

SPECIAL FIRST DIVISION

[G.R. NO. 124293, January 31, 2005]

J.G. SUMMIT HOLDINGS, INC., PETITIONER, VS. COURT OF APPEALS; COMMITTEE ON PRIVATIZATION, ITS CHAIRMAN AND MEMBERS; ASSET PRIVATIZATION TRUST; AND PHILYARDS HOLDINGS, INC., RESPONDENTS.

R E S O L U T I O N

PUNO, J.:

For resolution before this Court are two motions filed by the petitioner, J.G. Summit Holdings, Inc. for reconsideration of our Resolution dated September 24, 2003 and to elevate this case to the Court *En Banc*. The petitioner questions the Resolution which reversed our Decision of November 20, 2000, which in turn reversed and set aside a Decision of the Court of Appeals promulgated on July 18, 1995.

I. Facts

The undisputed facts of the case, as set forth in our Resolution of September 24, 2003, are as follows:

On January 27, 1997, the National Investment and Development Corporation (NIDC), a government corporation, entered into a Joint Venture Agreement (JVA) with Kawasaki Heavy Industries, Ltd. of Kobe, Japan (KAWASAKI) for the construction, operation and management of the Subic National Shipyard, Inc. (SNS) which subsequently became the Philippine Shipyard and Engineering Corporation (PHILSECO). Under the JVA, the NIDC and KAWASAKI will contribute P330 million for the capitalization of PHILSECO in the proportion of 60%-40% respectively. One of its salient features is the grant to the parties of the **right of first refusal** should either of them decide to sell, assign or transfer its interest in the joint venture, *viz*:

1.4 Neither party shall sell, transfer or assign all or any part of its interest in SNS [PHILSECO] to any third party without giving the other under the same terms the right of first refusal. This provision shall not apply if the transferee is a corporation owned or controlled by the GOVERNMENT or by a KAWASAKI affiliate.

On November 25, 1986, NIDC transferred all its rights, title and interest in PHILSECO to the Philippine National Bank (PNB). Such interests were subsequently transferred to the National Government pursuant to Administrative Order No. 14. On December 8, 1986, President Corazon C. Aquino issued Proclamation No. 50 establishing the Committee on Privatization (COP) and the Asset Privatization Trust (APT) to take title to, and possession of, conserve, manage and dispose of non-performing

assets of the National Government. Thereafter, on February 27, 1987, a trust agreement was entered into between the National Government and the APT wherein the latter was named the trustee of the National Government's share in PHILSECO. In 1989, as a result of a quasi-reorganization of PHILSECO to settle its huge obligations to PNB, the National Government's shareholdings in PHILSECO increased to 97.41% thereby reducing KAWASAKI's shareholdings to 2.59%.

In the interest of the national economy and the government, the COP and the APT deemed it best to sell the National Government's share in PHILSECO to private entities. After a series of negotiations between the APT and KAWASAKI, they agreed that the latter's right of first refusal under the JVA be "exchanged" for the right to top by five percent (5%) the highest bid for the said shares. They further agreed that KAWASAKI would be entitled to name a company in which it was a stockholder, which could exercise the right to top. On September 7, 1990, KAWASAKI informed APT that Philyards Holdings, Inc. (PHI)^[1] would exercise its right to top.

At the pre-bidding conference held on September 18, 1993, interested bidders were given copies of the JVA between NIDC and KAWASAKI, and of the Asset Specific Bidding Rules (ASBR) drafted for the National Government's 87.6% equity share in PHILSECO. The provisions of the ASBR were explained to the interested bidders who were notified that the bidding would be held on December 2, 1993. A portion of the ASBR reads:

1.0 The subject of this Asset Privatization Trust (APT) sale through public bidding is the National Government's equity in PHILSECO consisting of 896,869,942 shares of stock (representing 87.67% of PHILSECO's outstanding capital stock), which will be sold as a whole block in accordance with the rules herein enumerated.

