

THIRD DIVISION

**NATIONAL POWER
CORPORATION,**
Petitioner,

G.R. No. 176006

Present:

- v e r s u s -

CORONA, J., Chairperson,
VELASCO, JR.,
PERALTA,
BERSAMIN^{*} and
MENDOZA, JJ.

PINATUBO COMMERCIAL,
represented by ALFREDO
A. DY,

Respondent.

Promulgated:

March 26, 2010

X ----- X

D E C I S I O N**CORONA, J.:**

The National Power Corporation (NPC) ^[1] questions the decision dated June 30, 2006 rendered by the Regional Trial Court (RTC) of Mandaluyong City, Branch 213 declaring items 3 and 3.1 of NPC Circular No. 99-75 unconstitutional. The dispositive portion of the decision provides:

WHEREFORE then, in view of the foregoing, judgment is hereby rendered declaring item[s] 3 and 3.1 of NAPOCOR Circular No. 99-75, which [allow] only partnerships or corporations that

directly use aluminum as the raw material in producing finished products either purely or partly out of aluminum, to participate in the bidding for the disposal of ACSR wires as unconstitutional for being violative of substantial due process and the equal protection clause of the Constitution as well as for restraining competitive free trade and commerce.

The claim for attorney's fees is denied for lack of merit.

No costs.

[2]
SO ORDERED.

NPC also assails the RTC resolution dated November 20, 2006 denying its [3]
motion for reconsideration for lack of merit.

In this petition, NPC poses the sole issue for our review:

WHETHER OR NOT THE RTC GRAVELY ERRED WHEN IT DECLARED
ITEMS 3 AND 3.1 OF NAPOCOR CIRCULAR NO. 99-75 AS
UNCONSTITUTIONAL FOR BEING VIOLATIVE OF SUBSTANTIAL DUE
PROCESS AND THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION
AS WELL AS FOR RESTRAINING COMPETITIVE FREE TRADE AND
[4]
COMMERCE.

[5]
NPC Circular No. 99-75 dated October 8, 1999 set the guidelines in the
disposal of scrap aluminum conductor steel-reinforced or ACSRs in order to
decongest and maintain good housekeeping in NPC installations and to generate
additional income for NPC." Items 3 and 3.1 of the circular provide:

3. QUALIFIED BIDDERS

- 3.1 Qualified bidders envisioned in this circular are partnerships or corporations
that directly use aluminum as the raw material in producing finished products
either purely or partly out of aluminum, or their duly appointed [6]
representatives. These bidders may be based locally or overseas.

In April 2003, NPC published an invitation for the pre-qualification of bidders
[7]
for the public sale of its scrap ACSR cables. Respondent Pinatubo Commercial, a
trader of scrap materials such as copper, aluminum, steel and other ferrous and non-
ferrous materials, submitted a pre-qualification form to NPC. Pinatubo, however, was
informed in a letter dated April 29, 2003 that its application for pre-qualification had
[8] [9]
been denied. Petitioner asked for reconsideration but NPC denied it.

Pinatubo then filed a petition in the RTC for the annulment of NPC Circular No. 99-75, with a prayer for the issuance of a temporary restraining order and/or writ of preliminary injunction. ^[10] Pinatubo argued that the circular was unconstitutional as it violated the due process and equal protection clauses of the Constitution, and ran counter to the government policy of competitive public bidding. ^[11]

The RTC upheld Pinatubo's position and declared items 3 and 3.1 of the circular unconstitutional. The RTC ruled that it was violative of substantive due process because, while it created rights in favor of third parties, the circular had not been published. It also pronounced that the circular violated the equal protection clause since it favored manufacturers and processors of aluminum scrap vis-à-vis dealers/traders in the purchase of aluminum ACSR cables from NPC. Lastly, the RTC found that the circular denied traders the right to exercise their business and restrained free competition inasmuch as it allowed only a certain sector to participate in the bidding. ^[12]

In this petition, NPC insists that there was no need to publish the circular since it was not of general application. It was addressed only to particular persons or class of persons, namely the disposal committees, heads of offices, regional and all other officials involved in the disposition of ACSRs. NPC also contends that there was a substantial distinction between manufacturers and traders of aluminum scrap materials specially viewed in the light of RA 7832. ^[13] According to NPC, by limiting the prospective bidders to manufacturers, it could easily monitor the market of its scrap ACSRs. There was rampant fencing of stolen NPC wires. NPC likewise maintains that traders were not prohibited from participating in the pre-qualification as long as they had a tie-up with a manufacturer. ^[14]

The questions that need to be resolved in this case are:

- (1) whether NPC Circular No. 99-75 must be published; and
- (2) whether items 3 and 3.1 of NPC Circular No. 99-75 -
 - (a) violated the equal protection clause of the Constitution and
 - (b) restrained free trade and competition.

[15]

Tañada v. Tuvera stressed the need for publication in order for statutes and administrative rules and regulations to have binding force and effect, *viz.*:

x x x all statutes, including those of local application and private laws, shall be published as a condition for their effectivity, which shall begin fifteen days after publication unless a different effectivity is fixed by the legislature.

Covered by this rule are presidential decrees and executive orders promulgated by the President in the exercise of legislative power or, at present, directly conferred by the Constitution. Administrative Rules and Regulations must also be published if their purpose is to enforce or implement existing law pursuant

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also to a valid delegation.

Tañada, however, qualified that:

Interpretative regulations and those **merely internal in nature**, that is, regulating only the personnel of the administrative agency and not the public, need not be published. Neither is publication required of the so-called letters of instructions issued by administrative superiors concerning the rules or guidelines to

[17]

be followed by their subordinates in the performance of their duties. (emphasis ours)

In this case, NPC Circular No. 99-75 did not have to be published since it was merely an internal rule or regulation. It did not purport to enforce or implement an existing law but was merely a directive issued by the NPC President to his subordinates to regulate the proper and efficient disposal of scrap ACSRs to qualified bidders. Thus, NPC Circular No. 99-75 defined the responsibilities of the different NPC personnel in the disposal, pre-qualification, bidding and award of scrap ACSRS.

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It also provided for the deposit of a proposal bond to be submitted by bidders. the

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approval of the award, mode of payment and release of awarded scrap ACSRs. All these guidelines were addressed to the NPC personnel involved in the bidding and award of scrap ACSRs. It did not, in any way, affect the rights of the public in general or of any other person not involved in the bidding process. Assuming it affected individual rights, it did so only remotely, indirectly and incidentally.

Pinatubo's argument that items 3 and 3.1 of NPC Circular No. 99-75 deprived it of its right to bid or that these conferred such right in favor of a third person is erroneous. *Bidding*, in its comprehensive sense, means making an offer or an invitation to prospective contractors whereby the government manifests its intention to invite proposals for the purchase of supplies, materials and equipment for official business or public use, or for public works or repair. [20] Bidding rules may specify other conditions or require that the bidding process be subjected to certain reservations or qualifications. [21] Since a *bid* partakes of the nature of an offer to contract with the government, [22] the government agency involved may or may not accept it. Moreover, being the owner of the property subject of the bid, the government has the power to determine who shall be its recipient, as well as under what terms it may be awarded. In this sense, participation in the bidding process is a privilege inasmuch as it can only be exercised under existing criteria imposed by the government itself. As such, prospective bidders, including Pinatubo, cannot claim any demandable right to take part in it if they fail to meet these criteria. Thus, it has been stated that under the traditional form of property ownership, recipients of privileges or largesse from the government cannot be said to have property rights because they possess no [23] traditionally recognized proprietary interest therein.

Also, as the discretion to accept or reject bids and award contracts is of such

wide latitude, courts will not interfere, unless it is apparent that such discretion is exercised arbitrarily, or used as a shield to a fraudulent award. The exercise of that discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the concerned government agencies, not by the courts. Courts will not interfere with executive or legislative discretion exercised within those boundaries.

[24]

Otherwise, they stray into the realm of policy decision-making.

Limiting qualified bidders in this case to partnerships or corporations that directly use aluminum as the raw material in producing finished products made purely or partly of aluminum was an exercise of discretion by the NPC. Unless the discretion was exercised arbitrarily or used as a subterfuge for fraud, the Court will not interfere with the exercise of such discretion.

This brings to the fore the next question: whether items 3 and 3.1 of NPC Circular No. 99-75 violated the equal protection clause of the Constitution.

The equal protection clause means that ñno person or class of persons shall be deprived of the same protection of laws which is enjoyed by other persons or other

[25]

classes in the same place and in like circumstances.ö The guaranty of the equal protection of the laws is not violated by a legislation based on a reasonable

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classification. The equal protection clause, therefore, does not preclude classification of individuals who may be accorded different treatment under the law as

[27]

long as the classification is reasonable and not arbitrary.

