

THIRD DIVISION

[G.R. No. 203655, August 13, 2014]

SM LAND, INC., PETITIONER, VS. BASES CONVERSION AND DEVELOPMENT AUTHORITY AND ARNEL PACIANO D. CASANOVA, ESQ., IN HIS OFFICIAL CAPACITY AS PRESIDENT AND CEO OF BCDA, RESPONDENTS.

DECISION

VELASCO JR., J.:

The Case

Before Us is a Petition for Certiorari, Prohibition and Mandamus under Rule 65 of the Rules of Court, with prayer for injunctive relief, seeking to nullify and set aside the Bases Conversion and Development Authority (BCDA) Supplemental Notice No. 5 as well as all other acts pursued in furtherance thereof, and to order respondents to immediately conduct and complete the Competitive Selection Process on petitioner's duly accepted unsolicited proposal.

The Facts

As culled from the records, the facts are simple and undisputed.

Pursuant to Republic Act No. (RA) 7227 or the "Bases Conversion and Development Act of 1992," the BCDA opened for disposition and development its Bonifacio South Property, a 33.1-hectare expanse located at Taguig City that was once used as the command center for the country's military forces. Jumping on the opportunity, petitioner SM Land, Inc. (SMLI), on December 14, 2009, submitted to the BCDA an unsolicited proposal for the development of the lot through a public-private joint venture agreement. The proposal guaranteed the BCDA secured payments amounting to PhP 15,985/sqm or a total of PhP 8.1 billion.

Barely three months later, the initial proposal was followed by a second one with guaranteed secured payments of PhP 31,139/sqm, totaling PhP 20 billion. On May 4, 2010, however, SMLI submitted its third unsolicited proposal with guaranteed secured payments amounting to PhP 32,501/sqm for a total of PhP 22.6 billion.

Thereafter, the BCDA created a Joint Venture Selection Committee (JV-SC) following the procedures prescribed under Annex "C" of the *Detailed Guidelines for Competitive Challenge Procedure for Public-Private Joint Ventures* (NEDA JV Guidelines) promulgated by the National Economic Development Authority (NEDA). The said committee recommended the acceptance of the unsolicited proposal, which recommendation was favorably acted upon by the BCDA.

Through a letter dated May 12, 2010, the BCDA communicated to petitioner its

acceptance of the unsolicited proposal. Despite its acceptance, however, the BCDA clarified that its act should not be construed to bind the agency to enter into a joint venture agreement with the petitioner but only constitutes an authorization granted to the JV-SC to conduct detailed negotiations with petitioner SMLI and iron out the terms and conditions of the agreement.

Pursuant to this authorization, the JV-SC and SMLI embarked on a series of detailed negotiations, and on July 23, 2010, SMLI submitted its final revised proposal with guaranteed secured payments amounting to a total of PhP 25.9 billion. Afterwards, upon arriving at mutually acceptable terms and conditions, a Certification of Successful Negotiations (Certification) was issued by the BCDA and signed by both parties on August 6, 2010. Through the said Certification, the BCDA undertook to **"subject SMLI's Original Proposal to Competitive Challenge pursuant to Annex C"** and committed itself to **"commence the activities for the solicitation for comparative proposals."**^[1]

In an attempt to comply with its obligations, the BCDA prepared for the conduct of a Competitive Challenge to determine whether or not there are other Private Sector Entities (PSEs) that can match the proposal of SMLI, and concurrently ensure that the joint venture contract will be awarded to the party that can offer the most advantageous terms in favor of the government. In furtherance thereof, the agency issued Terms of Reference (TOR),^[2] which mapped out the procedure to be followed in connection with the Competitive Challenge. Consequently, SMLI was required, as it did, to post a proposal security in the amount of PhP 187 million, following the prescribed procedure outlined in the TOR and the NEDA JV Guidelines.

Afterwards, the BCDA set the Pre-eligibility Conference on September 3, 2010. Invitations to apply for eligibility and to submit comparative proposals were then duly published on August 12, 16 and 20, 2010. Hence, the pre-eligibility conference was conducted as scheduled. The companies that participated in the conference included SMLI, as the Original Proponent, and three (3) PSEs, namely Ayala Land, Inc., Rockwell Land Corp., and Filinvest Land, Inc.

