

THIRD DIVISION

[G.R. No. 107631, February 26, 1996]

NATIONAL POWER CORPORATION, PETITIONER, VS. HON. COURT OF APPEALS AND PECORP, INC. (FORMERLY PACIFIC EQUIPMENT CORP.), RESPONDENTS.

DECISION

FRANCISCO, J.:

The sole query here is whether or not the following two (2) claims

1. Fee on the cost of drilling and grouting which is ten percent (10%) of the Actual Final Cost of P6,962,519.50 - P696,251.95
2. Fee on the minimum guaranteed equipment rental which is ten percent (10%) of the Actual Final Cost of P 1.67 million - P 167,000.00

from a total of four (4) presented by herein private respondent PECORP, INC. (PECORP for brevity), can be brought for arbitration expressly provided for in the contract it entered into with herein petitioner National Power Corporation (NPC).

That contract forged between the government through the NPC and PECORP as party-CONTRACTOR on June 27, 1974 was for the construction of the Mariveles Dam No. 1 and appurtenant structures of the water supply system of the Bataan Export Processing Zone at Mariveles, Bataan.

It was agreed upon that the contract is of a "Cost-Plus a Percentage" type - meaning, PECORP will be paid a certain percentage as fee based on the "Actual Final Cost" of the work. And what constitutes "Actual Final Cost" has been aptly simplified by the trial court as "the total cost to the defendant (NPC) of all the work performed by the plaintiff (PECORP) which includes cost of materials and supplies, structures, furnitures, charges, etc. and all other expenses as are inherent in a Cost-Plus and Percentage Contract and necessary for the prosecution of the work that are approved by the defendant x x x."

The rift arose when NPC, in a letter dated July 11, 1974, communicated to PECORP that it was inclined to contract directly and separately with Philippine Grouting and Guniting Co., Inc. (GROGUN) for the drilling and grouting work on the construction project and consequently, PECORP will not be entitled to any fees for said task.

Contending that such NPC-GROGUN arrangement will violate its rights under the NPC-PECORP contract, PECORP made known to NPC its desire to bring the matter to arbitration, under Article VI of their contract, which reads:

"Should there occur any dispute, controversy, or differences between the parties arising out of this contract that cannot be resolved by them to their mutual satisfaction, the matter shall be submitted to arbitration at the choice of either party upon written demand to the other party. When formal arbitration is requested, an Arbitration Board shall be formed in the following manner: CORPORATION and CONTRACTOR shall each appoint one (1) member of this board and these members shall appoint a third member who shall act as chairman."

The **NPC-GROGUN** drilling and grouting contract, nonetheless, pushed through on August 23, 1974. NPC tendered the following justifications for its execution:

1. The drilling and grouting work equipment were not included in the equipment availability schedules made jointly by NPC and PECORP at the start of the work.
2. PECORP failed to provide and/or rent equipment for the work and NPC could not immediately provide the equipments.
3. GROGUN had all the equipments and personnel required for the work.
4. The work could not suffer any further delay, considering that from the execution of the NPC-PECORP contract on June 27, 1974 up to the date of NPC's letter to PECORP which was July 11, 1974, PECORP had not performed any drilling and grouting work.
5. NPC was availing of its alleged statutory right under Article 1725 of the Civil Code in removing the drilling and grouting work from the scope of its contract with PECORP (NPC-PECORP contract). Article 1725 reads:

"The owner may withdraw at will from the construction of the work, although it may have been commenced, indemnifying the contractor for all the latter's expenses, work, and the usefulness which the owner may obtain therefrom, and damages."

As a result of such purported "withdrawal," the drilling and grouting work ceased to be a part of the **NPC-PECORP** contract and therefore,

- a) is not an arbitrable matter thereunder, and
- b) precludes **NPC** from collecting fees for said work. Besides, the cost of drilling and grouting work under the **NPC-GROGUN** contract is a direct cost to **NPC** and thus cannot be included in the "Actual Final Cost" under the **NPC-PECORP** contract on which **PECORP's** fees are based.

