in the joint venture. In the subsequent negotiations for the sale of the government's interest, it was agreed that Kawasaki's right of first refusal be exchanged for the right to top by five percent (5%) the highest bid for the subject shares. We initially granted the petition for review on certiorari and reversed the Court of Appeals' dismissal of the petition for mandamus questioning the aforesaid right to top which was held illegal not only because it violates the rules on competitive bidding but more so because it allows foreign corporations to own more than 40% equity in the shipyard.

On motions for reconsideration filed by the parties, we ruled that the right to top granted to and exercised by Kawasaki did not violate the rules on competitive bidding, *viz*:

> We also hold that the right to top granted to KAWASAKI and exercised by private respondent did not violate the rules of competitive bidding.
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> The word "bidding" in its comprehensive sense means making an offer or an invitation to prospective contractors whereby the government manifests its intention to make proposals for the purpose of supplies, materials and equipment for official business or public use, or for public works or repair. **The three principles of public bidding are: (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.** x x x

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34 *Capalla v. Commission on Elections*, G.R. Nos. 201112, 201121, 201127 & 201413, June 13, 2012, 673 SCRA 1, 52.

35 *Alvarez v. People*, 668 Phil. 216, 247 (2011), citing *Garcia v. Burgos*, 353 Phil. 740, 767-768 (1998).

36 Supra note 18.

x x x x

In the instant case, the sale of the Government shares in PHILSECO was publicly known. All interested bidders were welcomed. The basis for comparing the bids were laid down. All bids were accepted sealed and were opened and read in the presence of the COA's official representative and before all interested bidders. The only question that remains is whether or not the existence of KAWASAKI's right to top destroys the essence of competitive bidding so as to say that the bidders did not have an opportunity for competition. We hold that it does not.

The essence of competition in public bidding is that the bidders are placed on equal footing. This means that all qualified bidders have an equal chance of winning the auction through their bids. In the case at bar, all of the bidders were exposed to the same risk and were subjected to the same condition, *i.e.*, the existence of KAWASAKI's right to top. Under the ASBR, the Government expressly reserved the right to reject any or all bids, and manifested its intention not to accept the highest bid should KAWASAKI decide to exercise its right to top under the ABSR. This reservation or qualification was made known to the bidders in a pre-bidding conference held on September 28, 1993. They all expressly accepted this condition in writing without any qualification. Furthermore, when the Committee on Privatization notified petitioner of the approval of the sale of the National Government shares of stock in PHILSECO, it specifically stated that such approval was subject to the right of KAWASAKI Heavy Industries, Inc./Philyards Holdings, Inc. to top JGSMI's bid by 5% as specified in the bidding rules. Clearly, the approval of the sale was a conditional one. Since Philyards eventually exercised its right to top petitioner's bid by 5%, the sale was not consummated. **Parenthetically, it cannot be argued that the existence of the right to top "set for naught the entire public bidding."** Had Philyards Holdings, Inc. failed or refused to exercise its right to top, the sale between the petitioner and the National Government would have been consummated. In like manner, the existence of the right to top cannot be likened to a second bidding, which is countenanced, except when there is failure to bid as when there is only one bidder or none at all**.** A prohibited second bidding presupposes that based on the terms and conditions of the sale, there is already a highest bidder with the right to demand that the seller accept its bid. In the instant case, **the highest bidder was well aware that the acceptance of its bid was conditioned upon the non-exercise of the right to top.**

To be sure, respondents did not circumvent the requirements for bidding by granting KAWASAKI, a non-bidder, the right to top the highest bidder. The fact that KAWASAKI's nominee to exercise the right to top has among its stockholders some losing bidders cannot also be deemed "unfair."

It must be emphasized that **none of the parties questions the existence of KAWASAKI's right of first refusal, which is concededly the basis for the grant of the right to top**. Under KAWASAKI's right of first refusal, the National Government is under the obligation to give preferential right to KAWASAKI in the event it decides to sell its shares in PHILSECO. It has to offer to KAWASAKI the shares and give it the option to buy or refuse **under the same terms** for which it is willing to sell the said shares to third parties. KAWASAKI is not a mere non-bidder. It is a partner in the joint venture; the incidents of which are

governed by the law on contracts and on partnership.