Items 3 and 3.1 met the standards of a valid classification. Indeed, as juxtaposed by the RTC, the purpose of NPC Circular No. 99-75 was to dispose of the

ACSR wires. ^[28] As stated by Pinatubo, it was also meant to earn income for the government. ^[29] Nevertheless, the disposal and revenue-generating objective of the circular was not an end in itself and could not bar NPC from imposing conditions for the proper disposition and ultimately, the legitimate use of the scrap ACSR wires. In giving preference to direct manufacturers and producers, it was the intent of NPC to support RA 7832, which penalizes the theft of ACSR in excess of 100 MCM. ^[30] The difference in treatment between direct manufacturers and producers, on one hand, and traders, on the other, was rationalized by NPC as follows:

x x x NAPOCOR can now easily monitor the market of its scrap ACSR wires and verify whether or not a person's possession of such materials is legal or not; and consequently, prosecute under R.A. 7832, those whose possession, control or custody of such material is unexplained. This is based upon the reasonable presumption that if the buyer were a manufacturer or processor, the scrap ACSRs end with him as the latter uses it to make finished products; but if the buyer were a trader, there is greater probability that the purchased materials may pass from one trader to another. Should traders without tie-up to manufacturers or processors of aluminum be allowed to participate in the bidding, the ACSRs bid out to them will likely co-mingle with those already proliferating in the illegal market. Thus, great difficulty shall be encountered by NAPOCOR and/or those authorities tasked to implement R.A. 7832 in determining whether or not the ACSRs found in the possession, control and custody of a person suspected of theft [of] electric power transmission lines and ^[31] materials are the fruit of the offense defined in Section 3 of R.A. 7832.

Items 3 and 3.1 clearly did not infringe on the equal protection clause as these were based on a reasonable classification intended to protect, not the right of any business or trade but the integrity of government property, as well as promote the objectives of RA 7832. Traders like Pinatubo could not claim similar treatment as direct manufacturers/processors especially in the light of their failure to negate the rationale behind the distinction.

Finally, items 3 and 3.1 of NPC Circular No. 99-75 did not restrain free trade or competition.

Pinatubo contends that the condition imposed by NPC under items 3 and 3.1 violated the principle of competitiveness advanced by RA 9184 (Government Procurement Reform Act) which states:

SEC. 3. Governing Principles on Government Procurement. 6 All procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or controlled corporations, government financial institutions and local government units, shall, in all cases, be governed by these principles:

x x x

- (b) Competitiveness by extending equal opportunity to enable private contracting parties who are **eligible** and **qualified** to participate in public bidding. (emphasis ours)

The foregoing provision imposed the precondition that the contracting parties should be *eligible* and *qualified*. It should be emphasized that the bidding process was not a "free-for-all" where any and all interested parties, qualified or not, could take part. Section 5(e) of RA 9184 defines competitive bidding as a "method of procurement which is open to participation by any interested party and which consists of the following processes: advertisement, pre-bid conference, **eligibility screening of prospective bidders**, receipt and opening of bids, evaluation of bids, post-qualification, and award of contract x x x." The law categorically mandates that prospective bidders are subject to eligibility screening, and as earlier stated, bidding rules may specify other conditions or order that the bidding process be subjected to [\[32\]](#) certain reservations or qualifications. Thus, in its pre-qualification guidelines issued for the sale of scrap ACSRs, the NPC reserved the right to pre-disqualify any [\[33\]](#) applicant who did not meet the requirements for pre-qualification. Clearly, the competitiveness policy of a bidding process presupposes the eligibility and qualification of a contestant; otherwise, it defeats the principle that only "responsible" and "qualified" bidders can bid and be awarded government contracts. [\[34\]](#) Our free

enterprise system is not based on a market of pure and unadulterated competition where the State pursues a strict hands-off policy and follows the let-the-devil-devour-the-hindmost rule. ^[35]

Moreover, the mere fact that incentives and privileges are granted to certain enterprises to the exclusion of others does not render the issuance unconstitutional for espousing unfair competition. ^[36] While the Constitution enshrines free enterprise as a policy, it nonetheless reserves to the government the power to intervene whenever ^[37] necessary to promote the general welfare. In the present case, the unregulated disposal and sale of scrap ACSR wires will hamper the government's effort of curtailing the pernicious practice of trafficking stolen government property. This is an evil sought to be prevented by RA 7832 and certainly, it was well within the authority of the NPC to prescribe conditions in order to prevent it.