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2.0 The highest bid, as well as the buyer, shall be subject to the final approval of both the APT Board of Trustees and the Committee on Privatization (COP).

2.1 APT reserves the right in its sole discretion, to reject any or all bids.

3.0 This public bidding shall be on an Indicative Price Bidding basis. The Indicative price set for the National Government's 87.67% equity in PHILSECO is PESOS: ONE BILLION THREE HUNDRED MILLION (P1,300,000,000.00).

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6.0 The highest qualified bid will be submitted to the APT Board of Trustees at its regular meeting following the bidding, for the purpose of determining whether or not it should be endorsed by the

APT Board of Trustees to the COP, and the latter approves the same. The APT shall advise Kawasaki Heavy Industries, Inc. and/or its nominee, [PHILYARDS] Holdings, Inc., that the highest bid is acceptable to the National Government. Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. shall then have a period of thirty (30) calendar days from the date of receipt of such advice from APT within which to exercise their "Option to Top the Highest Bid" by offering a bid equivalent to the highest bid plus five (5%) percent thereof.

6.1 Should Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. exercise their "Option to Top the Highest Bid," they shall so notify the APT about such exercise of their option and deposit with APT the amount equivalent to ten percent (10%) of the highest bid plus five percent (5%) thereof within the thirty (30)-day period mentioned in paragraph 6.0 above. APT will then serve notice upon Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. declaring them as the preferred bidder and they shall have a period of ninety (90) days from the receipt of the APT's notice within which to pay the balance of their bid price.

6.2 Should Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. fail to exercise their "Option to Top the Highest Bid" within the thirty (30)-day period, APT will declare the highest bidder as the winning bidder.

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12.0 The bidder shall be solely responsible for examining with appropriate care these rules, the official bid forms, including any addenda or amendments thereto issued during the bidding period. The bidder shall likewise be responsible for informing itself with respect to any and all conditions concerning the PHILSECO Shares which may, in any manner, affect the bidder's proposal. Failure on the part of the bidder to so examine and inform itself shall be its sole risk and no relief for error or omission will be given by APT or COP. . . .

At the public bidding on the said date, petitioner J.G. Summit Holdings, Inc.^[2] submitted a bid of Two Billion and Thirty Million Pesos (P2,030,000,000.00) with an acknowledgment of KAWASAKI/[PHILYARDS'] right to top, viz:

4. I/We understand that the Committee on Privatization (COP) has up to thirty (30) days to act on APT's recommendation based on the result of this bidding. Should the COP approve the highest bid, APT shall advise Kawasaki Heavy Industries, Inc. and/or its nominee, [PHILYARDS] Holdings, Inc. that the highest bid is acceptable to the National Government. Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. shall then have a period of thirty (30) calendar days from the date of receipt of such advice from APT within

which to exercise their "Option to Top the Highest Bid" by offering a bid equivalent to the highest bid plus five (5%) percent thereof.

As petitioner was declared the highest bidder, the COP approved the sale on December 3, 1993 "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."

On December 29, 1993, petitioner informed APT that it was protesting the offer of PHI to top its bid on the grounds that: (a) the KAWASAKI/PHI consortium composed of KAWASAKI, [PHILYARDS], Mitsui, Keppel, SM Group, ICTSI and Insular Life violated the ASBR because the last four (4) companies were the losing bidders thereby circumventing the law and prejudicing the weak winning bidder; (b) only KAWASAKI could exercise the right to top; (c) giving the same option to top to PHI constituted unwarranted benefit to a third party; (d) no right of first refusal can be exercised in a public bidding or auction sale; and (e) the JG Summit consortium was not estopped from questioning the proceedings.

