



Republic of the Philippines
Supreme Court
 Manila

SUPREME COURT OF THE PHILIPPINES
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THIRD DIVISION

**HARBOUR CENTRE PORT G.R. No. 211122
 TERMINAL, INC.,**

Present:

Petitioner,

- versus -

**HON. ARMAND C. ARREZA,
 ADMINISTRATOR OF SBMA
 AND/OR THE BOARD OF
 DIRECTORS OF SUBIC BAY
 METROPOLITAN AUTHORITY,
 AND SUBIC SEAPORT TERMINAL
 INC.,**

**LEONEN, Chairperson,
 CARANDANG,
 ZALAMEDA,
 ROSARIO, and
 MARQUEZ, JJ.**

Promulgated:

Respondents. December 6, 2021
MisrDCBatt

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DECISION

ZALAMEDA, J.:

The ones duty-bound to ensure observance with laws and rules should not be the ones to depart therefrom.¹ The violation by the government of the rules it set for itself would stain the credibility of the investment environment. With the increasing role of private sector entities in development and economic growth, it behooves the Court to hold their public counterparts to account. Thus, when necessary, a writ of *mandamus* may issue to compel the performance of a government entity's legal duties.

¹ *SM Land, Inc. v. BCDA*, G.R. No. 203655, 13 August 2014 [Per J. Velasco, Jr.].

The Case

This Petition for Review on *Certiorari*² seeks to reverse and set aside the Decision³ dated 08 August 2013 and Resolution⁴ dated 14 January 2014 of the Court of Appeals (CA) in CA-G.R. SP No. 125330. The CA reversed the Decision⁵ dated 12 January 2012 of Branch 72, Regional Trial Court of Olongapo City (RTC) in Civil Case No. 108-0-2011, granting a writ of *mandamus* in favor of petitioner Harbour Centre Port Terminal, Inc. (petitioner) and directing respondent Hon. Armand C. Arreza (Arreza),⁶ and/or his successor as administrator of the Subic Bay Metropolitan Authority (SBMA), and respondent SBMA Board of Directors (SBMA Board) to issue a Notice of Award (NOA) and Notice to Proceed (NTP) to petitioner.

Antecedents

Petitioner is a bulk and break-bulk port operator in the Philippines.⁷ SBMA, on the other hand, is a government agency created under Republic Act (RA) No. 7227. It is tasked to operate, manage, administer, and develop all ports located in the Subic Special Economic and Freeport Zone (Zone).⁸

On 16 November 2009, SBMA received an unsolicited proposal from petitioner to enter into an unincorporated joint venture (JV) for the development, management, and operation of the Naval Supply Depot, Boton, Alava, Rivera, and Bravo Wharfs/Ports (joint venture areas).⁹ The proposed JV sought to consolidate break-bulk, bulk, and other essential port services to achieve efficiency and optimization of port resources.¹⁰ The unsolicited proposal was made pursuant to the 2008 Guidelines and Procedures for Entering into Joint Venture Agreements between Government and Private Entities (2008 JV Guidelines)¹¹ issued by the National Economic and Development Authority (NEDA).¹²

The SBMA Board of Directors (SBMA Board), on 20 November 2009, acting pursuant to the 2008 JV Guidelines, issued Resolution No. 09-

² *Rollo*, pp. 3-39.

³ *Id.* at 40-55; penned by CA Associate Justice Noel G. Tijam (now a retired Member of this Court) and concurred in by Associate Justices Romeo F. Barza and Ramon A. Cruz.

⁴ *Id.* at 57-60.

⁵ *Id.* at 61-77; penned by Presiding Judge Richard A. Paradeza.

⁶ *Id.* at 61; at the time the petition for *mandamus* was filed before the RTC, respondent Arreza was the Administrator and Chief Executive Officer of SBMA.

⁷ *Id.* at 4.

⁸ See Republic Act No. 7227, Sec. 13 (b).

⁹ *Rollo*, pp. 765-799.

¹⁰ *Id.* at 712.

¹¹ During the period material to this case, the 2008 version of the JV Guidelines was in effect. The 2008 JV Guidelines had since been superseded by the Revised Guidelines and Procedures for Entering Into Joint Venture (JV) Agreements Between Government and Private Entities approved on 03 May 2013 and published on 11 May 2013.

¹² *Rollo*, pp. 712 and 825.

11-3400,¹³ accepting in principle petitioner's unsolicited proposal. Simultaneously, the SBMA Board constituted the SBMA Joint Venture Selection Panel (SBMA-JVSP) to pursue negotiations with petitioner.¹⁴

Petitioner and SBMA-JVSP commenced further negotiations on the terms and conditions, as well as the legal, technical, and financial aspects of the proposal.¹⁵ The parties conducted a series of in-depth negotiations on six (6) different dates.¹⁶ The results of the negotiations were then embodied in the Terms of Reference that were to be used for the solicitation of comparative proposals.¹⁷

SBMA also evaluated and determined the eligibility of petitioner in accordance with the 2008 JV Guidelines.¹⁸ SBMA found petitioner eligible to undertake the project.¹⁹

Meanwhile, a similar unsolicited proposal was jointly submitted by Amerasia International Services, Inc. (Amerasia) and Mega Subic Terminal Services, Inc. (MSTSI).²⁰ However, the proposal was returned for being insufficient in form and substance, with the option of resubmitting a revised proposal.²¹ Instead of submitting a new proposal, Amerasia and MSTSI withdrew altogether their intention to submit any proposal.²²

On 05 February 2010, the SBMA-JVSP presented to the SBMA Board the results of the negotiations with petitioner. Through Resolution No. 10-02-3514, the SBMA Board accepted the terms and conditions negotiated by petitioner and SBMA-JVSP, and authorized the SBMA-JVSP to conduct the competitive challenge required by the 2008 JV Guidelines.²³

To formalize the negotiated terms and conditions, petitioner and SBMA executed the Joint Venture Agreement for the Development, Operation, and Management of the Naval Supply Depot, Boton, Alava, Rivera and Bravo Wharfs/Ports (JVA).²⁴ The JVA was to be used as basis for, and subjected to the results of, the competitive challenge required under the 2008 JV Guidelines.²⁵

¹³ *Id.* at 699.

¹⁴ *Id.*

¹⁵ *Id.* at 62.

¹⁶ *Id.*

¹⁷ *Id.* at 43.

¹⁸ *Id.* at 62.

¹⁹ *Id.*

²⁰ *Id.* at 43 and 63.

²¹ *Id.* at 43.

²² *Id.*

²³ *Id.* at 43-44.

²⁴ *Id.* at 710-864.

²⁵ *Id.* at 63 and 715.

Meanwhile, respondent Subic Seaport Terminal Inc. (SSTI), a locator at the Zone, filed a case against SBMA before the RTC of Dinalupihan, Bataan. The action, docketed as Civil Case No. DH-1231-10 (Bataan Case),²⁶ was for injunction, breach of contract, and damages. Subsequently, however, SSTI filed an amended and supplemental complaint for declaration of nullity of the JVA.²⁷ Petitioner was not impleaded in the case.

Simultaneously, SBMA and petitioner progressed with the preparations for the competitive challenge. Petitioner posted the bid security for the project.²⁸ SBMA published in the Philippine Daily Inquirer an invitation to pre-qualify and submit comparative proposals.²⁹ This was also posted at SBMA's website and at a public and conspicuous place in the Zone.³⁰

A prospective bidder, Asian Terminals, Inc., purchased bid documents.³¹ However, on the date of the pre-proposal conference, no competitive challenge was interposed by any party.³² Also, SBMA did not receive any comparative proposal during the scheduled opening of eligibility documents and proposals.³³ Accordingly, the SBMA-JVSP issued a Resolution dated 22 April 2010, recommending the award of the project to petitioner.³⁴

Acting on the recommendation, on 07 May 2010, the SBMA Board issued Resolution No. 10-05-3646 (Approval Resolution).³⁵ The SBMA Board adopted the recommendation of the SBMA-JVSP to award the project to petitioner, without prejudice to the action of the Commission on Elections (COMELEC) on SBMA's request for election ban exemption (since the contract period coincided with the election ban) and subject to the favorable opinion of the Office of the Government Corporate Counsel (OGCC). The requirement of an election ban exemption was rendered *functus officio* after the election period lapsed without any further action on the JVA.³⁶

Meanwhile, SBMA-JVSP noticed an error in the computation of the bid security earlier posted by petitioner. Hence, it advised petitioner to post an additional bid security in the corrected amount of PhP100 Million, to which petitioner immediately complied.³⁷

²⁶ See *id.* at 346-359.