WHEREFORE, the petition is hereby **GRANTED**. The decision of the Regional Trial Court of Mandaluyong City, Branch 213 dated June 30, 2006 and resolution dated November 20, 2006 are **REVERSED** and **SET ASIDE**. Civil Case No. MC-03-2179 for the annulment of NPC Circular No. 99-75 is hereby **DISMISSED**.

SO ORDERED.

RENATO C. CORONA
Associate Justice
Chairperson

WE CONCUR:

PRESBITERO J. VELASCO, JR.
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

JOSE CATRAL MENDOZA
Associate Justice

A T T E S T A T I O N

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.

RENATO C. CORONA
Associate Justice
Chairperson

C E R T I F I C A T I O N

Pursuant to 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.

ANTONIO T. CARPIO
Acting Chief Justice

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Additional member per raffle dated March 24, 2010 in lieu of Justice Antonio Eduardo B. Nachura.

- [1] Represented by the Office of the Solicitor General.
- [2] *Rollo*, p. 40.
- [3] *Id.*, p. 42.
- [4] *Id.*, p. 21.
- [5] Subject: Implementing Guidelines Governing the Disposal Through Sale of SCRAP ACSRs.
- [6] *Rollo*, p. 43.
- [7] Aluminum conductor steel-reinforced.
- [8] *Rollo*, p. 74.
- [9] *Id.*, p. 56.
- [10] Docketed as Civil Case No. MC-03-2179.
- [11] *Rollo*, pp. 56-59.
- [12] *Id.*, pp. 37-40.
- [13] Republic Act No. 7832 or the Anti-Electricity and Electric Transmission Lines/Materials Pilferage Act of 1994.
- [14] *Id.*, pp. 22-30.
- [15] G.R. No. L-63915, 24 April 1985, 146 SCRA 446.
- [16] *Id.*, p. 453-454.
- [17] *Id.*, p. 454.
- [18] Items 4.1 to 4.1.2 require Cost Center Heads to report either to the Chairman of the Central or Regional Asset Management Sub-Committee (CAMSUC/RAMSUC) all available scrap ACSRs in their respective area of responsibility; Items 4.2 to 4.2.5 tasked the Head Office Bidding and Services Section and the Regional Materials Planning Services with the pre-qualification of prospective bidders; Items 4.3 to 4.3.4 set the procedure in the public bidding to be conducted by the CAMSUC or RAMSUC; and Items 4.4 to 4.4.4 direct the appraisal and coordination by the Asset Disposal Section and its Regional Counterpart of the awarded scrap ACSRs.
- [19] Items 5 to 8 and subsections.
- [20] *J.G. Summit Holdings, Inc. v. Court of Appeals*, G.R. No. 124293, 24 September 2003, 412 SCRA 10, 31-32.
- [21] *Id.*, p. 32.
- [22] *Desierto v. Ocampo*, G.R. No. 155419, 4 March 2005, 452 SCRA 789, 804.
- [23] *Terminal Facilities and Services Corporation v. Philippine Ports Authority*, G.R. No. 135639, 27 February 2002, 378 SCRA 82, 106.
- [24] *Albay Accredited Constructors Association, Inc. v. Desierto*, G.R. No. 133517, 30 January 2006, 480 SCRA 520, 533.
- [25] *Abakada Guro Party List v. Ermita*, G.R. No. 168056, 1 September 2005, 469 SCRA 1, 139.
- [26] *Coconut Oil Refiners Association, Inc. v. Torres*, G.R. No. 132527, 29 July 2005, 465 SCRA 47, 75.
- [27] *Ambros v. Commission on Audit*, G.R. No. 159700, 30 June 2005, 462 SCRA 572, 597.
- [28] *Rollo*, p. 39.

[29]

Id., p. 206.

[30]

Section 3 (a)(1) to (4), in relation to Section 3 (b)(2).

[31]

Rollo, pp. 288-289.

[32]

Supra, *J.G. Summit Holdings, Inc.*, note 20.

[33]

Rollo, p. 69.

[34]

Supra, *Desierto*, note 22, citing *National Power Corporation v. Philipp Brothers Oceanic, Inc.* 369 SCRA 629 (2001).

[35]

Tatad v. Secretary of the Department of Energy, G.R. No. 124360, 5 November 1997, 281 SCRA 330, 357.

[36]

Pest Management Association of the Philippines (PMAP) v. Fertilizer and Pesticide Authority (FPA), G.R. No. 156041, 21 February 2007, 516 SCRA 360, 369.

[37]

Ibid.