

CLARE B. LUCERO, ROBERTO S. PAJERMO AND CLE BERN J. PAGLINAWAN, PETITIONERS, VS. PROVINCE OF SIQUIJOR ELECTRIC COOPERATIVE (PROSIELCO) AND S.I. POWER CORPORATION (SIPCOR), RESPO...

Ponente: ANTONIO-VALENZUELA, J.

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ANTONIO-VALENZUELA, J.:

This is the Petition for Review[1] filed by Clare B. Lucero (“petitioner Lucero”), Roberto S. Pajermo (“petitioner Pajermo”), and Cle Bern J. Paglinawan (“petitioner Paglinawan”), assailing the Decision dated 17 December 2012[2] rendered by the Energy Regulatory Commission (“ERC”) in ERC Case No. 2012-018 RC.

THE FACTS

The facts are as follows: on 10 February 2012, the Province of Siquijor Electric Cooperative (“respondent PROSIELCO”) and S.I. Power Corporation (“respondent SIPCOR”), filed the Joint Application[3] for the approval of the Power Supply Agreement, as revised, before the ERC.

The Joint Application averred: respondent PROSIELCO (a non-stock, non-profit electric cooperative) had a franchise to distribute electricity in the municipalities of Enrique Villanueva, Larena, Lazi, Maria, San Juan, and Siquijor (“Franchise Area”), located in the island of Siquijor; the Franchise Area was not connected to and could not draw electricity from the nationwide transmission grid; the generation facilities of National Power Corporation (“NPC”) (who had been supplying electricity for the entire island of Siquijor) became less reliable, and consumed more fuel to generate electricity despite proper operation and maintenance; the dependable generation capacity in Siquijor was no longer enough to meet the electricity requirements of the island; there was an urgent need to replace the existing generation facilities, and install additional generating capacity in the island of Siquijor; respondent PROSIELCO, in accordance with the Department of Energy (“DOE”) Department Circular No. 2004-01-001, and pursuant to its mandate to provide stable, secure, and reliable power supply for its customers, undertook to conduct a competitive selection process to secure a private generation company to supply the electricity requirements of the island of Siquijor; in 2010, respondent PROSIELCO, through a DOE appointed transaction adviser, conducted a competitive selection, but the process was unsuccessful because only one prospective private power supplier participated; respondent PROSIELCO inquired with NPC on whether NPC could conduct a selection process to procure a private power provider, but NPC answered in the negative; in 2011, respondent PROSIELCO, through its Bids and Awards Committee, conducted another comparative selection process for a private power provider; in June 2011, respondent SIPCOR submitted an unsolicited proposal to respondent PROSIELCO to install brand new generation facilities in the municipalities of Siquijor and Lazi, with a total installed capacity of 6.464 MW to supply respondent PROSIELCO's present and future energy requirements; respondent PROSIELCO and respondent SIPCOR negotiated the terms of the unsolicited proposal; after negotiating, respondent PROSIELCO subjected respondent SIPCOR's unsolicited proposal, as negotiated, to a Swiss Challenge, a procedure similar to the Revised Implementing Rules and Regulations of Republic Act (“R.A.”) No. 6957, as amended by R.A. No. 7718, or the Build-Operate-Transfer Law; during the period July

2011 to August 2011, respondent PROSIELCO published, for three consecutive weeks, in a newspaper of national circulation, the Invitation to Submit Comparative Proposals, inviting interested parties to submit proposals for comparison with respondent SIPCOR's unsolicited proposal, as negotiated with petitioner PROSIELCO; respondent PROSIELCO did not receive any comparative proposals, thus respondent PROSIELCO issued the Notice of Award to respondent SIPCOR; pursuant to the Notice of Award, respondent PROSIELCO and respondent SIPCOR executed the Power Supply Agreement; respondent PROSIELCO and respondent SIPCOR signed the agreement revising the Power Supply Agreement in order to clarify the appropriate base index values and to reflect the appropriate formulas indicated therein; respondent PROSIELCO and respondent SIPCOR furnished the legislative bodies of each of the local government units where they principally operate a copy of the Joint Application, with all its annexes, and accompanying documents, in compliance with Rule 6 of the ERC Rules of Practice and Procedure, and caused the publication of the Joint Application in a newspaper of general circulation within the Franchise Area.

The Joint Application prayed that the ERC: 1) immediately issue an order provisionally approving the Power Supply Agreement, and the generation rate and adjustment mechanism indicated therein; 2) after due hearing, render judgment making the provisional approval permanent.