> It is true that properties of the National Government, as a rule, may be sold only after a public bidding is held. Public bidding is the accepted method in arriving at a fair and reasonable price and ensures that overpricing, favoritism and other anomalous practices are eliminated or minimized. **But the requirement for public bidding does not negate the exercise of the right of first refusal. In fact, public bidding is an essential first step in the exercise of the right of first refusal because it is only after the public bidding that the terms upon which the Government may be said to be willing to sell its shares to third parties may be known. It is only after the public bidding that the Government will have a basis with which to offer KAWASAKI the option to buy or forego the shares.**[37] (Emphasis supplied)

The above-cited case involved a right of first refusal in favor of a contracting party which did not participate in the bidding conducted for the sale of the subject shares. In *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*,[38] the right of first refusal was held invalid for being contrary to public policy, as it dispensed with public bidding for future sale of waste products by the NPC. Respondent therein had earlier won the public bidding for the purchase of the fly ash generated by NPC's power plant in Batangas. Subsequently, after negotiations, NPC entered into a long-term contract with respondent for the purchase of fly ash to be produced by NPC's *future* coal-fired plants. The provision granting the right of first refusal to respondent reads:

> 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.[39]

We held that the grant of first refusal to respondent constitutes an unauthorized provision in the contract that was entered into pursuant to the bidding, having been contractually bargained for by respondent after it won the public bidding for the purchase of fly ash from NPC's Batangas Power Plant. We noted that not only did the provision substantially amended the terms of the contract bidded upon -- so that resultantly, the other bidders were deprived of the terms and opportunities granted to respondent after it won the public auction -- it so altered the bid terms by effectively barring any and a true biddings in the future. The right of first refusal being contrary to public policy that government contracts must be awarded through public bidding, it was therefore invalid and have no binding effect nor does it confer a preferential right upon respondent to the fly ash of NPC's power plants.

Relevantly, we also held that the grant of right of first refusal to

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37 Id. at 614-617.
38 Supra note 17.
39 Id. at 742.

respondent has no basis whatsoever considering that the bidding subject was still inexistent. Thus:

> *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, as amended by P.D. No. 2016, 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. The same right is accorded by Republic Act No. 7279 (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*, *Parañaque Kings Enterprises, Inc. v. Court of Appeals*, and *Conculada v. Court of Appeals*, 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* and *Polytechnic University of the Philippines v. Golden Horizon Realty Corporation*, 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*, 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, it nevertheless did not sustain such right on the ground that the same was not seasonably exercised.
>
> Finally, in *Litonjua v. L & R Corporation*, 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*, 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.**[40] (Emphasis and underscoring supplied; citations omitted)

In this case, all potential bidders were aware of the existence of SPC's right to top as duly disclosed in the Bidding Procedures for the 3rd Round of Bidding for the NPPC.[41] TPVI did not question the said right to top and participated in the bidding where SPC was also a bidder. Emerging as the winning bidder, TPVI nevertheless knew that the acceptance of its bid was subject to SPC's exercise of the right to top by confirming its exercise of the right of first refusal and paying the amount of the winning bid plus five percent (5%).

Notwithstanding compliance with the conduct of bidding and procedures, we hold that SPC's right to top under the LBGT-LLA is void for lack of a valid interest or right to the object over which the right of first refusal is to be exercised. First, the property subject of the right of first refusal is outside the leased premises covered by the LBGT-LLA. Second, the right of first refusal refers not only to land but to *any* property within the vicinity of the leased premises, as in this case, an entire power plant complex (NPPC) and the land on which it is built. And third, while SPC cited concerns regarding security, right of way or other operational requirements, these are clearly not analogous to a lessee's legitimate interest on the property being leased. Indeed, acquisition of a three coal-fired thermal plants with far greater generating capacity than the gas turbine plant currently owned by SPC will not be merely for purposes of the latter's reasonable access, security or present operational needs. Besides, no such right or interest may be invoked by SPC because, as confirmed by PSALM itself, SPC never operated the Naga LBGT.