²⁷ *Rollo*, p. 347.

²⁸ *Id.* at 63.

²⁹ *Id.* at 520.

³⁰ *Id.* at 8.

³¹ *Id.*

³² *Id.* at 9.

³³ *Id.*

³⁴ *Id.* at 63.

³⁵ *Id.* at 873.

³⁶ *Id.* at 64.

³⁷ *Id.*

On 12 July 2010, the SBMA, through Arreza, formally sought a legal opinion from the OGCC.³⁸ Pending receipt of the OGCC legal opinion, petitioner continuously renewed its bid security.³⁹

On 23 May 2011, NEDA informed SBMA that the JVA's compliance with the 2008 JV Guidelines "could not be ascertained" because: (1) there was no COMELEC exemption; (2) the JVA was executed as early as Stage Two of the process; (3) the bid security was inadequate; and (4) SBMA failed to submit the JVA to NEDA.⁴⁰

In its reply to NEDA's letter, SBMA countered that the COMELEC exemption requirement had been rendered inapplicable since the election period had lapsed for more than a year. No harm was done by the signing of the JVA during the Stage Two of the process, as the JVA itself provides that it was not a final and executory contract and was subject to the result of competitive challenge. The error on the value of the bid security was made in good faith and had already been corrected. SBMA also excused the non-submission of the JVA to NEDA, arguing that the same was not yet executory.⁴¹

On 22 June 2011, SBMA received the OGCC's favorable legal opinion.⁴² The OGCC stated that the signed JVA complied with the 2008 JV Guidelines and is consistent with JV principles.⁴³ Nonetheless, the OGCC recommended certain revisions "to ensure clarity and avoid confusion", in light of the issues raised by the NEDA and SSTI's counsel, among others.⁴⁴ These proposed amendments were accepted by SBMA and petitioner in writing.⁴⁵

However, on 05 July 2011, NEDA withdrew its endorsement of the project based on alleged violations of the 2008 JV Guidelines, i.e., the execution of the JVA as early as Stage Two of the process and a supposed material change in the project cost from approximately Php763.029 Million to around Php5.537 Billion after the competitive challenge.⁴⁶

SBMA requested for reconsideration. Nonetheless, the SBMA Board issued Resolution No. 11-08-4080, deferring action on the award of the project to petitioner pending NEDA's response.⁴⁷

³⁸ *Id.* at 10.

³⁹ *Id.* at 64.

⁴⁰ *Id.* at 502-503.

⁴¹ *Id.* at 65.

⁴² *See id.* at 504-516.

⁴³ *Id.* at 516.

⁴⁴ *Id.* at 514.

⁴⁵ *Id.* at 65.

⁴⁶ *Id.* at 305-306.

⁴⁷ *Id.* at 65-66.

Due to SBMA's failure and refusal to issue the NOA and NTP, petitioner filed a petition for *mandamus* with the RTC of Olongapo City.⁴⁸ In the course of the proceedings, SSTI intervened.⁴⁹ It averred that it has leasehold rights over the lots adjacent to Boton Wharf and was designated as the exclusive fertilizer cargo handler for bulk and bagged cargoes.⁵⁰

During the pendency of the RTC proceedings, NEDA denied SBMA's request for reconsideration and reiterated its withdrawal on 30 September 2011.⁵¹ On 17 October 2011, the OGCC recommended that the issuance of the NOA be suspended in light of NEDA's withdrawal of its endorsement and pending further study of the JVA.⁵²

Ruling of the RTC

In its Orders dated 01 September 2011 and 20 September 2011, the RTC issued a temporary restraining order and a writ of preliminary injunction, respectively. These enjoined Arreza, or his successor as administrator of the SBMA, and the SBMA Board from further leasing out or entering into any form of contract, agreement, or arrangement over the joint venture areas that will diminish those covered by the JVA.⁵³

After due proceedings, the RTC ruled in favor of petitioner and granted the petition for *mandamus*. The *fallo* of the Decision⁵⁴ dated 12 January 2012 reads:

WHEREFORE, viewed from the foregoing premises, this Court hereby grants the Writ of Mandamus mandating the respondents Armand C. Arreza, and/or his successor as Administrator of the Subic Bay Metropolitan Authority, and the Board of Directors of SBMA, to immediately issue the Notice of Award and Notice to Proceed to Harbour Centre Port Terminal, Inc. for the development, operation and management of the Naval Supply Depot, Boton, Alava, Rivera and Bravo Wharfs/Ports pursuant to the Joint Venture Agreement dated 24 February 2010.

The writ of preliminary injunction granted by this Court on September 20, 2011 is hereby made permanent.

SO ORDERED.⁵⁵

The RTC found that, under the 2008 JV Guidelines and the terms of

⁴⁸ *Id.* at 66.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 517.

⁵² *Id.* at 300-301.

⁵³ *Id.* at 66.

⁵⁴ *Id.* at 61-77; penned by Presiding Judge Richard A. Paradeza.

⁵⁵ *Id.* at 77.



the JVA, if no comparative proposal is received by SBMA, the JV activity shall be immediately awarded to the original proponent. Since there was no challenger to petitioner's proposal, it already acquired a vested right to the project.⁵⁶ At such point, the issuance of the NOA became ministerial on the part of the SBMA Board.⁵⁷

The RTC further held that the issuance of the Approval Resolution effectively granted petitioner a vested right.⁵⁸ With the issuance of the favorable OGCC Opinion, all the conditions mentioned in the Approval Resolution had been complied with.⁵⁹ NEDA's subsequent withdrawal of its endorsement had no effect whatsoever. This is because NEDA was merely a member of the SBMA-JVSP and, thus, was only entitled to one (1) out of six (6) votes.⁶⁰

On petitioner's alleged failure to exhaust administrative remedies, the RTC found that the grave and irreparable injury that petitioner stood to suffer warranted immediate resort to the courts.⁶¹ Moreover, there appeared to be no legitimate dispute on the factual antecedents leading to the award; thus, the case involved purely legal questions.⁶²

The RTC also rebuffed SSTI's claims, finding that the JVA has sufficient provisions aimed at protecting the rights of existing locators.⁶³ Thus, SSTI has no interest that needs protection. As to petitioner's claim for damages, the same was denied for lack of basis.⁶⁴

Ruling of the CA

On appeal, the CA reversed the RTC. It held that SBMA has no legal duty to issue the NOA and NTP.⁶⁵ This is because SBMA has the discretion to either approve or reject the recommendation to award.⁶⁶ *Mandamus* will not issue to control the performance of discretionary duties.⁶⁷

According to the CA, petitioner has no vested right to the issuance of the NOA and the NTP. Until petitioner undergoes the required Swiss Challenge process, petitioner has no right enforceable by *mandamus*.⁶⁸

⁵⁶ *Id.* at 70.

⁵⁷ *Id.* at 71.

⁵⁸ *Id.* at 70.

⁵⁹ *Id.* at 70-71.

⁶⁰ *Id.* at 73.

⁶¹ *Id.* at 72.

⁶² *Id.* at 73.

⁶³ *Id.* at 75.

⁶⁴ *Id.* at 76.

⁶⁵ *Id.* at 51.

⁶⁶ *Id.*

⁶⁷ *Id.* at 52.