The ERC found the Joint Application sufficient in form and substance, and issued the Order which scheduled the Joint Application for initial hearing.[4]

Petitioner Lucero filed the verified Petition for Intervention,[5] and averred: petitioner Lucero was a member-consumer of respondent PROSIELCO; the Office of the Solicitor General ("OSG") issued the Opinion[6] stating that the process undertaken by respondent PROSIELCO in selecting respondent SIPCOR as its new power provider, through the unsolicited proposal with Swiss Challenge Procedure, was not in accordance with applicable law, rules, and regulations; petitioner Lucero, as a member-consumer of petitioner PROSIELCO, would stand to benefit or would be aggrieved by the terms and conditions of any power supply contract that would be entered by petitioner PROSIELCO.

The Petition for Intervention prayed that the ERC: 1) grant petitioner Lucero's motion to intervene and to participate in the proceedings as a party; 2) direct respondent PROSIELCO and respondent SIPCOR to serve petitioner Lucero copies of all notices, orders, and other issuances; 3) permit petitioner Lucero to obtain copies of the records of this case.

Petitioner Paglinawan and petitioner Pajermo filed the Petition for Intervention, and averred that the ERC should deny the Joint Application because the Power Supply Agreement was grossly disadvantageous to the island of Siquijor, and the respondents PROSIELCO and SIPCOR did not comply with the requirements of the law in selecting respondent SIPCOR as the new power provider.

In the Motion to Deny Outright with Notice of Entry of Appearance as Counsel for Intervenor-Oppositor,[7] petitioner Lucero prayed that the ERC deny the Joint Application outright for being contrary to law and public policy, and averred: there was no transparent and competitive bidding process made in compliance with law, ERC rules, and settled jurisprudence; the DOE did not issue the required certification that the comparative selection process was properly conducted; there was no offer made to the public, and no opportunity for competition.

In the Order dated 11 June 2012,[8] the ERC denied petitioner Lucero's Motion to Deny Petition Outright for lack of merit, scheduled the Joint Application for pre-trial conference, and directed the parties to file and serve their respective pre-trial briefs, and affidavits of their witnesses before the scheduled hearing. The ERC ruled that the "Swiss Challenge" was a form of competitive selection process because of the following reasons: there was an offer to the public (respondent SIPCOR's unsolicited proposal was published three times to invite interested

parties to submit their respective counter-proposals); there was competition (those who intended to submit their respective counter-proposals would definitely have to submit more competitive offers and the original proponent who submitted the unsolicited proposal could match the offers); there was determination of better offers (the unsolicited proposal and the submitted offers could be compared to determine which was the better offer).

Petitioner Lucero filed the Urgent Motion for Reconsideration[9] of the ERC's Order dated 11 June 2012, but the ERC denied the urgent motion in its Order dated 14 August 2012, and reiterated that it had already recognized the Swiss Challenge as a valid form of competitive selection process.[10]

On 09 October 2012, petitioner Lucero, petitioner Pajermo, and petitioner Paglinawan filed the Petition for Review on Certiorari with Prayer for Temporary Restraining Order and/or Writ of Preliminary Injunction[11] ("Petition for Certiorari") against the ERC, respondent PROSIELCO, and respondent SIPCOR before this Court, which was docketed as CA-G.R. SP No. 126649, and was subsequently raffled to the Fifteenth Division. The Petition for Certiorari (CA-G.R. SP No. 126649) prayed that the Court of Appeals dismiss the Joint Application, and imputed grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the ERC for issuing the Order dated 11 June 2012 (which denied petitioners' Motion to Deny Petition Outright), and the Order dated 14 August 2012 (which denied petitioners' Urgent Motion for Reconsideration).

The Petition for Certiorari (CA-G.R. SP No. 126649) averred: the ERC gravely abused its discretion in failing to dismiss the Joint Application for the failure of respondent PROSIELCO and respondent SIPCOR to comply with the minimum requirements of competitive selection process; respondent PROSIELCO and respondent SIPCOR did not comply with the minimum requirements of competitive selection process mandated by law and regulations; the ERC gravely abused its discretion in ruling that the certification from the DOE, on the conduct of a competitive selection process, was not applicable; the ERC gravely abused its discretion in ruling that the adoption of the Swiss Challenge method, as an alternative to the competitive bidding process, dispensed with the requirements of at least two qualified bidders, and the certification from the DOE.

The proceedings before the ERC ensued.