More recently, in *LTFRB v. Stronghold Insurance Company*,[42] we declared as void the *right to match* clause in a memorandum of agreement which was being invoked by respondent after it failed to meet capitalization requirements and was consequently excluded by the petitioner from the pool of qualified bidders for the third round of bidding to accredit providers of accident insurance to operators of passenger public utility vehicles. The CA granted respondent's petition for prohibition and nullified the said bidding proceedings. On appeal, we reversed the CA and found no grave abuse of discretion committed by the LTFRB, *viz*:

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40 Id. at 755-758.
41 *Rollo* (Vol. II), pp. 847-848.
42 Supra note 19.

The Matching Clause in the First MOA, which Stronghold invokes as basis for its right to participate in the third round of bidding, provides:

> [T]he two management groups herein shall be given the right to match the best bid/proposal in event another management group qualifies at the end of the term of this agreement[.]

The Court of Appeals sustained Stronghold's claim, effectively reading the Matching Clause to vest in Stronghold not only "the right to match the best bid/proposal in event another management group qualifies at the end of the term of this agreement," but also the prerogative not to comply with the terms of the succeeding bidding. We find it unnecessary to pass upon the correctness of the Court of Appeals' construction of the Matching Clause. It is, in the first place, void.

The Matching Clause contains what is referred to in contract law as the right of first refusal or the "right to match." Such stipulations grant to a party the right to offer the **same** amount as the highest bid to beat the highest bidder. "Right to match" stipulations are different from agreements granting to a party the so-called "right to top." Under the latter arrangement, a party is accorded the right to offer a **higher** amount, usually a fixed sum or percentage, to beat the highest bid.

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." The inclusion of a right of first refusal in a government contract executed post-bidding, as here, negates the essence of public bidding because the stipulation "gives the winning bidder an x x x advantage over the other bidders who participated in the bidding x x x." Moreover**, a "right of first refusal", " or "right to top," whether granted to a bidder or non-bidder, discourages other parties from submitting bids, narrowing the number of possible bidders and thus preventing the government from securing the best bid.**

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-à-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.** Thus, we upheld the validity of a "right to top" clause allowing a private stockholder in a corporation to top by 5% the highest bid for the shares disposed by the government in that corporation. Under the joint venture agreement creating the corporation, a party had the right of first refusal in case the other party disposed its shares. The government, the disposing party in the joint venture agreement, benefitted from the 5% increase in price under the "right to top," on outcome better than the right of first refusal.

The Matching Clause in this case does not fall under this narrow exception. The First MOA (and for that matter the Second MOA)

> was a contract for the procurement of *services*; hence, there is no "object" over which Stronghold can claim an interest which the Matching Clause protects. Nor did the government benefit from the inclusion of the Matching Clause in the First MOA. The Matching Clause was added in the First MOA "in consideration, x x x of the initial investment and the assumption of initial risk" of the two accredited management groups. These "initial investment" and "initial risk," however, are inherent in the business of providing accident insurance to public utility vehicle operators, which the bidders for the First MOA, including Stronghold's group UNITRANS, logically took into account when they submitted their bids to LTFRB. The government was under no obligation to reward the accredited insurers' investment and risk-taking with a right of first refusal stipulation at the expense of denying the public the benefits public bidding brings, and did bring, to select the insurance providers in the Second MOA.[43] (Emphasis supplied)

In the 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.

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 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.

MARTIN S. VILLARAMA, JR.
Associate Justice

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[43] Id. at 687-691.

WE CONCUR:

(Please see Concurring Opinion)
PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

DIOSDADO M. PERALTA
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

FRANCIS H. JARDELEZA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson, Third Division

CERTIFICATION

Pursuant to Section 13, Article VIII of the 1987 Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice