

**DEPARTMENT OF HEALTH, PETITIONER, VS. C.V. CANCHELA &
ASSOCIATES, ARCHITECTS (CVCAA), IN ASSOCIATION WITH MCS
ENGINEERS CO., AND A.O. MANSUETO IV — ELECTRICAL
ENGINEERING SERVIC...**

G.R. Nos. 151373-74. November 17, 2005

Ponente: CARPIO-MORALES, J.

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CARPIO-MORALES, J.:

The Department of Health assails, via petition for review on certiorari,[1] the consolidated June 28, 2000 decision of the Court of Appeals affirming that of the Sole Arbitrator of the Construction Industry Arbitration Commission (CIAC)[2] which granted the monetary claim of herein private respondents.

The following facts are not undisputed.

Petitioner entered into three Owner-Consultant Agreements (Agreements) with private respondents covering infrastructure projects for the Baguio General Hospital and Medical Center (Baguio Project), the Batangas Regional Hospital (Batangas Project) and the Corazon L. Montelibano Memorial Regional Hospital in Bacolod City (Bacolod Project).

The first Agreement[3] dated October 7, 1996 was signed by Dr. Jesus del Prado, Chief of Hospital of the Baguio General Hospital and Medical Center; the second,[4] dated October 8, 1996, by Dr. Vicente Gahol, Chief of Hospital of the Batangas Regional Hospital; and the third,[5] dated October 7, 1996, by Dr. Lourdes Espina, Officer-in-Charge of the Bacolod Regional Hospital.

The Agreements, which contained almost identical language, required the preparation by private respondents of the following documents: detailed architectural and engineering design plans; technical specifications and detailed estimates of cost of construction of the hospital, including the preparation of bid documents and requirements; and construction supervision until completion of hand-over and issuance of final certificate.

Work on the projects was generally divided into: architectural and engineering (A & E) services, and construction supervision (CS).

The Agreements contained a common provision stating that private respondents' consultancy or professional fees would be 7.5% of the project fund allocation, broken down into detailed architectural and engineering services (6%), and full-time construction supervision (1.5%).[6]

Thus, in the first Agreement involving the Baguio Project, petitioner agreed to pay private respondents a professional fee in the amount of P1,444,875.00 or 7.5% of the project fund allocation of P19,265,000.00.[7]

In the second agreement involving the Batangas Project, petitioner agreed to pay private respondents a professional fee of P1,318,020.00 or 7.5% of the project fund allocation of P17,575,000.00.[8]

In the third agreement, petitioner agreed to pay private respondents the amount of P890,549.00 which is equivalent to 7.5% of the P11,875,000.00 fund allocated for the Bacolod Project.[9]

While the Agreements were witnessed by the respective chief accountants of the hospitals and were duly approved by the Secretary of Health,[10] the former did not issue corresponding certificates of availability of funds to cover the professional or consultancy fees.[11]

Petitioner, acting through its representative Architect Ma. Rebecca M. Peñafiel, by separate letters[12] to the respective chiefs of hospitals, all dated October 15, 1996, confirmed its acceptance of private respondents' complete Contract or Bid Documents including the A & E Design Plans and Technical Specifications and the Detailed Cost Estimates for each project, and accordingly recommended the payment of 7.5% of the project allocation to private respondents as consultancy fees in accordance with the Agreements.[13] In the same letters, petitioner advised that private respondents' performance of full-time construction supervision services shall commence upon issuance of the Notices to Proceed to the winning contractors.

Before the Notices to Proceed could be issued to the winning contractors, however, petitioner amended the three Agreements on December 10, 1996 by deleting from private respondents' scope of work the item "full-time construction supervision" and replacing it with "periodic visits," thus:

1.5 Periodic Visits

The CONSULTANT shall make periodic visits to the project site to familiarize himself with the general progress and quality of the work and to determine whether, the work is proceeding in accordance with the Contract Documents. During such project site visits and on the basis of his observations he shall report to the OWNER defects and deficiencies noted in the work of contractors and shall condemn work found failing to conform to the Contract Documents.[14]

The Amendment to each of the three Agreements was likewise duly witnessed and signed by the hospitals' respective chief accountants and approved by the Secretary of Health. Just the same, no certifications of availability of funds for the purpose were issued.[15]

Full-time construction supervision having been excluded from private respondents' scope of work, their professional fee was correspondingly reduced from 7.5% of the project fund allocation to 6% of the project contract cost, payable as follows:

5.2 Payment Schedule

- Upon the completion and submission of the Contract Documents, SEVENTY percent (70%) of the fee will be made computed upon estimated project construction cost;
- Upon fifty percent completion of the construction of the project, the payment shall be adjusted and made so that it will amount to a sum equivalent to EIGHTY percent (80%) of the fee, computed upon the Project Contract Cost
- Upon completion and final acceptance of the project, the remaining balance will be paid computed on the Project Contract Cost.
- The payments arising from this Agreement, as amended shall be subject to the usual accounting and auditing rules and regulations.[16] (Emphasis supplied)

During the construction of the projects, various deficiencies in the performance of the agreed scope of private respondents' work were allegedly discovered[17] which were not, however, communicated to private respondents.[18] Due to such deficiencies, petitioner withheld payment of the consultancy fees due to private

respondents. And petitioner did not return the documents, plans, specifications and estimates submitted by private respondents.

As despite written demands for payment,[19] petitioner continued to withhold payment of their professional fees, private respondents appealed, by letter dated August 29, 1997, to then Department of Health Secretary Carmencita C. Reodica, they stating that their appeal was "purposely done as our ultimate administrative remedy before resorting to arbitration under E.O. 1008."

In a demand letter (undated) for payment addressed to Secretary Reodica and the chiefs of hospital concerned, private respondents expressed their intention to resort to arbitration in accordance with Article 12 of each of the Agreements.[20]

Still later, private respondents sent another letter dated February 19, 1998 to Secretary Reodica stating that it would be submitting the dispute to the CIAC.

The demands for payment remained unheeded, prompting private respondents to file on September 21, 1998 with the CIAC their request for adjudication of their claim for payment of professional fees, escalation costs, attorney's fees and costs of arbitration. The case was docketed as CIAC Case No. 31-98.

Acting on private respondents' petition, the CIAC appointed a Sole Arbitrator, Atty. Custodio O. Parlade, from a list of three nominees to preside over the arbitration proceedings.[21]

In its Answer dated January 21, 1999,[22] petitioner alleged, inter alia, that payment was withheld because the hospitals concerned were not satisfied with the performance of private respondents who did not fulfill the terms and conditions of the contracts; withholding of payment is sanctioned by Section 8.2 of the NEDA Board Approval Guidelines on the Procurement of Consultancy Services for government projects (Implementing Rules and Regulations) which provides:

To guarantee the faithful performance of the consultant under Contract, the final payment shall be withheld until after a Certificate of Completion indicating satisfactory completion of the Consultancy Services shall have been issued by the concerned government agency. (Emphasis supplied);

the delay in the implementation of the project, as well as the payment of fees, is not due to the fault of the hospitals but to private respondents' failure to rectify its unsatisfactory work; and the consultancy fees shall be on a per project basis and at 6% of the project contract cost.

In the parties' "Terms of Reference,"[23] the following facts were stipulated, inter alia:

- The A & E services were completed, and the Contract Documents (CD) submitted by Claimant, on 15 October 1996 for the Consultancy Contracts for:

4.1

Baguio Project, with CD accepted/approved by Respondent for Project Fund Allocation (PFA) or Project Construction Cost (PCC) of P19,719,376;

4.2

Batangas Project, with CD accepted/approved by Respondent for PFA/PCC of P20,373,565;

4.3

Bacolod Project, with CD accepted/approved by Respondent for PFA/PCC of P20,118,940."

- Claimants allege that they are entitled to 6% for A & E Fees, as follows, for:

5.1

the Consultancy Contract for Baguio Project in the amount of P1,183,163;

5.2

the Consultancy Contract for Batangas Project in the amount of P1,222,414; and

5.3

the Consultancy Contract for Bacolod Project in the amount of P1,207,136.

The Respondent, however, maintains that the 6% payment must be based upon the actual project contract cost of each building which is defined as the cost of the winning bid price of the contractor which performed the work. (*Italics supplied*)

And defined as issues were as follows:

- Did the Claimants complete their work under the contract on time so as to entitle them to their claims for A & E fees for:

[a] Baguio Project P 1,183,163.00

[b] Batnagas Project 1,222,414.00

[c] Bacolod Project 1,207,136.00

Total P 3,612,713.00

1.1 Was the work of the Claimants satisfactory so as to entitle them to their claims?

1.2 How should the "project cost" be defined:

- Should it be based on the detailed cost estimate for A & E services as provided in the bid documents; or

- Should it be based on the actual contract cost for each building?