On 17 December 2012, the ERC rendered the assailed Decision[12] approving the Joint Application with some technical modifications. The dispositive portion of the assailed Decision read:

WHEREFORE, the foregoing premises considered, the application for approval of the Power Supply Agreement (PSA), as revised, filed by the Province of Siquijor Electric Cooperative, Incorporated (PROSIELCO) and S.I. Power Corporation (SIPCOR) is hereby APPROVED WITH MODIFICATION, subject to the following conditions:

a. The applicable base tariff shall be as follows:

Particulars Approved Rates

Capital Recovery Rate PhP991.22/kW-month

Fixed O&M PhP94.68/kw-month

Variable O&M PhP0.5699/kWh

Fuel Cost Pass-through cost subject to efficiency cap

Lube Oil Cost Pass-through cost subject to 0.0168 li./kWh

b. The Fixed O&M, the Variable O&M, the Fuel Cost and the Lube oil Cost shall be subject to adjustments based on the economic indices provided in the PSA.

The Capital Recovery Rate (CRR) shall be subject to Foreign Exchange (Forex) adjustments only.

c. The pass-through fuel cost shall be subject to the following fuel consumption cap or actual, whichever is lower:

Plant Load Factor (PLF) Specific Fuel Oil
Consumption Rate Ceiling
(liters/kWh)

80% and above 0.2460

65% to 79% 0.2618

50% to 64% 0.2695

49% and below 0.2762

d. The Testing and Commissioning Rate shall be based on the Actual Fuel Price and the Specific Fuel Oil Consumption Rate of 0.2618 li./kWh or actual, whichever is lower.

e. Inasmuch as PROSIELCO is within the area served by the National Power Corporation-Small Power Utilities Group (NPC-SPUG), SIPCOR shall be allowed to recover the subsidy from the Commission-approved Universal Charge-Missionary Electrification (UC-ME) based on the petition filed by the NPC-SPUG and as set forth under the Guidelines for the Setting and Approval of Electricity Generation Rates and Subsidies for Missionary Electrification Areas.

Relative thereto, PROSIELCO is hereby directed to:

- VERIFY the computation of the subsidy fees paid by the NPC-SPUG for each billing month and CERTIFY that the amounts were computed and paid based on the pricing structure under the approved PSA in consideration of the electricity supplied to other off-grid electric cooperatives; and

- SUBMIT to the NPC-SPUG for each billing period, a certified report that SIPCOR, for each billing month covered, has been operating and maintaining the power plant in accordance with the requirements of the approved PSA.

Finally, SIPCOR is hereby directed to SUBMIT, after a full year of operation, its audited Financial Statement (AFS).

SO ORDERED.

Aggrieved, petitioners file this Petition for Review, and raise the following grounds:[13]

Grounds for the Petition

Petitioners respectfully submit that the Decision issued by the ERC must be reversed and set aside for being contrary to law and a patent nullity. Specifically, the Petitioner seeks the reversal of the Decision upon the following grounds:

A.

THE ENERGY REGULATORY COMMISSION ERRED IN DISPENSING WITH THE PRESENTATION OF DIRECTOR GOM-OS AS ADVERSE WITNESS FOR THE PETITIONERS WITHOUT THE LATTER'S FAULT.

B.

THE ENERGY REGULATORY COMMISSION ERRED IN APPROVING THE POWER SUPPLY AGREEMENT AS REVISED, NOTWITHSTANDING THE FACT THAT SIPCOR HAD NO JURIDICAL

PERSONALITY AT THE TIME OF THE SUBMISSION OF THE UNSOLICITED PROPOSAL.

C.

THE ENERGY REGULATORY COMMISSION ERRED IN APPROVING THE APPLICATION NOTWITHSTANDING THE FACT THAT THE LEGAL REQUIREMENTS WERE NOT COMPLIED WITH.

On 24 October 2013, the Special Fifteenth Division of this Court rendered the Decision[14] in CA-G.R. SP No. 126649, which denied the Petition for Certiorari and affirmed the assailed Orders dated 11 June 2012, and 14 August 2012, issued by the ERC. The pertinent portion of the Special Fifteenth Division read:

In the case at bench, it is beyond dispute that private respondents had undertaken a special form of bidding technically denominated as 'Swiss Challenge' which method was likewise adopted in the joint application filed by Palawan Electric Cooperative, Incorporated (PALECO) and Delta P. Incorporated (DELTA P) on April 17, 2009 and thereafter sustained by public respondent in its Decision dated November 9, 2009. In the assailed Order of public respondent, it considered 'Swiss Challenge' as a form of competitive selection process, for the following reasons:

a. There is an offer to the public. On June 24, 2011, SIPCOR submitted an unsolicited proposal to PROSIELCO to install a brand new generation facilities to the Municipalities of Siquijor and Lazi, with a total installed capacity of 6.464 MW to supply its present and future energy requirements. The said unsolicited proposal was accepted by PROSIELCO on July 14, 2011. Subsequently, on July 18, 2011, July 25, 2011 and August 1, 2011, the same was published to invite interested parties to submit their respective counter-proposals. Thus, it is clear that the public was invited to submit better proposals than that of SIPCOR.

b. There is competition. Those who intend to submit their respective counter-proposals will definitely have to submit more competitive offers and the original proponent who submitted the unsolicited proposal can match their offers.

c. Determination of better offer. The unsolicited proposal and the submitted offers can be compared to determine which is the better offer.

xxx

(Citations omitted.)