On Ayala Land, Inc.'s request, the deadline for submission of Eligibility Documents was scheduled on October 20, 2010 through Supplemental Notice No. 1. However, the deadline was again moved to November 19, 2010 to allow the BCDA, in conjunction with other national agencies, to resolve issues concerning the relocation and replication of facilities located in the subject property. For this purpose, the BCDA issued Supplemental Notice No. 2.

Following a conference, the BCDA, on November 18, 2010, issued Supplemental Notice No. 3, again rescheduling the submission deadline this time to an unspecified future date "pending final results of the policy review by the Office of the President on the lease versus joint venture/sale mode and other issues."^[3] Henceforth, the BCDA repeatedly postponed the deadline of eligibility requirements until two (2) years have already elapsed from the signing of the Certification without the Competitive Challenge being completed.

Then, instead of proceeding with the Competitive Challenge, the BCDA addressed a letter^[4] to Jose T. Gabionza, Vice President of SMLI, stating that it will welcome any "voluntary and unconditional proposal" to improve the original offer, with the

assurance that the BCDA will nonetheless respect any right which may have accrued in favor of SMLI. SMLI, through a letter dated December 22, 2011, replied by increasing the total secured payments to PhP 22.436 billion in over fifteen (15) years with an upfront payment of PhP 3 billion. SMLI likewise proposed to increase the net present value of the property to PhP 38,500.00/sqm. With this accelerated terms of payment, the total inflow to be received by the BCDA from the project after five (5) years would amount to PhP 9.289 billion. In the same letter, SMLI clarified that its improved offer is tendered on reliance of the BCDA's previous commitment to respect SMLI's status as the Original Proponent.

Without responding to SMLI's new proposal, the BCDA sent a memorandum to the Office of the President (OP) dated February 13, 2012, categorically recommending the termination of the Competitive Challenge. The memorandum, in part, reads:

In view of the foregoing, may we respectfully recommend the President's approval for BCDA to terminate the proceedings for the privatization and development of the BNS/PMC/ASCOM/SSU Properties in Bonifacio South through Competitive Challenge and proceed with the bidding of the property.^[5]

Alarmed by this development, SMLI, in a letter dated August 10, 2012, urged the BCDA to proceed with the Competitive Challenge as agreed upon. However, the BCDA, via the assailed Supplemental Notice No. 5, terminated the Competitive Challenge altogether. Said Supplemental Notice pertinently reads:

This Supplemental Notice No. 05 is issued to inform the [PSEs] that the Competitive Challenge for the Selection of BCDA's Private Sector Partner for the Privatization and Development of the approximately 33.1-hectare BNS/PMC/ASCOM/SSU Properties in Bonifacio South is hereby terminated. BCDA shall not dispose the property through Competitive Challenge.^[6]

To support its position, the BCDA invoked Article VIII of the TOR on the subject "Qualifications and Waivers," to wit:

The BCDA reserves the right to call off [the] 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.

Thereafter, the BCDA informed SMLI of the OP's decision to subject the development of the subject property to public bidding. When asked by SMLI, the JV-SC manifested its conformity with the actions thus taken by the BCDA and OP.

The JV-SC's declaration proved to be the last straw that fractured SMLI's patience as it lost no time in interposing the instant recourse.

In the meantime, the BCDA issued in favor of SMLI Philippine National Bank Check No. 11-634-610001-0 in the amount of PhP 188,508,466.67 dated September 28, 2012. The check was sent through registered mail with no explanation whatsoever accompanying the same, although the BCDA admitted that its value corresponds to the proposal security posted by SMLI, plus interest in an unspecified rate. SMLI attempted to return the check but to no avail.

The BCDA likewise caused the publication of an "Invitation to Bid" for the development of the subject property in the December 21, 2012 issue of the *Philippine Star*.^[7] This impelled SMLI to file an *Urgent Manifestation with Reiterative Motion to Resolve SMLI's Application for Temporary Restraining Order (TRO) and Preliminary Injunction* on the same day. By Resolution^[8] of January 9, 2013, the Court issued the TRO prayed for by petitioner and enjoined respondent BCDA from proceeding with the new selection process for the development of the property.