⁶⁸ *Id.* at

The CA further cited the Approval Resolution, which it found to be conditional.⁶⁹ The CA held that the requirement of a favorable OGCC Opinion had not been complied with because the OGCC recommended the suspension of the issuance of the NOA in light of NEDA's withdrawal of its endorsement.⁷⁰ Moreover, while the OGCC previously issued a favorable opinion, it proposed amendments to the terms of the JVA.⁷¹

Lastly, the CA emphasized that, in the absence of a NOA or an NTP, the JVA remains to be a proposal.⁷² As such, the JVA cannot be a source of any legal right.⁷³

Petitioner moved for reconsideration, but the same was denied by the CA in its Resolution⁷⁴ dated 14 January 2014.

Issues

Before the Court, petitioner raises the main issue of whether SBMA may be compelled through a writ of *mandamus* to issue the NOA and NTP in favor of petitioner.

In addition, however, respondents raise other issues that seek to defeat petitioner's claimed entitlement to the writ: (1) whether petitioner failed to exhaust administrative remedies before filing its petition for *mandamus*;⁷⁵ and (2) whether the JVA is null and void for violating the Constitution, as was held in the Bataan Case.⁷⁶

We resolve the preliminary issues before delving into the substantive merits of the case.

Ruling of the Court

This case falls within the exceptions to the doctrine of exhaustion of administrative remedies

Under the doctrine of exhaustion of administrative remedies, before a party is allowed to seek the intervention of the court, it should have availed itself of all the means of administrative processes afforded it.⁷⁷ The

⁶⁹ *Id.* at 52-53.

⁷⁰ *Id.* at 53.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 57-60.

⁷⁵ *Id.* at 257.

⁷⁶ *Id.* at 483 and 1695.

⁷⁷ *Public Hearing Committee of the Laguna Lake Development Authority v. SM Prime Holdings, Inc.*, 645 Phil. 327, 22 September 2010 [Per J. Peralta].

premature invocation of the intervention of the court is fatal to one's cause of action.⁷⁸

Nonetheless, there are exceptions to the rule. Among these are when the question raised is purely legal, when there is urgent need for judicial intervention, and when to require exhaustion of administrative remedies would be unreasonable.⁷⁹

The RTC correctly ruled that this case falls within the exceptions. There is no legitimate dispute on the factual antecedents relating to the unsolicited proposal. The only issue is whether, based on the undisputed facts, petitioner is entitled to the issuance of the NOA and NTP. This is a purely legal question that rests only on what the law provides on the given set of circumstances.⁸⁰

There was also urgent necessity for judicial intervention. Petitioner incurred expensive premiums for the repeated renewal of its bid security due to the non-issuance of the NOA and NTP. At that point, petitioner had already devoted substantial time and resources in pursuit of its proposal. Moreover, it would be unreasonable to expect petitioner to still go through the motions with SBMA, when it was evident that the parties had already reached an impasse and no NOA or NTP was forthcoming.

Thus, under the circumstances, resort to a petition for *mandamus* is justified.

The constitutional issues raised may not be threshed out in this case

SSTI and SBMA raise constitutional issues allegedly besetting the JVA, particularly the undue delegation of legislative powers and franchise to petitioner and the monopoly that will result from the implementation of the JVA.⁸¹ They rely on the Decision⁸² dated 10 September 2012 rendered in the Bataan Case. Said Decision declared the JVA null and void for allegedly contravening the Constitution, RA No. 7227, and the 2008 JV Guidelines.⁸³ The Decision was declared final as no appeal or motion for reconsideration was interposed.⁸⁴

This Court is not in a position to rule on the alleged constitutional

⁷⁸ *Id.*

⁷⁹ *Roxas & Co., Inc. v. Court of Appeals*, 378 Phil. 727, 17 December 1999 [Per J. Puno]; *Philippine Health Insurance Corp. v. Urdaneta Sacred Heart Hospital*, G.R. No. 214485, 11 January 2021 [Per J. Hernandez].

⁸⁰ *Allied Banking Corp. v. Sia*, G.R. No. 195341, 28 August 2019 [Per J. J.C. Reyes, Jr.].

⁸¹ *Rollo*, pp. 495-496 and 1704-1707.

⁸² *Id.* at 346-359; penned by Presiding Judge Jose Ener S. Fernando.

⁸³ *Id.* at 359.

⁸⁴ *Id.* at 521.

infirmities. The Court observes a policy of constitutional avoidance. Hence, if the controversy can be settled on other grounds, We will stay Our hand from ruling on the constitutional issue.⁸⁵

Here, threshing out the constitutional questions presented is not essential to the disposition of the case. The petition may be resolved by applying the provisions of the 2008 JV Guidelines in relation to prevailing jurisprudence.

Besides, SSTI and SBMA failed to substantiate their arguments before the Court. They also failed to establish the requisites for judicial review, among which are the existence of an actual case and controversy and an absolute necessity for the determination of the constitutional issue.⁸⁶ The alleged constitutional defects are not supported by concrete facts, especially since the JVA has yet to be implemented. Any ruling on these issues would be premised on speculations and hypotheticals.

Moreover, SSTI and SBMA may not casually invoke the Decision in the Bataan Case. It is undisputed that SSTI did not implead petitioner in the case. As a contracting party to the JVA, petitioner was an indispensable party, without whom no final determination can be had of the action.⁸⁷

The joinder of all indispensable parties is a condition *sine qua non* for the exercise of judicial power.⁸⁸ The absence of an indispensable party renders all subsequent actions of the court null and void for want of authority to act, not only as to the absent parties but even as to those present.⁸⁹ Thus, the non-participation of an indispensable party precludes the judgment from attaining finality, and the decision may be ignored wherever and whenever it exhibits its head.⁹⁰

Since petitioner was not impleaded in the Bataan Case, the decision therein is null and void for want of authority. The pronouncement on the alleged nullity of the JVA has no effect whatsoever.

Petitioner is entitled to the issuance of a writ of mandamus. Under the

⁸⁵ See *Palencia v. People*, G.R. No. 219560, 01 July 2020 [Per J. Leonen].

⁸⁶ See *Garin v. City of Muntinlupa*, G.R. No. 216492, 20 January 2021 [Per J. Leonen].

⁸⁷ See *Land Bank of the Phils. v. Cacayuran*, 759 Phil. 145, 22 April 2015 [Per J. Perlas-Bernabe]; RULES OF COURT, Rule 3, Sec. 7: "SECTION 7. *Compulsory Joinder of Indispensable Parties*. — Parties in interest without whom no final determination can be had of an action shall be joined either as plaintiffs or defendants."

⁸⁸ *Technical Education and Skills Development Authority v. Abragar*, G.R. No. 201022, 17 March 2021 [Per J. Hernandez].

⁸⁹ *Id.*

⁹⁰ See *Spouses Crisologo v. JEW Agro-Industrial Corp.*, G.R. No. 196894, 03 March 2014 [Per J. Mendoza]; *Macawadib v. PNP Directorate for Personnel and Records Management*, 715 Phil. 484, 29 July 2013 [Per J. Peralta]; *Technical Education and Skills Development Authority v. Abragar*, G.R. No. 201022, 17 March 2021 [Per J. Hernandez].

2008 JV Guidelines, the award of the JV activity follows as a matter of course if no comparative proposal is received by the government entity

On the substantive merits of the case, We rule in favor of petitioner.

For a writ of *mandamus* to issue, there must be a concurrence between a clear legal right accruing to petitioner and a correlative duty incumbent upon respondents to perform an act, this duty being imposed upon them by law.⁹¹

The duty subject of *mandamus* must be ministerial rather than discretionary.⁹² A purely ministerial act or duty is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of his or her own judgment upon the propriety or impropriety of the act done.⁹³

In this case, all the requisites for the issuance of the NOA had already been complied with. The existence of these requisites gave rise to a clear legal right in favor of petitioner and a correlative ministerial duty upon SBMA.

