

## FIRST DIVISION

[ G.R. NO. 146120, January 27, 2006 ]

### DEPARTMENT OF HEALTH,PETITIONER, VS. HTMC ENGINEERS COMPANY, RESPONDENT.

#### D E C I S I O N

##### CHICO-NAZARIO, J.:

Before Us is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Civil Procedure assailing the Court of Appeals' Decision<sup>[1]</sup> denying petitioner's petition for review of the Decision<sup>[2]</sup> of the Construction Industry Arbitration Commission (CIAC) awarding respondent's claim against petitioner in the total amount of P4,430,174.00 with interest, as well as the Resolution dated 20 November 2000 denying petitioner's Motion for Reconsideration.

On various dates in May 1996, petitioner Department of Health (DOH) entered into four Owner–Consultant Agreements with respondent HTMC Engineers Company (HTMC) involving various infrastructure projects for East Avenue Medical Center, Rizal Medical Center, Amang Rodriguez Medical Center, and Tondo Medical Center.

All four consultancy agreements for the above-named hospitals were similarly-worded, indicating therein that said contracts were intended for the preparation of architectural and engineering (A & E) design plans and bid documents/requirements, and for construction supervision (CS). Moreover, Under Article 5.1 of the consultancy contracts, the professional fee of HTMC is 7.5% of the project fund allocation.

Sometime in July and August 1996, respondent was able to complete the A & E services for all four hospitals and the necessary documents were submitted to petitioner in accordance with the consultancy agreements. Thus, on 07 October 1996, DOH Undersecretary Milagros L. Fernandez issued a Memorandum Circular to the Chiefs of Hospital of the four hospitals advising them to facilitate the payment for the Consultancy Service Contract of the 1995 various infrastructure projects of their respective hospitals once the copy of the approved contract has been forwarded to their office. Thereafter, Arch. Ma. Rebecca Penafiel, Director III, Health Infrastructure Services, DOH, on 15 October 1996, wrote to the Chiefs of Hospital advising the latter that respondent had submitted the required contract documents and were therefore requested to facilitate the corresponding payment of 70% of the consultancy fee as stipulated in the contracts.

On 29 November 1996, petitioner requested the following amendments to the consultancy agreements pursuant to the guidelines issued by the National Economic Development Authority (NEDA):

1. To divide the scope of works under the original contracts into two (2) separate contracts:
  - a. Preparation of Detailed Architecture and Engineering Plans, Technical Specifications and Detailed Estimates; and
  - b. Full time construction supervision.
2. To breakdown the original professional fee of 7.5% based on the project fund allocation into two and to change the basis of payment, thus:
  - a. 6% based on the project contract cost (PCC) shall be paid to the claimant for the 1st scope of work (A & E service); and
  - b. 1.5% based on the project contract cost shall be paid to the claimant for the 2nd scope of work (CS services).
3. To define the project contract cost as to the cost of the winning bid price.

In response to the proposed amendments, on 24 January 1997, HTMC sent the DOH a position paper expressing their opinion on the matter. Among the contents of said position paper are the following:

1. In order that the intent of the TOR (Terms of Reference), being the basis of the award will not be disturbed, the 7.5% consultant's fee for the Regular A&E and CS shall be retained, splitting this to 6% for Regular A&E and 1.5% for CS is acceptable, on certain qualifying breakdown and schedules, to wit:
  - a) The 7.5% shall be based on the a [sic] Project Contract Cost which includes any adjustments (negative or positive variations);
  - b) The 6% A&E Consultant's fee shall be paid in accordance with the following payment schedule:
    - 10% - of Project Allotment Fund, upon signing of contract
    - 30% - to complete all payments to 40% of the roughly estimated Project Construction Cost, upon 50% completion of design works
    - 45% - to complete all payments to 85% of the detailed estimated Project Construction Cost, upon completion and submission of the contract documents
    - 15% - to complete the payments to 100% of the Project Contact Cost, upon periodic inspection during the construction of the project, further broken to 10% upon 50% completion and 5% upon owner's acceptance of substantial completion

x x x

e) The 1.5% for CS shall be paid in accordance with the following terms of payment as per industry practice:

15% - of the Project Contract Cost; upon signing of the contract.

Remaining balance shall be paid on an equal monthly installments [sic] and within the original construction contract schedule

x x x

h) The combined 6% A&E and 1.5% CS or a total of 7.5% of the Project Contract Cost shall be paid in accordance with the following:

10% - of the Project Allotment Fund (temporary basis), upon signing of the contract

60% - to complete all payments to 70% of the detailed estimated Project Construction Cost, upon completion and submission of the contract documents

30% - to complete all payments to 100% of the Project Contract Cost, upon completion of the construction of the project, further broken down to 10% upon 50% completion and 20% upon owner's acceptance of substantial completion

Meanwhile, in compliance with the Memorandum Circular issued by DOH Undersecretary Fernandez, the Amang Rodriguez Medical Center paid HTMC the amount of P1,870,312.00 on 19 December 1996, while the Rizal Medical Center paid HTMC P498,400.00 on 26 December 1996. Thereafter, the Tondo Medical Center paid respondent the amount of P2,119,687.00 on 10 February 1997, and the East Avenue Medical Center, the amount of P249,131.00 on 18 June 1997.