- Was the payment of the claims of the Claimant so delayed so as to entitle the Claimants to interest? If so, by how much, and what rate of interest should be applied?

- Was the implementation of the project delayed so as to entitle the Claimants to escalation? If so, how much?

- Are the Claimants entitled to their claims for attorney's fees and cost of arbitration?

After the presentation of evidence and submission of memoranda by the parties, the Sole Arbitrator rendered a decision of March 30, 1999, the dispositive portion of which reads:

IN VIEW OF THE FOREGOING, award is hereby made in favor of the claimants sentencing the respondent to pay the claimants the amount of P3,492,713 for A & E services performed and completed for and accepted by DOH. This amount shall earn interest at 6% per annum from the date of this award until this decision becomes

final. Thereafter, the principal and the interest accrued as of such time shall earn interest at 12% per annum.

The claim for escalation is denied. No award as to attorney's fees and costs.

SO ORDERED.[24]

Petitioner elevated the case to the Court of Appeals via petition for review under Rule 43 of the Rules of Court, docketed as CA-G.R. No. 52538,[25] citing the following grounds in support thereof: (a) the CIAC has no jurisdiction to hear and decide Case No. 31-98; (b) the Sole Arbitrator acted with grave abuse of discretion amounting to lack or excess of jurisdiction when, despite absence of factual and legal basis, he awarded to private respondents the monetary award of P3,492,713 for A & E services, with interest at 6% per annum from the date of award until the decision becomes final, and at 12% on the principal and accrued interest thereafter; and (c) the Sole Arbitrator exceeded his powers and was partial to petitioner.

By Resolution of May 19, 1999, the Court of Appeals dismissed the petition for having been filed out of time.[26]

Meanwhile, on May 31, 1999, the Sole Arbitrator, acting on private respondents' Motion for Execution which was filed soon after his decision as promulgated, directed the issuance of a writ of execution.[27]

On June 10, 1999, the Office of the Solicitor General (OSG), counsel for petitioner, filed a Motion for Reconsideration of the Court of Appeals' Resolution dated May 19, 1999[28] which was, by Resolution of June 29, 1999, denied, the appellate court noting that no Motion for Extension to file petition for review was received prior to the filing of the petition for review.[29]

Petitioner subsequently filed on July 8, 1999 through the OSG, another petition before the Court of Appeals under Rule 65 of the Rules of Court with urgent prayer for the issuance of a Temporary Restraining Order and/or a Writ of Preliminary Injunction, docketed as CA-G.R. No. 53632,[30] assailing the Sole Arbitrator's Order dated May 31, 1999 directing the issuance of a writ of execution of the March 30, 1999 decision, as well as the Writ of Execution and the Order denying petitioner's motion for reconsideration of the Order dated May 31, 1999, upon the following grounds: the petition questioning the Sole Arbitrator's decision subject of the assailed order dated May 31, 1999 was still pending with the Court of Appeals; the CIAC has no jurisdiction to hear and decide Case No. 31-98; and "government funds and properties may not be seized under writs of execution or garnishment to satisfy such judgments," following *Commissioner of Public Highways v. San Diego*[31] and *Republic v. Villazor*. [32]

On July 16, 1999, the OSG filed a Motion for Reconsideration of the appellate court's Resolution of June 29, 1999 but it was, by Resolution of June 29, 1999, denied.

By Resolution issued on July 20, 1999, the Court of Appeals required private respondents to comment on petitioner's second petition.[33] On even date, the OSG filed a motion for the issuance of a temporary restraining order and/or writ of preliminary injunction[34] to restrain the enforcement of the writ of execution, which motion was, by Resolution of July 23, 1999, granted.

On July 27, 1999, the Court of Appeals issued a resolution in the first petition granting petitioner's Motion for Reconsideration and accordingly reinstating said first petition. By the same Resolution, private respondents were directed to file their comment[35] thereon.

The two petitions were later consolidated on motion of the OSG.