For a clearer understanding of SBMA's discretion and duties in relation to negotiated JVs, a step-by-step overview of the 2008 JV Guidelines is in order.

The 2008 JV Guidelines, issued pursuant to EO No. 423,⁹⁴ was the controlling legal framework for JVs entered into by government entities. Specifically, it governed the process of selecting the JV partners of government entities.⁹⁵

The 2008 JV Guidelines was in effect during the period material to this case. It had since been superseded by the Revised Guidelines and Procedures for Entering Into Joint Venture (JV) Agreements Between Government and Private Entities that was approved on 03 May 2013 and published on 11 May 2013 (2013 JV Guidelines). Nonetheless, the 2008 JV Guidelines should be applied to this case because the JVA was executed

⁹¹ See *Lihaylihay v. Tan*, G.R. No. 192223, 23 July 2018 [Per J. Leonen].

⁹² *Pangilinan v. Cayetano*, G.R. Nos. 238875, 239483 & 240954, 16 March 2021 [Per J. Leonen].

⁹³ *Development Bank of the Philippines v. Ronquillo*, G.R. No. 204948, 07 September 2020 [Per J. Gaerlan].

⁹⁴ EXECUTIVE ORDER No. 423, Sec. 8 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."

⁹⁵ See 2008 JV Guidelines, Sec. 7.3.

prior to the effectivity of the 2013 JV Guidelines.⁹⁶ Moreover, the 2013 JV Guidelines may not impair vested rights that already accrued.⁹⁷

Going to the legal status and character of the 2008 JV Guidelines, its designation is actually a misnomer, as it is not a mere directive that the government may freely disregard whenever convenient. As laid down in *SM Land, Inc. v. BCDA (SM Land, Inc.)*,⁹⁸ a government entity may be compelled to comply with the provisions of the 2008 JV Guidelines.

In said case, the Court held that the 2008 JV Guidelines is an administrative issuance promulgated in compliance with Executive Order No. 423, series of 2005. As such, the 2008 JV Guidelines has the force and effect of law:

Deviation from the procedure outlined cannot be countenanced. Well-established is the rule that administrative issuances — such as the NEDA JV Guidelines, duly promulgated pursuant to the rule-making power granted by statute have the force and effect of law. Being an issuance in compliance with an executive edict, the NEDA JV Guidelines, therefore, has the same binding effect as if it were issued by the President himself. As such, no agency or instrumentality covered by the JV Guidelines can validly stray from the mandatory procedures set forth therein, even if the other party acquiesced therewith or not.

Under the 2008 JV Guidelines, a JV partner may be selected through competitive selection or negotiated agreement.⁹⁹ Negotiated agreements may be entered into when the government entity receives an unsolicited proposal,¹⁰⁰ defined as a project proposal submitted by the private sector without any formal solicitation issued by the government entity.¹⁰¹

In all cases where the government entity directly negotiates with a private sector participant for a proposed JV undertaking, the negotiated terms shall be subjected to a competitive challenge.¹⁰² A competitive challenge is an alternative selection process where third parties are invited to

⁹⁶ See 2013 JV Guidelines, Sec. 12:

12.0 Transitory Provision. The following shall be governed by the old Guidelines (2008 JV Guidelines): (a) All negotiated JVs wherein a JV contract/agreement between the winning private sector participant and the Government Entity concerned has been executed prior to effectivity of the Revised JV Guidelines; and, (b) All JVs undertaken through competitive selection wherein the bid/s' have already been opened prior to the effectivity of these Revised JV Guidelines.

For JVs not covered under items (a) and (b) above, these Revised JV Guidelines shall govern, provided that the Revised Guidelines shall not, in any manner, operate to impair vested rights already accruing to a party.

⁹⁷ *Id.*

⁹⁸ G.R. No. 203655, 13 August 2014 [Per J. Velasco, Jr.].

⁹⁹ 2008 JV Guidelines, Sec. 7.3.

¹⁰⁰ *Id.* at Sec. 7.3.

¹⁰¹ *Id.* at Sec. 5.10.

¹⁰² *Id.* at Annex C, Sec. II.

submit comparative proposals to an unsolicited proposal.¹⁰³

Thus, negotiated agreements are subjected to a three-stage process. Throughout said procedure, the government entity is vested with discretion, but the last stage also imposes legal duties. Below is a summary of the steps together with respective characterizations:

1. **Stage One** involves the submission of an unsolicited proposal to the government entity for a projected JV activity or undertaking.¹⁰⁴ The government entity, through its Joint Venture Selection Committee (JVSC), is tasked with the initial evaluation of the proposal.¹⁰⁵ Upon completion of the initial evaluation, the head of the government entity, upon recommendation of the JVSC, shall either issue an acceptance or non-acceptance of the proposal.¹⁰⁶ This is **discretionary**. Should the government entity accept the proposal, it is not bound to enter into the JV activity; the acceptance only signifies authorization to proceed with detailed negotiations on the terms and conditions of the JV activity.¹⁰⁷
2. **Stage Two** pertains to negotiations on the terms and conditions of the JV activity.¹⁰⁸ The JVSC shall also determine the eligibility of the private sector entity to enter into the JV activity.¹⁰⁹ In the course of negotiations, the government entity is free to accept or reject the proposed terms. This is **discretionary**. If negotiations are successful, the head of the government entity and the authorized representative of the private sector shall issue a signed certification that an agreement has been reached by the parties.¹¹⁰ Thereafter, the contract documents, including the selection document for the competitive challenge, are prepared.¹¹¹
3. **Stage Three** refers to the conduct of a competitive challenge. The government entity prepares the tender documents,¹¹² which include the draft contract reflecting the negotiated terms and conditions.¹¹³ The head of the government entity shall approve all tender documents including the draft contract before the publication of the invitation for comparative proposals.¹¹⁴

Within seven (7) calendar days from the issuance of the certification of a successful negotiation referred to in Stage Two above, the JVSC shall

¹⁰³ *Id.* at Sec. 5.8.

¹⁰⁴ *Id.* at Annex C, Sec. III.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 2008 JV Guidelines, Annex A, Sec. II.

¹¹⁴ *Id.* at Annex C, Sec. III.

publish the invitation for comparative proposals.¹¹⁵ The private sector entity shall post the proposal security at the date of the first day of the publication.¹¹⁶

Once the proposal undergoes a competitive challenge, the original proponent is accorded certain rights, viz:

If the Government Entity determines that an offer made by a comparative private sector participant other than the original proponent is superior or more advantageous to the government than the original proposal, **the private sector entity who submitted the original proposal shall be given the right to match** such superior or more advantageous offer within thirty (30) calendar days from receipt of notification from the Government Entity of the results of the competitive selection. Should no matching offer be received within the stated period, the JV activity shall be awarded to the comparative private sector participant submitting the most advantageous proposal. **If a matching offer is received within the prescribed period, the JV activity shall be awarded to the original proponent. If no comparative proposal is received by the Government Entity, the JV activity shall be immediately awarded to the original private sector proponent.**¹¹⁷

The use of the word “shall” in Stage Three underscores the mandatory character of the provision and disavows any notion of discretion.¹¹⁸ Thus, while the government entity has the discretion to accept or reject a proposal in the first two steps,¹¹⁹ the immediate award of the project becomes mandatory in Stage Three once certain conditions occur, i.e., the proposal underwent a competitive challenge and no comparative proposal was received by the government entity.

On a sound foundation rests the distinction between discretion and duty across the various stages. In the first two stages, the parties are still in the negotiations phase. Hence, either party is free to walk away from the bargaining table at any point. At these early stages, the government is afforded every opportunity to reject the proposal and its terms.

The success of the negotiations, therefore, signifies two things: (1) the

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Emphasis supplied.

¹¹⁸ See *In re: Yuhares Jan Barcelote Tinitigan*, 815 Phil. 664, 07 August 2017 [Per J. Carpio]; *SM Land, Inc. v. BCDA*, *supra* at note 98.