The Issue

Without a doubt, the issue in this case boils down to whether or not the BCDA gravely abused its discretion in issuing Supplemental Notice No. 5, in unilaterally aborting the Competitive Challenge, and in subjecting the development of the project to public bidding.

For its part, SMLI alleged in its petition that the Certification issued by the BCDA and signed by the parties constituted a contract and that under the said contract, BCDA cannot renege on its obligation to conduct and complete the Competitive Challenge. The BCDA, on the other hand, relies chiefly on the reservation clause in the TOR, which allegedly authorized the agency to unilaterally cancel the Competitive Challenge. Respondents add that the terms and conditions agreed upon are disadvantageous to the government, and that it cannot legally be barred by estoppel in correcting a mistake committed by its agents.

The Court's Ruling

The petition is impressed with merit. SMLI has the right to a completed competitive challenge pursuant to the NEDA JV Guidelines and the Certification issued by the BCDA. The reservation clause adverted to by the respondent cannot, in any way, prejudice said right.

The Procurement Process under the NEDA JV Guidelines

In resolving the case, discussing the procedure outlined under the NEDA JV Guidelines and a brief backgrounder thereof is apropos.

To streamline the procurement process and expedite the acquisition of goods and services, Executive Order No. (EO) 423 was issued on April 30, 2005, which prescribed the rules and procedures on the review and approval of government contracts. The EO, in part, provides:

Section 8. Joint Venture Agreements. The NEDA, in consultation with the GPPB, shall issue guidelines regarding joint venture agreements with private entities with the objective of promoting transparency,

competitiveness, and accountability in government transactions, and, where applicable, complying with the requirements of an open and competitive public bidding.

Taking its cue from the above-quoted provision, the NEDA promulgated the NEDA JV Guidelines, which detailed two (2) modes of selecting a private sector JV partner: by **competitive selection** or through **negotiated agreements**.

Competitive selection involves a selection process based on transparent criteria, which should not constrain or limit competition, and is open to participation by any interested and qualified private entity.^[9] Selection by negotiated agreements^[10] or negotiated projects,^[11] on the other hand, comes about as an end result of an unsolicited proposal^[12] from a private sector proponent, or if the government has failed to identify an eligible private sector partner for a desired activity after subjecting the same to a competitive selection.

Relevant to the case at bar is the selection modality by negotiated agreement arising from the submission and acceptance of an unsolicited proposal, known as the Swiss Challenge method,^[13] *in esse* a hybrid mechanism between the direct negotiation approach and the competitive bidding route.^[14] With the availability of the Swiss Challenge method for utilization by those in the private sector, PSEs have studied, formulated, and submitted numerous *suo moto* or unsolicited proposals with the ultimate goal of assisting the public sector in elevating the country's place in the global economy, as in the case herein.

The development and adoption by several countries of the Swiss Challenge scheme^[15] is attributed to the recognition that the private sector can be an important source of technical and managerial expertise, as well as financing, as evidenced by private companies' practice of directly approaching governments with new and innovative project ideas through unsolicited proposals.^[16] Some states, however, frown on the practice since transparency is allegedly compromised when the government directly negotiates with a proponent. In this method, the Original Proponent, who first submitted and secured acceptance of the unsolicited proposal, is given the right to match the successful bid received in the competitive bid process for the said project.^[17]

Item III, Annex "C" of the NEDA JV Guidelines, where the Swiss Challenge format is tucked in, maps out a three-stage framework, to which Negotiated JV Agreements are to be mandatorily subjected, as summarized below:

Stage One

Submission and the Acceptance or Rejection of the Unsolicited Proposal

Stage One^[18] of the process involves the submission, evaluation, and the acceptance of unsolicited proposals from private entities. The steps involved are:

1. A PSE submits an unsolicited proposal to the government entity (GE) or the GE seeks out a JV partner after a failed competition (open bidding) for a JV