Following the filing by private respondents of their Comments on the two petitions, the Court of Appeals, by the assailed consolidated decision dated June 20, 2000, affirmed the decision of the Sole Arbitrator, it finding that the CIAC, which has original and exclusive jurisdiction over the dispute pursuant to Executive Order No. 1008,[36]

did not commit grave abuse of discretion amounting to lack or excess of jurisdiction in the promulgation of its assailed decision, the same being well-supported by evidence and it containing a just interpretation and application of the provisions of the consultancy agreements.[37]

The Court of Appeals having denied petitioner's Motion for Reconsideration[38] for being "barren of merit,"[39] petitioner now comes before this Court on petition for review by certiorari under Rule 45 on the following assigned errors:

I

THE COURT OF APPEALS ERRED IN NOT FINDING THAT THE CLAIMS FILED BY RESPONDENT C.V. CANCHELA WERE PREMATURE

II

THE COURT OF APPEALS ERRED IN HOLDING THAT THE MONETARY AWARD BY RESPONDENT ARBITRATOR WAS IN ACCORD WITH THE TENOR OF THE AGREEMENT AS THERE WAS NO BASIS AT ALL FOR THE AWARD THEREOF

Petitioner asserts that the claims of private respondents are premature as they failed to obtain the decision of the Secretary of Health prior to arbitration, a mandatory requirement under Article 12 of the Agreements.[40] But even granting that the claims were ripe for arbitration, petitioner asserts that the CIAC should have dismissed the petition on the ground that the State is immune from suits, the Agreements, being to promote the health and well-being of the citizens, having been entered into pursuant to the State's sovereign and governmental power.

With respect to the monetary award, petitioner contends that private respondents are only entitled to the A & E services it rendered in the amount of P2,749,960.40 which is 6% of the total cost of the project, taking into account the deletion of the provision on construction supervision; and no interest on the principal is due as it did not incur any delay and the Agreements contained no express stipulation on interest.

Private respondents, on the other hand, counter that, as correctly held by the Court of Appeals and the Sole Arbitrator, they did not fail in their duty to go through the mode of settling their claims for payment as stipulated in the Agreements and that the records clearly establish the factual and legal bases for the award in their favor.

In compliance with the Resolution[41] of this Court requiring the parties to submit their respective memoranda, petitioner filed its Memorandum[42] raising for the very first time the argument that the Agreements are void from the beginning for failure to include therein a certification of availability of funds which is required under existing law. As such, petitioner concludes that the consultancy fees cannot be based on the project fund allocation but on the basis of the reasonable value or on the principle of quantum meruit.

Petitioner thus additionally prays that the Sole Arbitrator's Decision be nullified.

As reflected above, the failure of the respective chief accountants to issue a certification of availability of funds for respondents' services subject of the Agreements was not raised before the CIAC or the Court of Appeals. It is settled that an issue which was neither averred in the complaint nor raised during the trial cannot be raised for the first time on appeal as it would be offensive to the basic rules of fair play, justice and due process,[43] save on exceptional circumstances.[44] The paramount and overriding public policy is that no money shall be paid out of the Treasury except upon an appropriation made by law.[45] That public funds are involved in the present controversy thus justifies a relaxation of technical rules of procedure in order to serve the demands of substantial justice.[46]

An inquiry into the fundamental issue of nullity of the Agreements is then warranted to determine if petitioner

duly observed the constitutional prescription for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of public funds and properties.[47]

Proceeding from the foregoing consideration, the Court finds merit in the petition.

The Agreements, it bears noting, expressly stated that payments arising therefrom shall be "subject to the usual accounting and auditing rules and regulations." [48] Being government contracts, they are governed and regulated by special laws, failure to comply with which renders them void.

