

**EN BANC**

**[ G.R. NO. 128145, September 05, 2001 ]**

**J. C. LOPEZ & ASSOCIATES INC., PETITIONER, VS. COMMISSION  
ON AUDIT AND NATIONAL POWER CORPORATION,  
RESPONDENTS.**

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

This is a petition for review on *certiorari* of the Decision of the Commission on Audit, docketed as COA Decision No. 95-475,<sup>[1]</sup> dated September 12, 1995; the Resolutions of the Commission on Audit, docketed as COA Decision No. 96-416,<sup>[2]</sup> dated August 13, 1996; and COA Decision No. 97-075,<sup>[3]</sup> dated January 23, 1997.

The factual and procedural antecedents are as follows:

On January 2, 1991, petitioner entered into a contract with the National Power Corporation (NAPOCOR) for the dredging of the vicinity of the Intake Tower at the Ambuklao Hydroelectric Plant in Bokod, Benguet. The pertinent provisions of the said contract provide:

"xxx xxx.

"ARTICLE III  
"P A Y M E N T S

"For and in consideration of the Work to be undertaken by CONTRACTOR as specified in the preceeding (sic) Article hereof, NAPOCOR shall pay CONTRACTOR in Philippine Currency, and in accordance with the Contract Documents the unit and lump sum prices indicated hereunder in the total amount of PESOS SIXTY SEVEN MILLION FIVE HUNDRED ONE THOUSAND (P67,501,000.00), Philippine Currency.

<u>"DESCRIPTION</u>	<u>UNIT PRICE</u>	<u>TOTAL PRICE</u>
1. Mobilization	Lump Sum	P18,000,000.00
2. Dredging of 300,000 cu. m. of silt	P165.00/sqm.	49,500,000.00
3. Demobilization	Lump Sum	<u>1,000.00</u>
TOTAL CONTRACT PRICE		P67,501,000.00

"Payment shall be made in accordance with the Contract Documents, and

as follows:

- "1. Fifteen percent (15%) of the total contract price shall be paid within thirty (30) calendar days from [the] signing of this Contract against submission of a refund bond, in the form of an irrevocable standby letter of credit in the equivalent amount. This advance payment shall be deducted from the mobilization cost which mobilization cost shall be paid upon the commencement of the dredging works. Consequently, the refund bond shall be released to CONTRACTOR.
- "2. Seventy five percent (75%) of the monthly billing for the work completed and duly accepted by NAPOCOR shall be paid within fifteen (15) calendar days from submission of CONTRACTOR's billing complete with supporting documents.
- "3. The remaining ten percent (10%) shall be paid in accordance with GP-28 of the Contract Specifications.

"CONTRACTOR shall pay any and all taxes imposable under this Contract.

"xxx xxx."<sup>[4]</sup>

Pursuant to the applicable provision of the foregoing contract, NAPOCOR paid the petitioner the amount of P10,125,150.00, as per Disbursement Voucher No. 091-02-853,<sup>[5]</sup> dated January 28, 1991, representing fifteen percent (15%) of the total contract price.<sup>[6]</sup> Subsequently, NAPOCOR paid the petitioner the amount of P7,694,850, as per Disbursement Voucher No. 091-07-861,<sup>[7]</sup> dated July 20, 1991, representing the balance of the mobilization cost. After the petitioner completed the mobilization of its resources (manpower, materials and equipment) on June 25, 1991, and the fabrication, assemblies and testing of its system on July 16, 1991, the petitioner started the actual dredging works on July 18, 1991.<sup>[8]</sup> However, due to the delays incurred by petitioner in its dredging operations, resulting in "substantial slippages of 35.0% and 51.6% in the financial and physical accomplishments, respectively," petitioner's contract with NAPOCOR was terminated through a Notice of Termination dated September 24, 1991.<sup>[9]</sup> Petitioner's letter seeking reconsideration of the termination was denied by NAPOCOR.<sup>[10]</sup> NAPOCOR ordered the petitioner to stop its dredging operations in preparation for the joint survey to determine the actual volume of silt dredged by the petitioner. The joint survey which was conducted on November 29, 1991 to December 4, 1991 revealed that petitioner was able to dredge 167,983.70 cubic meters of silt, amounting to P27,717,310.50.<sup>[11]</sup>

On February 20, 1992, NAPOCOR entered into a negotiated contract with a consortium led by Meralco Industrial Engineering Services Corporation (MIESCOR) to rehabilitate, operate and lease back the Ambuklao Hydroelectric Plant, including the dredging of silt within the vicinity of the intake tower.<sup>[12]</sup>