On February 2, 1994, petitioner was notified that PHI had fully paid the balance of the purchase price of the subject bidding. On February 7, 1994, the APT notified petitioner that PHI had exercised its option to top the highest bid and that the COP had approved the same on January 6, 1994. On February 24, 1994, the APT and PHI executed a Stock Purchase Agreement. Consequently, petitioner filed with this Court a Petition for Mandamus under G.R. No. 114057. On May 11, 1994, said petition was referred to the Court of Appeals. On July 18, 1995, the Court of Appeals denied the same for lack of merit. It ruled that the petition for mandamus was not the proper remedy to question the constitutionality or legality of the right of first refusal and the right to top that was exercised by KAWASAKI/PHI, and that the matter must be brought "by the proper party in the proper forum at the proper time and threshed out in a full blown trial." The Court of Appeals further ruled that the right of first refusal and the right to top are prima facie legal and that the petitioner, "by participating in the public bidding, with full knowledge of the right to top granted to KAWASAKI/[PHILYARDS] is...estopped from questioning the validity of the award given to [PHILYARDS] after the latter exercised the right to top and had paid in full the purchase price of the subject shares, pursuant to the ASBR." Petitioner filed a Motion for Reconsideration of said Decision which was denied on March 15, 1996. Petitioner thus filed a Petition for Certiorari with this Court alleging grave abuse of discretion on the part of the appellate court.

On November 20, 2000, this Court rendered x x x [a] Decision ruling among others that the Court of Appeals erred when it dismissed the petition on the sole ground of the impropriety of the special civil action of mandamus because the petition was also one of certiorari. It further ruled that a shipyard like PHILSECO is a public utility whose capitalization must be sixty percent (60%) Filipino-owned. Consequently, the right to top granted to KAWASAKI under the Asset Specific Bidding Rules (ASBR) drafted for the sale of the 87.67% equity of the National Government in

PHILSECO is 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. It also held that "although the petitioner had the opportunity to examine the ASBR before it participated in the bidding, it cannot be estopped from questioning the unconstitutional, illegal and inequitable provisions thereof." Thus, this Court voided the transfer of the national government's 87.67% share in PHILSECO to Philyard[s] Holdings, Inc., and upheld the right of JG Summit, as the highest bidder, to take title to the said shares, *viz*:

WHEREFORE, the instant petition for review on certiorari is GRANTED. The assailed Decision and Resolution of the Court of Appeals are REVERSED and SET ASIDE. Petitioner is ordered to pay to APT its bid price of Two Billion Thirty Million Pesos (P2,030,000,000.00), less its bid deposit plus interests upon the finality of this Decision. In turn, APT is ordered to:

- (a) accept the said amount of P2,030,000,000.00 less bid deposit and interests from petitioner;
- (b) execute a Stock Purchase Agreement with petitioner;
- (c) cause the issuance in favor of petitioner of the certificates of stocks representing 87.6% of PHILSECO's total capitalization;
- (d) return to private respondent PHGI the amount of Two Billion One Hundred Thirty-One Million Five Hundred Thousand Pesos (P2,131,500,000.00); and
- (e) cause the cancellation of the stock certificates issued to PHI.

SO ORDERED.

In separate Motions for Reconsideration, respondents submit[ted] three basic issues for x x x resolution: (1) Whether PHILSECO is a public utility; (2) Whether under the 1977 JVA, KAWASAKI can exercise its right of first refusal only up to 40% of the total capitalization of PHILSECO; and (3) Whether the right to top granted to KAWASAKI violates the principles of competitive bidding.^[3] (*citations omitted*)

In a Resolution dated September 24, 2003, this Court ruled in favor of the respondents. On the first issue, we held that Philippine Shipyard and Engineering Corporation (PHILSECO) is not a public utility, as by nature, a shipyard is not a public utility^[4] and that no law declares a shipyard to be a public utility.^[5] On the second issue, we found nothing in the 1977 Joint Venture Agreement (JVA) which prevents Kawasaki Heavy Industries, Ltd. of Kobe, Japan (KAWASAKI) from acquiring more than 40% of PHILSECO's total capitalization.^[6] On the final issue, we held that the right to top granted to KAWASAKI in exchange for its right of first refusal did not violate the principles of competitive bidding.^[7]