P.D. 1445 (The Auditing Code of the Philippines) provides that no contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor [49] and unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and the auditor who verified it shall be attached to and become an integral part of the proposed contract. [50] Any contract entered into contrary to the foregoing requirements is void. [51]

E.O. 292 (The Administrative Code of 1987) provides too that no funds shall be disbursed without first securing the certification of a government agency's chief accountant or head of the accounting unit as to the availability of funds. [52] The issuance of such certification is thus a condition sine qua non to entering into any contract or incurring any obligation that may be chargeable against the authorized allotment in any department, office or agency. Unless the certification is issued, the contract can not be considered final or binding. [53]

The formalities expressly required by the Auditing Code of the Philippines and The Administrative Code of 1987 not having been complied with, the subject three Agreements are null and void from the very beginning. The signatures of the chief accountants as instrumental witnesses do not constitute substantial compliance with the explicit requirements of said Codes. As *Melchor v. Commission on Audit* [54] teaches, the certification, not the accountant's signature as contract witness, is "the basic and more important validating document," and "the more reliable indicium of fund availability," notwithstanding paragraph 2 of Letter of Instructions No. 968 [55] (LOI No. 968) which considers the signature of the chief accountant as itself constituting a certification that funds are indeed available. [56] For LOI No. 968, being an administrative issuance, must yield to the explicit provisions of The Auditing Code of the Philippines and Revised Administrative Code of 1987. [57]

Even if each of the Agreements did not incorporate the provision calling for compliance with the above-said Codes, the provisions thereof, as well as those of the 1987 Constitution and LOI No. 968, must be deemed to form part of, and co-exist with, the Agreements. Applicable peremptory provisions of law of this nature, affecting as they do public policy or impressed as they are with public interest, are held to be written into the contract. [58]

The illegality of the subject Agreements proceeds, it bears emphasis, from an express declaration or prohibition by law, [59] not from any intrinsic illegality. As such, the Agreements are not illegal per se [60] and the party claiming thereunder may recover what had been paid or delivered. [61]

The Court thus finds that private respondents are entitled to be compensated for the services they actually performed for the benefit of petitioner, as shown by petitioner's acceptance and use [62] of the complete Contract or Bid Documents including the A & E Design Plans and Technical Specifications and the Detailed Cost Estimates for each project that private respondents promptly submitted, as in fact petitioner itself recommends that private respondents be paid therefor.

The compensation must, however, exclude services for "periodic visits" which the records irrefutably show not to

have been rendered.

With respect to the stipulation in each of the Agreements that private respondents' professional fees would be 7.5% of the project fund allocation, which was amended to 6% of the project contract cost, the same patently contravenes Section 525 of the Government Accounting and Auditing (GAA) Manual directing that fees for architectural, engineering design, and similar professional services should be fixed in monetary or peso amounts, instead of as percentage of the project cost.

Section 525 of GAA Manual provides:

Sec. 525. Contract fees for architectural, engineering design, and similar professional services. – Professional fees for architectural, engineering design and similar professional services shall be stipulated in the contract in fixed monetary or peso amounts instead of as percentage of the project cost. Professional fees in terms of percent of the project cost is inconsistent with our national goal of economy in fiscal operations because the percentage fee motivates the architect or designer to design a project so as to maximize its cost since his fees will be computed as a direct proportion to the resulting cost (COA Cir. 82-191, July 5, 1982). (Emphasis and italics supplied)

Thus, on top of the chief accountants' unexplained failure to issue the requisite certificates of availability of funds[63] and the unjustified omission of the chiefs of hospital to secure such certification before even entering into the Agreements with private respondents, these officers failed to heed the guidelines embodied in above-quoted Section 525 of the GAA Manual. The records do not show any explanation for these lapses.

Paragraph 2 of LOI 968 provides:

- It shall be the responsibility of the Chief Accountant to verify the availability of funds, as duly evidenced by programmed appropriations released by the Ministry of the Budget and received by the agency, from which such contract shall be ultimately payable. (Emphasis supplied)

And Book VI, Chapter 5, Section 40 of the Revised Administrative Code of 1987 provides:

SECTION 40. Certification of Availability of Funds. — No funds shall be disbursed, and no expenditures or obligations chargeable against any authorized allotment shall be incurred or authorized in any department, office or agency without first securing the certification of its Chief Accountant or head of accounting unit as to the availability of funds and the allotment to which the expenditure or obligation may be properly charged.

No obligation shall be certified to accounts payable unless the obligation is founded on a valid claim that is properly supported by sufficient evidence and unless there is proper authority for its incurrence. xxx (Emphasis supplied)

As the immediately-quoted provisions of law mandate, the issuance of a certification that funds are available is a legal duty imposed on the chief accountant or the head of the accounting unit. And ascertainment that such certification exists prior to entering into any government contract or incurring any obligation chargeable against public funds is a responsibility which devolves on the officer concerned.