Shortly thereafter, or on April 1, 1992, petitioner filed a complaint for injunction with

the Regional Trial Court of Quezon City, Branch 215, docketed as Civil Case No. Q-92-11797, assailing NAPOCOR's termination of its contract,<sup>[13]</sup> and with prayer for the issuance of a writ of preliminary injunction. In a Resolution<sup>[14]</sup> dated June 22, 1992, the trial court issued a writ of preliminary injunction enjoining NAPOCOR and MIESCOR from interfering with petitioner's dredging operations and from proceeding with the negotiated contract between them.<sup>[15]</sup> In resolving petitioner's application for the issuance of a writ of preliminary injunction, the trial court delved extensively on the issue of "...whether the dredging of the Ambuklao water reservoir is to be considered an infrastructure work, and therefore, within the coverage of P.D. 1818, and as such, may not be enjoined or whether the same is merely a service undertaking and therefore, outside the ambit of [the] said decree."<sup>[16]</sup> The trial court agreed with the opinion of the NAPOCOR SVP and General Counsel that "...the dredging of the Ambuklao water reservoir is not an infrastructure work envisioned in Section 1 of P.D. 1818 but a service contract or undertaking."<sup>[17]</sup> In addition, the trial court construed that "...[w]hat the plaintiff [herein petitioner] apparently seeks from the Court is not to stop the dredging of the Ambuklao water reservoir but on the contrary, to continue its dredging of [the] said reservoir pursuant to the contract between plaintiff J.C. Lopez [petitioner] and defendant NAPOCOR. Far from delaying the dredging of the Ambuklao water reservoir, the continuation of the dredging [operations] by the plaintiff J.C. Lopez [petitioner] would expedite the rehabilitation of the said water reservoir."<sup>[18]</sup> Furthermore, the trial court ruled that petitioner's right to due process of law was violated when NAPOCOR unilaterally cancelled petitioner's contract and entered into a contract with MIESCOR.<sup>[19]</sup>

Alleging that the trial court committed grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the aforestated writ of preliminary injunction, MIESCOR filed a petition for *certiorari*<sup>[20]</sup> dated February 1, 1993, with prayer for a temporary restraining order/preliminary injunction, with the Court of Appeals, docketed as CA-G.R. SP No. 30141. On March 18, 1993, the Court of Appeals issued a writ of preliminary injunction prohibiting the trial court from enforcing the writ of preliminary injunction which it had earlier issued, and enjoining NAPOCOR and MIESCOR from undertaking further activities at the Ambuklao water reservoir until further orders from the court.<sup>[21]</sup>

On July 22, 1993, the Court of Appeals rendered a Decision<sup>[22]</sup> setting aside the Resolutions dated June 22, 1992, and January 13, 1993, of the trial court. In its Decision, the Court of Appeals dismissed, as being without basis, the petitioner's allegation that the act of clearing or dredging the reservoir of a hydroelectric plant may be considered as a mere maintenance work or service undertaking.<sup>[23]</sup> Citing Executive Order No. 380 which defines the term "infrastructure projects" as "construction, improvement or rehabilitation of roads and bridges, railways, airports, seaports, communication facilities, irrigation, flood control and drainage, water supply and sewerage systems, shore protection, power facilities, national buildings, school buildings, hospital buildings, and other related construction projects that form part of the government capital investment;" the Court of Appeals ruled that "there should not be any iota of doubt" that the enumerated undertakings [which include the dredging of the reservoir, power intake, tailrace tunnel and tailrace channel] in the Memorandum of Agreement dated February 20, 1992 between NAPOCOR and MIESCOR, "fall under the protection of P.D. No. 1818<sup>[24]</sup> and even

within the definition of 'infrastructure project' under Executive Order No. 380."<sup>[25]</sup> The Court of Appeals further ruled that the trial court's "act of granting the writ of preliminary injunction is patently erroneous, committed with grave abuse of discretion and in excess of jurisdiction, as it is directly in contravention of the mandate of P.D. No. 1818 and Circular No. 2-91 implementing the same."<sup>[26]</sup> The foregoing decision of the Court of Appeals became final and executory.

Meanwhile, while NAPOCOR and MIESCOR were still seeking reconsideration of the trial court's Resolution dated June 22, 1992, issuing a writ of preliminary injunction against them, the resident corporate auditor of NAPOCOR, after conducting a post-audit examination of the pertinent transaction, issued a Notice of Suspension (NS-INFRA-92-01)<sup>[27]</sup> dated November 25, 1992, involving the advance payment/mobilization fee amounting to P17,820,000.00, paid by NAPOCOR to the petitioner for the dredging of the vicinity of the Intake Tower at the Ambuklao Hydroelectric Plant. Among the "errors, differences and omissions" listed in the Notice of Suspension was as follows:

"xxx xxx.