¹¹⁹ See *SM Land, Inc. v. BCDA*, *supra* at note 98:

A review of the outlined three-stage framework reveals that there are only two occasions where pre-termination of the Swiss Challenge process is allowed: at Stage One, prior to acceptance of the unsolicited proposal; and at Stage Two, should the detailed negotiations prove unsuccessful. In the Third Stage, the BCDA can no longer withdraw with impunity from conducting the Competitive Challenge as it became ministerial for the agency to commence and complete the same.

government entity is satisfied with the negotiated terms and the qualifications of the proponent; and (2) the government entity is committed to pursue the project. It would not have accepted the terms if it were otherwise. Moreover, at that point, the government entity already had a hand in shaping the terms of the contract. Presumably, it already incorporated into the final terms all matters it deems necessary and beneficial.

Hence, once the negotiations are successfully concluded and the parties reach an agreement in the latter part of Stage Two, the original proponent is accorded duties, rights, and preferential status. The only issue that remains is whether another private entity can offer a proposal that is superior or more advantageous to the government than the negotiated terms. At Stage Three, the original proponent is now required to post the proposal security, which involves a substantial amount.¹²⁰ Conversely, it assumes the status of a default winner, unless another private entity outranks it.

In *SM Land, Inc. v. BCDA*,¹²¹ the Court laid down the rights conferred on the original proponent once it reaches Stage Three:

A scrutiny of the NEDA JV Guidelines reveals that certain rights are conferred to an Original Proponent. As correctly pointed out by SMLI, these rights include:

1. The right to the conduct and completion of a competitive challenge;
2. The right to match the superior or more advantageous offer, if any;
3. The right to be awarded the JV activity in the event that a matching offer is submitted within the prescribed period; and
4. **The right to be immediately awarded the JV activity should there be no comparative proposals.**¹²²

In this case, petitioner had already undergone all three stages and complied with all the requisites for the immediate award of the JV activity. Petitioner submitted an unsolicited proposal, underwent negotiations, arrived at an agreement with SBMA, and completed the competitive challenge without contest.

Thus, the CA erred in ruling that petitioner has no right to the issuance of the NOA because the parties had yet to conduct a Swiss Challenge.¹²³ The competitive challenge under Annex C of the 2008 JV Guidelines is what was referred to as the Swiss Challenge, having been patterned after the Swiss

¹²⁰ 2008 JV Guidelines, Annex A, Sec. IV.

¹²¹ G.R. No. 203655, 13 August 2014 [Per J. Velasco, Jr.].

¹²² Emphasis supplied; emphasis in the original omitted.

¹²³ *Rollo*, p. 52.

Challenge method.¹²⁴

It is undisputed that petitioner and SBMA carried out the competitive challenge. SBMA published an invitation to submit comparative proposals. It also scheduled a pre-proposal conference and the opening of eligibility documents and proposals. No one submitted any proposal. Thus, the requirement of conducting a competitive challenge (or a Swiss Challenge) had already been complied with.

Moreover, contrary to respondents' contentions, the conditional character of the JVA *upon its execution* does not negate petitioner's entitlement to the issuance of the NOA *after the conduct of the competitive challenge*.¹²⁵ The conditions attached to the JVA are specified in its Whereas clauses, viz:

xxx

WHEREAS, in order to formalize the agreements reached between the parties pending the result of the challenge process under the JV Guidelines issued by the NEDA, the parties have agreed to execute this Agreement;

WHEREAS, pursuant to the JV Guidelines issued by the NEDA, the proposal of HCPTI will then be advertised for challenge by SBMA;

WHEREAS, if no bidder will challenge the proposal of HCPTI within the prescribed period, then this Agreement shall become the final contract of SBMA and HCPTI for the Development, Management and Operation of the Joint Venture Areas;

WHEREAS, if there will be qualified bidders who will challenge the offer of HCPTI, the bids (offers) will have to be reviewed by SBMA and if any offer/s is/are better than that of HCPTI, then HCPTI has the option to match the better or best offer;

WHEREAS, should HCPTI fail to match the best/better offer within thirty (30) working days from the endorsement thereof by SBMA to HCPTI, the development, management and operation of the Joint Venture Areas will be awarded to the bidder with the best/better offer and this Agreement shall be deemed to have not at all been executed by the parties or had taken effect;

WHEREAS, on the other hand, should HCPTI match the best/better offer, then this agreement will have to be revised accordingly to incorporate the necessary changes;

NOW, THEREFORE, HCPTI hereby submits this Agreement with

¹²⁴ See *SM Land, Inc. v. BCDA*, *supra* at note 98: Strictly speaking, however, the term Swiss Challenge is used for projects falling under Republic Act No. 6957, as amended (*See Revised Implementing Rules and Regulations of Republic Act No. 6957, Sec. 3.2.*)

¹²⁵ See *Rollo*, p. 484.

SBMA as its offer and proposal to develop, manage, and operate the Joint Venture Areas, and SBMA agrees to accept the same subject to challenge pursuant to the JV Guidelines issued by the NEDA.¹²⁶

To clarify, all contracts executed before Stage Three are indeed preliminary and not yet binding. As accurately stated in the JVA, Stage Two of the process results in the execution of a contract that formalizes the terms agreed upon by the parties. The 2008 JV Guidelines refer to this contract as a “draft contract.”¹²⁷ The draft contract is part of the selection or tender documents that will be given to prospective challengers.¹²⁸

Thus, the conditional nature of the JVA is consistent with, and is in fact required by, the provisions of the 2008 JV Guidelines. It does not alter the legal duty of SBMA to award the project upon completion of the competitive challenge. As recognized in the Whereas clause of the JVA, if no bidder challenges the proposal of petitioner, then the JVA shall become the final contract between the parties.

The suppletory application of rules on competitive selection should not contradict those specifically governing unsolicited proposals. The issuance of Resolution No. 10-05-3646 supports petitioner's entitlement to the issuance of a NOA

The CA cited Section VIII, Annex A of the 2008 JV Guidelines to support its conclusion that the acceptance or rejection of the proposal is discretionary.¹²⁹ SSTI further argues that, since there is a choice involved, the award of the project is discretionary and not compellable by *mandamus*.¹³⁰

We do not agree.

The cited provisions read:

VIII. Award and Approval of Contract

1. Recommendation to Award. Within seven (7) calendar days from the date the evaluation procedure adopted is completed, the JV-SC shall submit the recommendation of award to the Head of the Government Entity concerned. The JVSC shall include as part of its recommendation, a detailed evaluation/assessment report on its decision regarding the evaluation of the proposals, and explain in clear terms the basis of its recommendations.

¹²⁶ *Rollo*, p. 715.

¹²⁷ 2008 JV Guidelines, Annex A, Sec. II.

¹²⁸ *Id.* at Annex C, Sec. III.

¹²⁹ *Rollo*, p. 51.

¹³⁰ *Id.* at 485.



2. Decision to Award. **Within seven (7) calendar days from the submission by JV-SC of the recommendation to award, the Head of the Government Entity shall approve or reject the same. The approval shall be manifested by signing and issuing the "Notice of Award" to the winning private sector participant within seven (7) calendar days from approval thereof.**¹³¹

It bears stressing, however, that the above-quoted provisions are in Annex A of the 2008 JV Guidelines. Annex A governs the procedure for proposals that underwent competitive selection, and not unsolicited proposals subject of competitive challenge. The procedure for unsolicited proposals is set forth in Annex C of the 2008 JV Guidelines.

While the provisions in Annex A are suppletory to those in Annex C,¹³² the provisions carried over from Annex A should not contradict those expressly provided in Annex C, including the requirement of immediate award in the absence of a comparative proposal. Otherwise, there would be absurdity and confusion.