In the Notice of Withdrawal of Appeal,[15] petitioner Pajermo and petitioner Paglinawan manifested that they were withdrawing as petitioners in this Petition for Review because of the developments in connection with the Power Supply Agreement.

In the Resolution dated 11 September 2014,[16] we deemed this Petition for Review withdrawn, in so far as petitioner Pajermo and petitioner Paglinawan were concerned.

At the outset, we find it necessary to first resolve the issue on whether petitioner Lucero engaged in forum shopping in filing this Petition for Review, and the Petition for Certiorari (CA-G.R. SP No. 126649) before this Court.

RESPONDENT SIPCOR

Respondent SIPCOR answers in the affirmative. Petitioner Lucero engaged in forum shopping in filing this Petition for Review, and the Petition for Certiorari (CA-G.R. SP No. 126649) before this Court.

Respondent SIPCOR's Manifestation (Re: Actual Willful and Deliberate Forum Shopping)[17] thrusts: petitioner Lucero deliberately committed a clear act of forum shopping in filing this Petition for Review, and the Petition for

Certiorari (CA-G.R. SP No. 126649); this Petition for Review, and the Petition for Certiorari (CA-G.R. SP No. 126649), involved the same parties, the same issues, the same facts, the same relief sought, and the same justifications and arguments.

PETITIONER LUCERO

Petitioner Lucero answers in the negative. Petitioner Lucero did not engage in forum shopping in filing this Petition for Review, and the Petition for Certiorari (CA-G.R. SP No. 126649) before this Court.

The Counter Manifestation (Re: SIPCOR's Manifestation dated 19 February 2013)[18] parries: petitioner Lucero did not commit forum shopping because this Petition for Review, and the Petition for Certiorari (CA-G.R. SP No. 126649), questioned different orders, raised two distinct causes of action and issues, and sought two different objectives.

Respondent PROSIELCO remains silent on the issue.

THE COURT'S RULING

We rule in the affirmative. Petitioner Lucero engaged in forum shopping in filing this Petition for Review, and the Petition for Certiorari (CA-G.R. SP No. 126649), before this Court.

Forum shopping is the institution of two or more proceedings or actions, either simultaneously or successively, involving the same parties for the same cause of action, on the expectation that one or the other court would render a favorable decision.[19] It is an act of malpractice because it trifles with the courts, degrades the administration of justice, and contributes to the already congested dockets of the courts.[20]

In order to determine whether a party violated the rule against forum shopping, it is essential to ascertain whether the elements of *litis pendentia* are present, or whether a final judgment in one case will amount to *res judicata* in another. The test for determining forum shopping is whether in the two (or more) cases pending, the following elements are present: 1) identity of parties; 2) identity of rights asserted and reliefs prayed for, the relief being founded on the same facts; and 3) identity of the two preceding particulars, such that any judgment rendered in the other action will, regardless of which party is successful, amount to *res judicata* in the action under consideration.[21]

After a careful scrutiny of the Petition for Certiorari (CA-G.R. SP No. 126649) filed before the Fifteenth Division of this Court, and this Petition for Review, we find that all of the elements above enumerated are present.

The first element is present. The parties in this Petition for Review, are the same parties in involved in the Petition for Certiorari in CA-G.R. SP No. 126649 (with the inclusion of the ERC as public respondent).