PECORP's objection to the **NPC-GROGUN** contract insofar as it deprives PECORP of fees on drilling and grouting is essentially anchored on the following:

1. Drilling and grouting work is but a part of its over-all contractual duty, as

expressed in Article II of the NPC-PECORP contract, to undertake the construction, complete, of the Mariveles Dam No. 1,

2. **PECORP** was expressly allowed under the **NPC-PECORP** contract to sub-contract labor, supplies and/or services, apparently in order to discharge fully its contractual duty. **PECORP** in fact intended to do just that, when even prior to the **NPC's** letter of July 11, 1974, **PECORP** sought authorization from **NPC** to sub-contract the very same drilling and grouting work to the very same **GROGUN** in the proposed **NPC-GROGUN** contract. And even if the proposed **PECORP-GROGUN** sub-contract was turned down by NPC, PECORP is still entitled to the fees considering that the **NPC-GROGUN** contract would involve identical undertaking and party as that in the rejected sub-contract, not to mention that it was **PECORP** which actually supervised the drilling and grouting work conducted by **GROGUN**.

Roughly five (5) years after, PECORP on June 14, 1979 presented to NPC four (4) claims - two of which are the subject claims mentioned at the beginning of this opinion and the other two are:

3. Fee on the inventory of unused stocks and POL P 155,844.95

4. Reimbursement of Medical Hospital expenses re: TK-001 Accident case P50,085.93,

coupled with a request for arbitration.

A board of arbitrators was thereafter convened. But after a series of written communications among the board, NPC and PECORP, it appeared that NPC was willing to arbitrate on claims (3) and (4) only. NPC resisted claim (1) (fee for drilling and grouting work) on grounds previously discussed. As to claim (2) (fee on the minimum guaranteed equipment rental), NPC argued that PECORP withdrew this claim from arbitration, as per PECORP's letter to NPC dated May 19, 1980 which reads in full:

"We confirm our agreement earlier pertaining to our claim for payment for contractor's fee in connection with the construction of the EPZA Dam No. 1 Project, whereby we are withdrawing our claim for fee on the guaranteed equipment rental hours for P167,000.00 in as much as this is an imputed cost and not direct cost as the rest of the claims. We understand however that the rest of the claims, in the sum of P902,182.58 shall be favorably adjudicated and endorsed."

As **NPC** was uncompromising, **PECORP** filed an action in the Regional Trial Court of Manila to compel **NPC** to submit/confirm/certify all the four (4) claims for arbitration, where judgment was thereafter rendered in favor of **PECORP**, the dispositive portion of which reads:

"IN VIEW OF ALL THE FOREGOING, judgment is hereby rendered in favor of the plaintiff PECORP, INC. and against National Power Corporation, ordering:

1. The Board of Administrators (sic) to reconvene and to arbitrate, the four (4) claims of the plaintiff against the defendant;
2. The defendant to submit and/or confirm and certify the four (4) claims for arbitration;
3. The parties to shoulder equally the expenses for arbitration;
4. The defendant to pay the plaintiff the amount of P 10,000.00 as and for attorney's fees;
5. The defendant to pay the costs of suit; and
6. The counterclaim is hereby dismissed for lack of merit."

After the trial court denied NPC's motion for reconsideration of its decision, respondent Court of Appeals, on appeal, affirmed the same but deleted the award of attorney's fees. However, in affirming said decision which merely ordered NPC and PECORP to arbitrate on all four (4) claims, respondent CA went further in disposing of issues which could have been appropriately ventilated and passed upon in the arbitration proceedings - a course of action apparently prompted by PECORP's request as contained in its "Motion For Early Resolution" and reiterated in a "Reiteration Motion For Early Resolution," that respondent CA make:

1. a definitive ruling on whether or not the withdrawal by NPC from PECORP of the drilling and grouting work in favor of GROGUN is a valid withdrawal of work under Article 1725 of the Civil Code, and
2. an outright resolution of PECORP's claims against NPC, in order to obviate further prolonged proceedings or multiplicity of suits.

Thus, in its now-assailed judgment, respondent CA resolved PECORP's claims for fees for drilling and grouting work (claim no. 1) and on the minimum guaranteed equipment rental hours (claim no. 2) in this wise:

As to claim no. 1:

"Art. II of the contract executed between appellee and appellant provides:

'SCOPE OF WORK AND COMPLETION, DELAYS AND EXTENSION OF TIME.' For and in consideration of the payment or payments to be made by CORPORATION in accordance with the provisions of this contract, CONTRACTOR shall fully and faithfully furnish all labor, plant and materials and construct, complete, all works required for the Project, in accordance with the terms and conditions of all the documents mentioned under Art. I above.'