For their failure to discharge their duties under the law, The Revised Administrative Code of 1987 provides that the officer or officers entering into the contract shall be liable to the Government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties.[64]

On the other hand, COA Circular No. 76-34[65] directs the COA to call the attention of management, within five days from receipt of a copy of the contract, any defects or deficiencies therein and to suggest corrective measures as appropriate and warranted to facilitate the processing of the claim upon presentation. The records do not show that COA complied with said directive. It was thus negligent.[66]

The Court believes, however, that declaring the individual officers of petitioner who entered into the Agreements personally liable for the unpaid professional fees due to private respondents would be highly unjust, the government having already received and accepted the benefits of the services rendered. En passant, it is, however, non sequitor to let these officers go scot-free from their negligence.

Since the questioned Agreements are null and void for want of the requisite covering certificates of appropriation, the teachings in *Eslao v. Commission on Audit*[67] and in *Royal Trust Construction v. Commission on Audit*[68] must be heeded.

In *Eslao*, this Court, directed payment to the contractor on a quantum meruit basis despite the failure to undertake a public bidding, it holding that "to deny payment to the contractor of the two buildings which are almost fully completed and presently occupied by the university would be to allow the government to unjustly enrich itself at the expense of another."

In *Royal Trust*, this Court, in the interest of substantial justice and equity, allowed payment to the contractor on a quantum meruit basis despite the absence of a written contract and a covering appropriation.

In the case at bar then, the nullity of the herein Agreements notwithstanding, the ends of substantial justice and equity will be better served if payment to private respondents for their consultancy services is allowed on a quantum meruit basis.

The measure of recovery under the principle of quantum meruit should relate to the reasonable value of the services performed,[69] taking into account the standard of practice in the profession, the architectural and engineering skills of private respondents, and their professional expertise and standing.[70]

Respecting petitioner's argument that the State is immune from suit, the same deserves scant consideration. To sustain the argument would not only perpetuate a grave injustice on private respondents who performed their services in good faith and were given the run-around for over eight years, but would sanction as well unjust enrichment on the part of the State.

Such conduct by petitioner and its officers, in addition, derogates against the salutary policies enunciated in Presidential Decree No. 1746 "CREATING THE CONSTRUCTION INDUSTRY AUTHORITY OF THE PHILIPPINES (CIAP)"[71] and E.O. 1008 "CONSTRUCTION INDUSTRY ARBITRATION LAW." [72] As expressed therein, these statutes contain provisions for the promotion of the healthy partnership between the government and the private sector and encourage the optimum development and growth of the local construction industry.

As *EPG Construction Company v. Vigilar*[73] holds, "this Court – as the staunch guardian of the citizens' rights and welfare – cannot sanction an injustice so patent on its face, and allow itself to be an instrument in the perpetration thereof. Justice and equity sternly demand that the State's cloak of invincibility against suit be shred in this particular instance, and that petitioners-contractors be duly compensated – on the basis of quantum meruit – for construction done on the public works housing project." [74]

In light of the foregoing discussions, addressing the question of jurisdiction and other collateral issues raised in the petition is rendered unnecessary.

WHEREFORE, the petition is GRANTED. The Owner-Consultant Agreements entered into between petitioner Department of Health, through the respective chiefs of hospitals, and private respondents are declared null and void ab initio.

The assailed consolidated decision of the Court of Appeals dated June 28, 2000 and its Resolution dated

November 23, 2001 in CA-G.R. SP Nos. 52538 and 53632 are REVERSED AND SET ASIDE.

The Commission on Audit is hereby directed to determine and ascertain with dispatch, on a quantum meruit basis, the total compensation due to private respondents for the performance of consultancy services and to allow payment thereof upon the completion of said determination.

SO ORDERED.

Corona, and Garcia, JJ., concur.

Panganiban, (Chairman), J., No. part. former law partner of the sole assetrator.

Sandoval-Gutierrez, J., on leave.

[1] RULES OF COURT, Rule 45.

[2] CIAC Case No. 31-98 dated March 30, 1999; penned by the Sole Arbitrator, Custodio O. Parlade.

[3] Rollo at 85 to 98.

[4] Id. at 99 to 112.

[5] Id. at 113 to 126.

[6] CIAC Case No. 31-98 Records, Terms of Reference.

[7] Rollo at 90.