The second element is present. There is identity of rights asserted and reliefs prayed for. To determine whether there is identity of the rights asserted and reliefs prayed for, grounded on the same facts and bases, the following tests may be applied: 1) whether the same evidence would sustain both the first and the second causes of action, also known as the "same evidence" test; or 2) whether the defenses in one case may be used to substantiate the complaint in the other.[22] The test of determining whether the cause of action in the second case existed at the time of the filing of the first case is also essential.[23]

In the Petition for Certiorari in CA-G.R. SP No. 126649, petitioner Lucero argued that the ERC's denial of the petitioners' Motion to Deny Petition Outright, and the Urgent Motion for Reconsideration, was tainted with grave abuse of discretion amounting to excess or lack of jurisdiction, because the procedure adopted by respondents PROSIELCO and SIPCOR (i.e. adoption of the Swiss Challenge method as an alternative to the competitive bidding process) did not comply with the minimum requirements of competitive selection process mandated by

law and pertinent regulations. Among others, the Petition for Certiorari (CA-G.R. SP No. 126649) prayed that judgment be issued: 1) reversing and setting aside the assailed Orders of the ERC dated 11 June 2012, and 14 August 2012; and 2) ordering the ERC to dismiss the Joint Application.

On the other hand, in this Petition for Review, petitioner Lucero argues that the assailed Decision rendered by the ERC was erroneous because respondent PROSIELCO and respondent SIPCOR, in adopting the Swiss Challenge method as an alternative to the competitive bidding process, did not comply with the minimum requirements of competitive selection process mandated by law and regulations. Among others, the Petition for Review prayed that judgment be rendered: 1) reversing and setting aside the assailed Decision dated 17 December 2012; and 2) dismissing respondent PROSIELCO's and respondent SIPCOR's Joint Application before the ERC.

In both cases, the petitioner Lucero raised the issue of the alleged illegality of adopting the Swiss Challenge method as an alternative to the competitive bidding process mandated by law and regulations. The parties argued the same arguments and laws in support of their respective positions. Further, the parties relied on substantially the same evidence in both cases. Moreover, the cause of action in this Petition for Review (i.e., the ERC's alleged erroneous ruling that the Swiss Challenge method was a valid alternative to the competitive bidding process) was obviously already in existence when the Petition for Certiorari (CA-G.R. SP No. 126649) was filed, as the Petition for Certiorari also dealt with the very same issue.

Finally, the third element is present. The Decision dated 24 October 2013 rendered by the Special Fifteenth Division of this Court in the Petition for Certiorari (CA-G.R. SP No. 126649), which ruled that the Swiss Challenge method adopted by the parties was a valid and recognized alternative to the competitive bidding process mandated by law and regulations, amounted to *res judicata*.

In filing both petitions before this Court, petitioner Lucero put us in a quandary, inasmuch as the possibility of two separate and contradictory decisions on the issue of the validity of the Swiss Challenge method as an alternative to competitive bidding process (i.e., that this Division would render a ruling contradictory to the Decision rendered by the Special Fifteenth Division anent the same issue), is all too real. This is the very evil that the proscription on forum-shopping seeks to avoid. We can not sanction such trifling with the courts.

To fend off the resultant confusion, strict adherence to the rules against forum-shopping must be observed, and any violation of these rules results in the dismissal of the case.[24]

We DISMISS the Petition for Review.

IT IS SO ORDERED.

De Leon, M.M., Chairperson and Lantion, J.A.C. JJ., concur.

[1] C.A. Rollo, p. 3.

[2] C.A. Rollo, p. 21.

[3] C.A. Rollo, p. 226.

[4] Order, C.A. Rollo, p. 533.

[5] C.A. Rollo, p. 573.

[6] Re: Acquisition of New Power Provider by the Province of Siquijor Electric Cooperative, Inc., C.A. Rollo, p. 579.

- [7] C.A. Rollo, p. 610.
- [8] C.A. Rollo, p. 601.
- [9] C.A. Rollo, p. 678.
- [10] C.A. Rollo, p. 853.
- [11] C.A. Rollo, p. 122.
- [12] Supra, note 2.
- [13] Supra, note 1, at p. 8.
- [14] C.A. Rollo, p. 1939.
- [15] C.A. Rollo, p. 2096.
- [16] C.A. Rollo, p. 2111.
- [17] C.A. Rollo, p. 104.
- [18] C.A. Rollo, p. 207.
- [19] *Madara v. Honorable Perello*, G.R. No. 172449, 20 August 2008.
- [20] *Top Rate Construction & General Services, Inc. v. Commission on Elections*, G.R. No. 1510981, 11 September 2003.
- [21] *Borra v. Court of Appeals*, G.R. No. 167484, 09 September 2013, citing *Pentacapital Investment Corporation v. Mahinay*, G.R. No. 171736 and 181482, 05 July 2010.
- [22] *Cabreza, Jr. v. Cabreza*, G.R. No. 181962, 16 January 2012.
- [23] *Umale v. Canoga Park Development Corporation*, G.R. No. 167246, 20 July 2011.
- [24] *Guaranteed Hotels, Inc. v. Baltao*, G.R. No. 164338, 17 January 2005.

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