In the context of a competitive selection, the head of the government entity retains discretion until the very end of the selection process. This is because competitive selection is akin to ordinary procurement, where the government entity publishes an invitation to apply and blindly receives proposals.¹³³ Similar to the first two stages of the three-part framework for unsolicited proposals, the government entity may reject or approve any of the proposals. It may even reject all of them.¹³⁴ The government entity is free to reject because it had not previously seen, studied, or revised the proposals prior to the scheduled date of proposal opening.¹³⁵ The proposals were not, and would not be, negotiated.

In contrast, in the three-part framework for unsolicited proposals, the proposal that is put up for competitive challenge had already been thoroughly studied, negotiated, and approved by the government entity. To stress, the proposal would not have reached Stage Three if it was not acceptable to the government entity. Indeed, it would be unjust to allow the proponent to undergo the arduous process only to reject the approved proposal in the end, even in the absence of a comparative proposal. To do so would be plainly capricious and whimsical. Hence, the government entity should not retain the same degree of discretion for unsolicited proposals that already reached Stage Three.

In any event, the undisputed facts show that the SMBA Board, the

¹³¹ Emphasis and underscoring supplied.

¹³² 2008 JV Guidelines, Annex C, Sec. III.

¹³³ See *id.* at Annex A.

¹³⁴ 2008 JV Guidelines, Annex C, Sec. III.

¹³⁵ See 2008 JV Guidelines, Annex A, Sec. VII.



head of the government entity referred to in the 2008 JV Guidelines, already approved the SBMA-JSVP's recommendation to award the project. Hence, assuming further approval was in fact necessary, such approval had already been obtained.

The pertinent part of the Approval Resolution reads:

Resolution No. 10-05-3646

Resolve, as it is hereby resolved, upon the recommendation of Management, and without prejudice to COA regulations and pertinent laws on the matter, **the Board hereby approves the Resolution adopted by the Joint Venture Selection Panel (JVSP) on 22 April 2010 awarding the Joint Venture Agreement** for the Development, Operation and Management of the NSD Area, Boton, Alava, Rivera and Bravo Wharfs/Ports **in favor of Harbour Centre Port Terminal, Inc. (HCPTI)** without prejudice to whatsoever action the Commission on Elections (COMELEC) may take on the SBMA's request for the exemption from the ban in awarding contracts during the election period and subject to the favorable opinion of the Office of the Government Corporate Counsel (OGCC) on the legality and propriety of said Joint Venture Agreement.¹³⁶

That the approval was not reduced into a NOA does not diminish petitioner's right to its issuance, contrary to the CA's and respondents' position.¹³⁷ On the contrary, the Approval Resolution supports petitioner's right to have the NOA issued within seven (7) calendar days from approval, as mandated in the 2008 JV Guidelines.¹³⁸ The NOA is merely a manifestation of the approval by the SBMA Board.

SSTI further cites provisions and jurisprudence to the effect that government agencies possess the discretion to accept or reject a bid and award contracts.¹³⁹ However, the cited provisions and cases are inapplicable for they do not pertain to JVs governed by the JV Guidelines. They refer to projects bidded out under R.A. No. 9184, or the Government Procurement Reform Act, and its preceding laws. The rules on procurement are distinct and separate from those on JVs.

SSTI also relies on *Asia's Emerging Dragon Corp. v. Department of Transportation and Communications*¹⁴⁰ (*Asia's Emerging Dragon*), where the Court refused to issue a writ of *mandamus* to award a project to an original proponent. However, *Asia's Emerging Dragon* involved an unsolicited proposal made under Republic Act No. 6957 (BOT Law), not the JV

¹³⁶ Emphasis supplied.

¹³⁷ *Rollo*, pp. 486 and 1696.

¹³⁸ 2008 JV Guidelines, Annex A, Sec. VIII (2).

¹³⁹ *Rollo*, pp. 488-493, citing Republic Act No. 9184, Sec. 41; Implementing Rules and Regulations of RA No. 9184, Sec. 37.1.4; *First United Constructors Corp. v. Poro Point Management Corp.*, 596 Phil. 334, 19 January 2009 [Per J. Nachura]; *Bureau Veritas v. Office of the President*, 282 Phil. 734, 03 February 1992 [Per J. Melencio-Herrera].

¹⁴⁰ 575 Phil. 59, 18 April 2008 [Per J. Chico-Nazario].

Guidelines. As such, the proposal was subject to different rules and procedures.

Moreover, in that case, a more advantageous proposal was submitted during the Swiss Challenge. The original proponent failed to timely match it. Naturally, the original proponent lost its right to be awarded the project when it failed to submit an equally advantageous proposal. In contrast, no comparative proposal was submitted in this case. With such absence, petitioner already acquired a right to the award of the project.

The condition of a favorable OGCC opinion had been met. Even assuming otherwise, the NOA must still be issued in favor of petitioner

The CA cited the conditions imposed in the Approval Resolution as bases to conclude that petitioner has no vested right to the issuance of the NOA.¹⁴¹ In the Approval Resolution, the SBMA Board subjected the award of the project to two (2) conditions: a COMELEC exemption and a favorable OGCC opinion. According to the CA, since the OGCC's approval was not obtained, petitioner has no right enforceable by *mandamus*.¹⁴²

We do not agree.

It goes without saying that the requirement of a COMELEC exemption has been rendered *functus officio* upon the lapse of the election period. The only contentious issue is the obtainment of a favorable OGCC opinion.

Such condition had been complied with. The OGCC issued a favorable opinion affirming the legality of the JVA.¹⁴³ Contrary to the CA's conclusion, the OGCC's proposed changes did not affect the tenor of its opinion.¹⁴⁴ The suggested revisions were only made "to ensure clarity and avoid confusion;"¹⁴⁵ they did not materially affect the terms of the JVA. Besides, the proposed amendments had been formally adopted by SBMA and petitioner.¹⁴⁶

The OGCC's subsequent recommendation to suspend the issuance of the NOA does not erase the fact of prior compliance. The favorable OGCC opinion was not "revoked" or "amended", as posited by SSTI.¹⁴⁷ The OGCC merely deferred to the findings of the NEDA on the technical and financial

¹⁴¹ *Rollo*, pp. 52-53.

¹⁴² *Id.* at 53.

¹⁴³ *Id.* at 504-516.

¹⁴⁴ *Id.* at 53.

¹⁴⁵ *Id.* at 514.

¹⁴⁶ *Id.* at 65.

¹⁴⁷ *Id.* at 495.

aspects of the project, as was the usual practice.¹⁴⁸ The OGCC did not withdraw its findings on the legality of the JVA as reviewed.

Moreover, under the 2008 JV Guidelines, the favorable opinion of the OGCC is not a condition precedent to the issuance of the NOA; it is a condition precedent to the execution of the final JVA, which ordinarily follows *after* the issuance of the NOA.

For clarity, quoted below are the provisions of Annex A of the 2008 JV Guidelines that are suppletorily applicable to negotiated agreements. These enumerated in sequence the steps that should have been observed by the parties:

xxx

2. *Decision to Award.* xxx The approval shall be manifested by signing and issuing the "Notice of Award" to the winning private sector participant within seven (7) calendar days from approval thereof.¹⁴⁹
3. *Notice of Award.* **The "Notice of Award" to be issued by the Head of Government Entity concerned, shall contain among others, an instruction to the winning private sector participant to comply with conditions precedent for the execution of the JV Agreement** and to submit compliance statements with regard thereto, within fifteen (15) calendar days from receipt of the "Notice of Award".

Failure to comply with the conditions precedent for the execution of the contract within the prescribed fifteen (15)-calendar day period will result in confiscation of the proposal security. Within seven (7)-calendar days from receipt of the compliance statements from the winning private sector participant, the Head of the Government Entity shall determine the sufficiency of the same, and notify the winning private sector participant accordingly.

4. *Validity of Proposals/Return of Proposal Security.* The execution of the JV Agreement shall be made within the period of the validity of the proposal security. The required proposal security shall be valid for a reasonable period, but in no case beyond one hundred eighty (180) calendar days following the opening of the proposals. xxx

xxx

7. *Execution/Approval of the JV Agreement.* The authorized signatory(ies) of the winning private sector participant and the Government Entity concerned, shall execute and sign the JV Agreement, within seven (7) calendar days from receipt by the winning private sector participant of the notice [of award] referred to in VIII.3 above.