[8] Id. at 104.

[9] Id. at 118.

[10] Id. at 97, 111 and 125.

[11] Id. at 417.

[12] CIAC Case No. 31-98 Records, Exhibits "J", "K" and "L".

[13] Rollo at 90, 104 and 118; Vide also CIAC Case No. 31-98 Records, Terms of Reference dated January 11, 1999, as amended.

[14] Rollo at 127 to 130; CIAC Case No. 31-98 Records, Annex "E".

[15] Rollo at 129.

[16] Id. at 128.

[17] Id. at 131 to 133.

[18] CA-G.R. SP No. 52538 Records at 35.

[19] CIAC Case No. 31-98 Records, Exhibits "O", "P", "R", "S" and "T".

[20] ARTICLE 12. DISPUTES ARBITRATION AND TERMINATION

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. xxx

[21] CIAC Case No. 31-98 Records, Letter dated December 7, 1998.

[22] CA-G.R. SP No. 53632 Records at 129 to 132.

[23] Dated January 11, 1999; CIAC Case No. 31-98 Records; later amended to correct certain typographic errors.

[24] Rollo at 188.

[25] CA-G.R. SP No. 52538 Records at 1.

[26]Id. at 142.

[27]CA-G.R. SP No. 53632 Records at 037 to 038.

[28]CA-G.R. SP No. 52538 Records at 143.

[29] Id. at 150.

[30]CA-G.R. SP No. 53632 Records at 1.

[31] 31 SCRA 616 (1970).

[32] 54 SCRA 83 (1973).

[33]CA-G.R. SP No. 53632 Records at 159.

[34] Id. at 160.

[35] CA-G.R. SP No. 52538 Records at 163.

[36] Dated February 4, 1985, otherwise known as the "Construction Industry Arbitration Law."

[37]Rollo at 13.

[38]CA-G.R. SP No. 52538 Records at 288.

[39] Rollo at 84.

[40] Vide note 20.

[41] Dated November 25, 2002; Rollo at 345.

[42] Dated July 1, 2003; Rollo at 403.

[43] Matienzo v. Servidad, 107 SCRA 276 [1981].

[44]Casolita et al. v. Court of Appeals et al., 275 SCRA 257,258 [1997].

[45] CONST. Art. VI, Sec. 29, par. 1.

[46] Republic of the Philippines v. Sandiganbayan et al., 240 SCRA 376, 472[1995].

[47]CONST. Art. IX (D), Sec. 2, par. 2.

[48]Vide note 16.

[49] Pres. Decree No. 1445 (1978), Sec. 85 reads:

SECTION 85. Appropriation before entering into contract. — (1) No contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure.

(2) Notwithstanding this provision, contracts for the procurement of supplies and materials to be carried in stock may be entered into under regulations of the Commission provided that when issued, the supplies and materials shall be charged to the proper appropriation account.

[50] Pres. Decree No. 1445 (1978), Sec. 86 reads:

SECTION 86. Certificate showing appropriation to meet contract. — Except in the case of a contract for personal service, for supplies for current consumption or to be carried in stock not exceeding the estimated consumption for three months, or banking transactions of government-owned or controlled banks no contract involving the expenditure of public funds by any government agency shall be entered into or authorized unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract, and the sum so certified shall not thereafter be available for expenditure for any other purpose until the obligation of the government agency concerned under the contract is fully extinguished; Vide also E.O. 292, Book VI, Chapter 5, Sec. 40.

SECTION 40. Certification of Availability of Funds. — No funds shall be disbursed, and no expenditures or obligations chargeable against any authorized allotment shall be incurred or authorized in any department, office or agency without first securing the certification of its Chief Accountant or head of accounting unit as to the availability of funds and the allotment to which the expenditure or obligation may be properly charged.

No obligation shall be certified to accounts payable unless the obligation is founded on a valid claim that is properly supported by sufficient evidence and unless there is proper authority for its incurrence. Any certification for a non-existent or fictitious obligation and/or creditor shall be considered void. The certifying official shall be dismissed from the service, without prejudice to criminal prosecution under the provisions of the Revised Penal Code. Any payment made under such certification shall be illegal and every official authorizing or making such payment, or taking part therein or receiving such payment, shall be jointly and severally liable to the government for the full amount so paid or received.