It would seem, however, that no clear settlement had been reached by the parties in connection with petitioner's proposed amendments to the consultancy agreements, thus, the DOH refused to issue the necessary notices to proceed with the construction supervision in favor of HTMC.

On 22 April 1998, respondent's counsel sent a letter to the DOH stating that:

In the stated Owner-Consultant Agreements, my client had completed the Detailed Architectural and Engineering Plans, Technical Specifications and Detailed Estimates, and was paid 10% and 60% of the "Construction Contract Cost" as downpayment and for the completed documents, respectively.

The above-referred projects had already been awarded to different Contractors and construction works are on-going, but my client is not allowed to undertake the Construction Supervision, inspite [sic] of repeated inquiry and request for the Notice to Proceed from the DOH Infrastructure Service Office and the DOH PEAC.

The Owner-Consultant Agreement, in its Article 5, provides that the Consultant's Fee is based on the "project fund allocation" which should have been the basis of the percentages of payments as partially done.

The documents (plans, specifications, estimates, etc.), which my client had undertaken for the East Avenue Medical Center, include the complete Cold Water Supply Rehabilitation, Standard Fire Protection, New Hot Water Supply and Distribution, and Improvement of Storm Drainage System with a total estimated construction cost in 1996 of P44M. The documents, which my client had undertaken for the Rizal Medical Center, include Phase I and Phase II with a total estimated construction cost in 1996 of P30.68M.

The project fund allocation for the above-referred projects had a total of P91,200,000.00 with a total Consultant's Fee of P6,840,000.00 based on Article 5 of the Owner-Consultant Agreement. However, only the gross amount of P4,737,530.72 had been paid.

In spite of my client's various demands, you did not issue any Notice to Proceed for the Construction Supervision of the above-referred projects, and that you insisted to pay on the percentage basis of the "construction contract cost" in violation of the Owner-Consultant Agreement.

In view of all the above, it is hereby requested that the balance of the Consultant's Fee for the above four (4) referred projects in the amount of P2,102,469.28 be paid in full to my client.

Further, it is requested that the Consultant's Fee in the amount of P4,461,000.00 for the other works undertaken by my client for the East Avenue and the Rizal Medical Centers, which are awaiting project fund allocations, be likewise paid in full to my client.

Should you fail to settle with my client, the above-requested amounts within ten (10) days from receipt hereof, we will be constrained to resort to Arbitration in pursuance to Article 12 of the Owner-Consultant Agreement.<sup>[3]</sup>

For petitioner's continued refusal to heed respondent's demand for payment and issuance of notices to proceed, on 26 October 1998, HTMC filed a claim against DOH and requested for arbitration with the CIAC.

On 30 March 1999, Arbitrator Custodio Parlade issued the assailed Decision in favor of HTMC, the dispositive portion of which states:

### **AWARD**

In summary, award is hereby made in favor of the claimant ordering the respondent to pay claimant the amount of P3,543,630 due for A&E services, to reimburse claimant for its expenses for salaries to the three engineers who were engaged by HTMC to perform construction supervision work in the amount of P576,000.00, and to pay as damages unrealized profit as a result of the non-performance of the this [sic] work

in the amount of P310,544.00 or the total amount of P4,430,174.00 with interest at the rate of 6% per annum from the time of the promulgation of this decision and 12% per annum on the amount due [principal plus accrued interest] from the date this decision becomes final.

All other claims are hereby denied.<sup>[4]</sup>

On 27 April 2000, petitioner filed a petition for review on certiorari with the Court of Appeals, which petition was subsequently denied for lack of merit by the appellate court on 28 September 2000. According to the Court of Appeals:

The instant petition is without merit.

Anent the issue of jurisdiction, respondent arbitrator correctly assumed jurisdiction over CIAC Case No. 33-98. The owner-consultant agreement provides in paragraphs 12.1 and 12.2:

#### 12.1 Disputes

Any dispute concerning any question arising under this Agreement which is not disposed of by agreement between the parties, shall be decided by the Secretary of Health who shall furnish the CONSULTANT a written copy of his decision.

#### 12.2 Arbitration

The decision of the Secretary of Health shall be final and conclusive unless within thirty (30) days from the date of receipt thereof, the CONSULTANT shall deliver to OWNER a written notice addressed to the Secretary of Health stating its desire to submit the controversy to arbitration. In such event, the dispute shall be decided in accordance with the provisions of the Rules of Procedure in the Construction Industry Arbitration Law under EO 1008.

Thus, when petitioner continued not to act on HTMC's request for the observance of the provisions of the agreement, private respondent HTMC properly submitted the claim with the CIAC for arbitration.

Petitioner's posture that the referral of the case to the CIAC is premature deserves scant consideration. Respondent had demanded that petitioner comply with the agreement. The latter, through the Secretary of Health, failed to act on the request. Later, a demand letter was sent to petitioner. Still, it did not comply. Thus, in order to protect its right, HTMC properly submitted its claim with the CIAC, it being the eventual forum of their agreement as mandated by E.O. No. 1008.

Petitioner's reliance and interpretation of the Supreme Court's ruling in Jesco Services Incorporated vs. Vera is misplaced. The same was clarified in a subsequent resolution of the Third Division of the Supreme Court dated September 30, 1996 in G.R. No. 125706 entitled "China Chang Jiang Energy Corporation (Philippines) versus Rosal Infrastructure Builders, represented by its General Manager, Alberto S. Surla,