"3. The contract provided for P18 M mobilization fee which amount is 26% of the total contract cost. Under PD 1594, the allowed mobilization fee is only 15% of the total contract price. The contract also provided for advance payment in violation of Sec. 88 of PD 1445.

"xxx xxx."<sup>[28]</sup>

In reply to the foregoing findings by the corporate auditor, NAPOCOR maintained that its contract with the petitioner provided for a mobilization fee of P18,000,000.00 as a "pay item," the payment of which is provided under subparagraph 1, Article III of the dredging contract. NAPOCOR further claimed that the "...mobilization fee, taken as a whole, is not an advance payment. It is only so to the extent of fifteen percent (15%) as clearly reflected in the afore-quoted provision of the contract. The balance of the mobilization cost (which is a pay item), after deducting the 15% advance payment, is due and payable only upon the commencement of the dredging works. Stated otherwise, the remaining mobilization cost was paid, as evidenced by the Disbursement Voucher (Annex "B"), upon the completion by the contractor of the pay item. Hence, the contract did not violate the 15% limit on advance payment as allowed under PD 1594 and its implementing rules and regulations (Sec. 3, CI-4)."<sup>[29]</sup> NAPOCOR's explanation having been found substantially insufficient, the notice of suspension of payment ripened into a disallowance of payment, prompting the petitioner to bring the matter before the Commission on Audit where it requested the lifting of the suspension on its claim for advance payment and mobilization fee in the total amount of P17,820,000.00.

On September 12, 1995, the Commission on Audit rendered a Decision,<sup>[30]</sup> the dispositive part of which provides:

"Accordingly, if J.C. Lopez's [petitioner] claim for work accomplishment, amounting to P29,196,708.75 is correct, properly documented and approved by the National Power Corporation, the mobilization cost of P18,000,000.00 paid to [the] said firm should be deducted therefrom."

[31]

In its Decision dated September 12, 1995, the Commission on Audit phrased the issue for its consideration, as follows:

"WHETHER OR NOT THE AMOUNT OF P18 M WHICH WAS PAID AS MOBILIZATION FEE AS PROVIDED FOR IN THE PERTINENT CONTRACT IS LEGAL OR PROPER IN VIEW OF WHICH THE HEREIN REQUEST FOR [THE] LIFTING OF [THE] SUSPENSION [OF PAYMENT] WHICH MATURED INTO A DISALLOWANCE, MAY BE GIVEN DUE COURSE." [32]

The Commission on Audit ruled that petitioner's appeal for the lifting of the suspension/disallowance of payment is "devoid of merit in the light of the ruling of the Court of Appeals in the Certiorari Case (CA-G.R. SP No. 30141 entitled 'Meralco Industrial Engineering Services Corporation vs. Hon. Romeo F. Zamora and J.C. Lopez, Inc.') wherein it was held that the NAPOCOR-MIESCO[R] Contract, which includes the dredging of the reservoir is an infrastructure project;" [33] and resolved that "...it is logical to conclude that the dredging contract of J.C. Lopez [petitioner] is likewise an infrastructure project and not a mere service agreement." [34] From the foregoing ratiocination, the Commission on Audit determined that "...the provision for advance payment [de]nominated as 'Mobilization Cost' under the contract in question, violates the provision of CI.4.3 of the IRR of P.D. 1594 and may not be enforced. Advance payment under the said IRR is subject to recoupment from progress billings for work accomplishment submitted by the Contractor." [35]

Petitioner sought reconsideration but the same was denied by the Commission on Audit in a Resolution (COA Decision No. 96-416) dated August 13, 1996, where it was noted that petitioner's motion for reconsideration "merely reiterated the same arguments earlier raised and did not present substantial evidence not previously invoked or earlier (sic) considered and passed upon by the Commission [on Audit] when it rendered COA Decision No. 95-475." [36]

Petitioner sought a second reconsideration but the same was again denied by the Commission on Audit in a Resolution (COA Decision No. 97-075) dated January 23, 1997. [37]

Hence, this petition for *certiorari* where the following assignment of errors [38] are raised:

"I

"THE RESPONDENT COMMISSION ON AUDIT GRAVELY ABUSED ITS DISCRETION IN FINDING THAT THE DREDGING CONTRACT BETWEEN PETITIONER AND NAPOCOR INVOLVED AN 'INFRASTRUCTURE,' WHICH