¹⁴⁸ *Id.* at 203-204.

¹⁴⁹ Emphasis and underscoring supplied.



Consistent with Article 1159 of the New Civil Code, said JV Agreement is considered the law between the parties, and the parties shall perform their respective prestations, obligations, and undertakings thereunder with utmost good faith, with a view to attaining the objective thereof. xxx

xxx

8. *Other Approvals for Contract.* The entity tasked under the JV Agreement shall, as may be required under existing laws, rules and regulations, secure any and all other approvals for the contract, or the implementation thereof, from government agencies or bodies including the Regulator, in the case of Public Utility Projects. This includes securing the necessary and appropriate environmental clearances from the DENR prior to actual project implementation. The DENR shall act on the environmental clearance of the JV activity within the time frame prescribed and following the guidelines of the DENR Administrative Order No. 96-37 and subsequent guidelines as may be issued from time to time. The Government Entity may provide the necessary assistance to its JV partner in securing all the required clearances. The contract shall provide milestones in securing such other approvals required for the implementation of the contract.

Prior to the execution of the JV Agreement, the OGCC, OSG or other entity prescribed by law/issuances as the statutory counsel of GOCCs, GCEs and GICPs, shall issue the corresponding Counsel's Opinion.¹⁵⁰

In summary, the conditions are not attached to the issuance of the NOA, but to the execution of the final JVA. Compliance with the conditions precedent shall be made *after* the issuance of the NOA. The absence of a favorable OGCC Opinion does not preclude the issuance of the NOA. Only the execution of the final JVA is deferred pending the issuance of the opinion.

In this regard, the Court notes that the parties adopted a different modality for the finalization of the JVA, albeit with the same legal effect. In the 2008 JV Guidelines, the parties will only prepare a draft contract prior to the competitive challenge. The draft contract shall only be signed after the issuance of the NOA and compliance with conditions precedent, including the submission of the OGCC opinion.

Here, the parties already signed the JVA, but made its effectivity subject to the outcome of the competitive challenge. In other words, the parties opted to impose a legal obstacle (i.e., suspensive condition) to defer the effectivity of the final JVA, as opposed to a physical hindrance (i.e., an unsigned contract).

¹⁵⁰ Emphasis supplied.



Nonetheless, the legal effect is the same — the JVA shall not be effective until after all the conditions had been complied with. Hence, while the provisions of the 2008 JV Guidelines were not strictly complied with, their spirit and intent were observed. The same conclusion was correctly reached by the OGCC when it reviewed the JVA and found no irregularity in the execution of a JVA subject to a suspensive condition.¹⁵¹

In sum, assuming that the conditions precedent had not been complied with, this non-compliance only defers the effectivity of the JVA, not the issuance of the NOA.

The 2008 JV Guidelines does not require a NEDA endorsement, much less approval

There is no legal basis for the suspension of the issuance of the NOA due to NEDA's withdrawal of its endorsement. The 2008 JV Guidelines does not require NEDA's endorsement or approval.

Among the many differences between JVs and other government contracts was the requirement for the endorsement or approval of NEDA. For instance, certain projects falling under the BOT Law require approval by the NEDA Board or its Investment Coordination Committee (ICC).¹⁵² In contrast, in the 2008 JV Guidelines, the participation of NEDA is very limited: (1) one out of six voting members of the JVSC shall be a representative of NEDA;¹⁵³ and (2) the signed copy of the JVA shall be submitted to NEDA.¹⁵⁴ The endorsement or approval of NEDA is not required.

The JVSC, of which a NEDA representative is a member, is in charge of the pre-selection and selection processes,¹⁵⁵ but it only submits the recommendation of award to the head of the government entity (in this case, the SBMA Board).¹⁵⁶ The authority to approve JVAs is vested on the SBMA Board,¹⁵⁷ not the JVSC, much less the NEDA representative therein. In fact, the 2008 JV Guidelines expressly provides that, aside from the approval of

¹⁵¹ *Rollo*, pp. 508-509:

If this suspensive condition of subjecting the signed agreement to a challenge does not materialize, then the parties will stand as though the conditional obligation never existed. Thus, while on its face the JVA appears to have been executed before it can be challenged competitively, the very terms of the signed JVA readily refutes this. Evidently therefore, the required transparent and competitive process found in the JV Guidelines has not been sacrificed.

¹⁵² See Republic Act No. 6957, as amended, Sec. 4; Revised Implementing Rules and Regulations of Republic Act No. 6957, Sec. 2.7:

¹⁵³ 2008 JV Guidelines, Annex A, Sec. I (1) (f).

¹⁵⁴ *Id.* at Annex A, Sec. VIII (7).

¹⁵⁵ *Id.* at Annex A, Sec. I (2).

¹⁵⁶ *Id.* at Annex C, Sec. III (5).

¹⁵⁷ *Id.* at Annex A, Sec. VIII (7).

the head of the government entity, no further approval is necessary.¹⁵⁸

Notably, the 2013 JV Guidelines now differentiates the approvals required, depending on the character and cost of the JV activity.¹⁵⁹ Certain projects require approval by the NEDA ICC, while others may be approved by the head of the government entity.¹⁶⁰ This distinction and the requirement for a NEDA approval are absent in the 2008 JV Guidelines.

NEDA itself appears to be aware of the limits of its authority. In its letter dated 18 January 2012 to then SBMA Chairman and Administrator Roberto V. Garcia,¹⁶¹ NEDA reiterated its refusal to reconsider the withdrawal of its endorsement. Nonetheless, it urged SBMA to “make its own assessment as to the propriety of the said JVA and to determine for itself whether it was entered into in strict compliance with the 2008 NEDA Joint Venture Guidelines.”¹⁶² The OGCC reiterated NEDA’s advice, stating that the presence or absence of a material deviation “is a matter that the SBMA Board can actually rule upon.”¹⁶³

Unfortunately, SBMA did not exercise this authority. Instead, it suspended the issuance of the NOA pending NEDA’s favorable endorsement. The OGCC also recommended such suspension, without citing any clear legal basis therefor.¹⁶⁴ In other words, SBMA, NEDA, and the OGCC passed the buck among themselves, leaving petitioner at their mercy.

The tentativeness displayed by all involved should not be tolerated, lest We drive away potential investors. Official actions must, at all times, be supported by clear legal bases. This is the primordial value that makes Us a government of laws, not of men.

Hence, SBMA and the OGCC may not make NEDA’s endorsement a condition for the issuance of the NOA when there is no legal authority to that effect. Between procedural guidelines promulgated by an agency pursuant to its rule-making power and a condition unilaterally designed and imposed, the former must prevail.¹⁶⁵

Moreover, the withdrawal of the NEDA endorsement occurred more than a year after the SBMA Board issued the Approval Resolution. Hence, the withdrawal should not affect the petitioner’s right that accrued long before said withdrawal. Otherwise, We would countenance unilateral withdrawal from contracts entered into by the government even without a

¹⁵⁸ *Id.* at Sec. X.

¹⁵⁹ 2013 JV Guidelines, Sec. 7.2.

¹⁶⁰ *Id.*

¹⁶¹ *Rollo*, p. 206.

¹⁶² *Id.* at

¹⁶³ *Id.* at 208.

¹⁶⁴ *Id.* at 300-301.

¹⁶⁵ *SM Land, Inc. v. BCDA*, *supra* at note 98.

clear legal basis.

The reasons for NEDA's withdrawal of endorsement are unmeritorious

Petitioner's entitlement to the writ is further highlighted by the fact that the reasons proffered by NEDA for the withdrawal of its endorsement are unmeritorious. Even the SBMA Board defended the JVA, stating that the NEDA "misconstrued and apparently did not fully understand the intricacies of the issues" it raised against the JVA.¹⁶⁶

As mentioned, the execution of a conditional JVA at Stage Two has the same legal effect as the preparation of a draft contract to be signed after the competitive challenge. The JVA expressly states that it is subject to the results of Stage Three, and may even be abandoned should SBMA receive a better proposal.¹⁶⁷ Thus, the intent of the 2008 JV Guidelines, i.e., to subject the terms of the proposal to a competitive challenge, had been achieved.

On the supposed "material change in the total contract cost," there is no evidence showing that the project cost was indeed changed from approximately Php763.029 Million to around Php5.537 Billion after the competitive challenge.¹⁶⁸ Records show that the project cost, revenue shares, and other material financial components of the JV were included in the tender documents, which were then used as basis for the competitive challenge.¹⁶⁹ The tender documents show that the estimated direct project cost was pegged at approximately Php5.524 Billion.¹⁷⁰ There is thus no basis to the claim that the project cost was initially fixed at Php763.029 Million.

As correctly emphasized by the petitioner, there was never any change in the total cost of the JV activity, and the proposal stood consistently at around Php5.5 Billion.¹⁷¹ What was changed was the basis for the computation of the bid security.

The SBMA-JVSP fixed the bid security based on the total fixed and guaranteed revenue share of SBMA for 25 years amounting to USD32 Million. This basis was later on changed to Php5.537 Billion representing the total investments under the proposal.¹⁷² SBMA proffered the same reasons when it defended the project against NEDA.¹⁷³

Notably, the 2008 JV Guidelines requires a NEDA representative to sit

¹⁶⁶ *Rollo*, p. 32.

¹⁶⁷ *Id.* at 715.

¹⁶⁸ *Id.* at 305-306.

¹⁶⁹ *Id.* at 710-864.

¹⁷⁰ *Id.* at 821

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 969.

as a voting member of the JVSP.¹⁷⁴ In this case, two (2) NEDA representatives were appointed as members of the SBMA-JVSP, the body that fixed the amount of the bid security.¹⁷⁵ Petitioner merely complied with the SBMA-JVSP's instructions.

In its Opinion dated 02 June 2011, the OGCC traced the origins of the change in bid security, which NEDA eventually interpreted as a material deviation in the project cost. The OGCC even remarked that the error in the computation of the bid security was attributable to SBMA:

Then of course there's the allegation that HCPTI failed to comply with the required proposal security. This Office notes that the initial proposal security that the proponent posted was based on the tender documents. SBMA admits that it has initially excluded the respective equity of SBMA and HCPTI from its computation of the cost of the JV activity. Upon a re-evaluation, however, SBMA decided to include the value of HCPTI's total investment commitment prompting it to revise the figures leading to the JVSP's demand from HCPTI for an increased proposal security. HCPTI has since complied with this demand. It would be unfair to dismiss the proposal and deny HCPTI the chance to make good with its representation for this JV just because it belatedly gave a P100 million security proposal upon an error that is not of its own making.¹⁷⁶

The confusion on the components of the project cost is understandable. The 2008 JV Guidelines does not define or provide the formula for the "cost of JV activity." This absence gave the government agency leeway in defining what will be included in the project cost and the basis for the bid security. In contrast, the phrase is now defined in the 2013 JV Guidelines as "the total amount of the contributions of the parties to the JV activity/project in present value with discount rate as prescribed by the appropriate Approving Authority."¹⁷⁷ The inclusion of such definition is an implied acknowledgment of the ambiguity of the 2008 JV Guidelines.

In sum, there is no law justifying the non-issuance of the NOA due to the withdrawal of the NEDA endorsement. Petitioner has complied with all the legal requisites for the issuance of the NOA. As such, a writ of *mandamus* may issue to compel SBMA to perform its legal duty.

There is no basis to withhold the issuance of the NTP

As regards the NTP, the 2008 JV Guidelines neither refers to, nor lays the requirements for, the issuance of an NTP.

¹⁷⁴ 2008 JV Guidelines, Annex A, Sec. 1 (1).

¹⁷⁵ *Rollo*, pp. 302 and 305.

¹⁷⁶ *Id.* at 511.

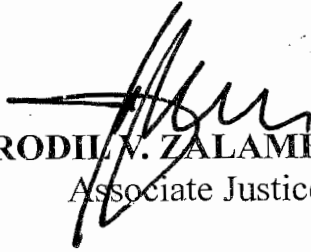
¹⁷⁷ 2013 JV Guidelines, Sec. 5.4.

Nonetheless, in their JVA, the parties stipulated for the issuance of an NTP. The issuance of the NTP shall commence the period within which petitioner and SBMA shall procure conditions precedent to the effectivity of the JVA,¹⁷⁸ such as the obtainment of the necessary permits, licenses, and authorizations.¹⁷⁹ The JVA's effectivity date is also reckoned thirty (30) days from petitioner's receipt of the NTP.¹⁸⁰

It appears that there is no legal or contractual obstacle to the issuance of the NTP. Hence, the same must also be issued to petitioner in preparation for the implementation of the JVA, and so that the parties may start complying with other conditions precedent stipulated therein.

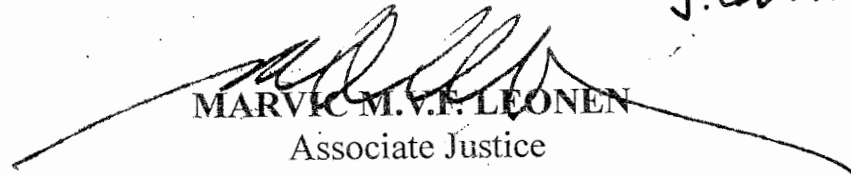
WHEREFORE, premises considered, the petition is hereby **GRANTED**. The Decision dated 08 August 2013 and Resolution dated 14 January 2014 of the Court of Appeals in CA-G.R. SP No. 125330 are **REVERSED** and **SET ASIDE**. The Decision dated 12 January 2012 of Branch 72, Regional Trial Court of Olongapo City in Civil Case No. 108-0-2011 is hereby **REINSTATED**.

SO ORDERED.


RODIL N. ZALAMEDA
 Associate Justice

WE CONCUR:

I join ~~the~~ dissenting opinion of J. Cuanduan


MARVIC M.V.F. LEONEN
 Associate Justice
 Chairperson

¹⁷⁸ JVA, Clause 7.2.1 (*Rollo*, p. 726).

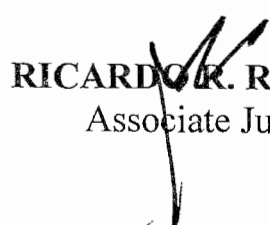
¹⁷⁹ *Id.* at Clause 7.1.1 (*Id.*).

¹⁸⁰ *Id.* at Clause 7.1.2 (*Id.*).

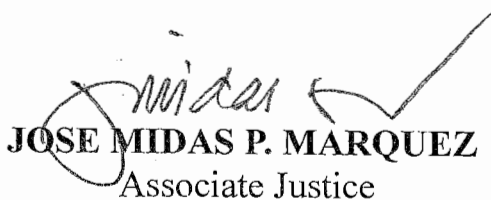
With dissenting opinion



ROSMARI D. CARANDANG
Associate Justice



RICARDO R. ROSARIO
Associate Justice



JOSE MIDAS P. MARQUEZ
Associate Justice

ATTESTATION

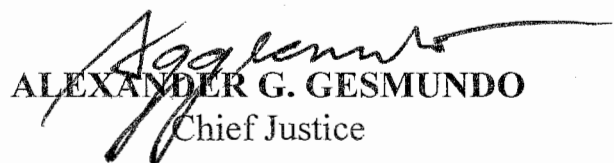
I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



MARVIC M.V.F. LEONEN
Associate Justice
Chairperson

CERTIFICATION

Pursuant to the Section 13, Article VIII of the Constitution, 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.



ALEXANDER G. GESMUNDO
Chief Justice