[51] Sec. 87 of Pres. Decree No. 1445 (1978) reads:

SECTION 87. Void contract and liability of officer. — Any contract entered into contrary to the requirements of the two immediately preceding sections shall be void, and the officer or officers entering into the contract shall be liable to the government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties; (Emphasis supplied)

Vide also E.O. 292, Book V, Title 1, Sub-Title B, Chapter 7, Sec. 47 reads:

SECTION 47. Certificate Showing Appropriation to Meet Contract. — Except in the case of a contract for personal service, for supplies for current consumption or to be carried in stock not exceeding the estimated consumption for three (3) months, or banking transactions of government-owned or controlled banks, no

contract involving the expenditure of public funds by any government agency shall be entered into or authorized unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current calendar year is available for expenditure on account thereof, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and auditor who verified it, shall be attached to and become an integral part of the proposed contract, and the sum so certified shall not thereafter be available for expenditure for any other purpose until the obligation of the government agency concerned under the contract is fully extinguished.

[52] E.O. 292, Book VI, Chapter 5, Sec. 40.

[53] Vide Letter of Instructions No. 767 dated November 16, 1978, "Directing the Improvement of Budget Execution and Cash Operations in the National Government." Paragraph 6 reads:

6. No Head of Ministry/Bureau/Office/Agency or other official shall enter into a Contract unless funds are available for the purpose, duly certified to by the Chief Accountant as being available from allotments actually released by the Ministry of the Budget. Neither shall private contractors be allowed by any government agency to undertake work "at their own risk." Contracts shall not be considered as final or binding unless a certification of funds availability is issued. (*Italics supplied*)

[54] 200 SCRA 704 [1991].

[55] Dated December 17, 1979.

[56] Paragraph 2 of LOI 968 reads in toto:

2. It shall be the responsibility of the Chief Accountant to verify the availability of funds, as duly evidenced by programmed appropriations released by the Ministry of the Budget and received by the agency, from which such contract shall be ultimately payable. His signature shall be considered as constituting a certification to that effect. (*Italics supplied*)

[57] Vide *Conte et al., v. COA*, G.R. No. 116422 dated November 4, 1996, where the Court declared that:

It is doctrinal that in case of conflict between a statute and an administrative order, the former must prevail. A rule or regulation must conform to and be consistent with the provisions of the enabling statute in order for such rule or regulation to be valid. The rule-making power of a public administrative body is a delegated legislative power, which it may not use either to abridge the authority given it by the Congress or the Constitution or to enlarge its power beyond the scope intended. Constitutional and statutory provisions control with respect to what rules and regulations may be promulgated by such a body, as well as with respect to what fields are subject to regulation by it. It may not make rules and regulations which are inconsistent with the provisions of the Constitution or a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute. (*Italics supplied*)

[58] *General Milling Corporation v. Torres*, 196 SCRA 215 (1991); *Pakistan International Airlines v. Ople*, 190 SCRA 90 [1990]; *Commissioner of Internal Revenue v. United States Lines Company*, 135 SCRA 175, 181-182 (1985).

[59] CIVIL CODE, Art. 1409, par. 7. Art. 1409 provides:

ARTICLE 1409. The following contracts are inexistent and void from the beginning:

(1) Those whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy;

- (2) Those which are absolutely simulated or fictitious;
- (3) Those whose cause or object did not exist at the time of the transaction;
- (4) Those whose object is outside the commerce of men;
- (5) Those which contemplate an impossible service;
- (6) Those where the intention of the parties relative to the principal object of the contract cannot be ascertained;
- (7) Those expressly prohibited or declared void by law.

These contracts cannot be ratified. Neither can the right to set up the defense of illegality be waived.

[60] EPG Construction v. Vigilar, 354 SCRA 566 [2001].

[61] CIVIL CODE, Art. 1416, which reads:

When the agreement is not illegal per se but is merely prohibited, and the prohibition by the law is designed for the protection of the plaintiff, he may, if public policy is thereby enhanced, recover what he has paid or delivered.

[62] Rollo at 180 and 271.

[63] Vide note 54.

[64] Book V, Title 1, Sub-Title B, Chapter 7, Sec. 48 reads:

SECTION 48. Void Contract and Liability of Officer. — Any contract entered into contrary to the requirements of the two (2) immediately preceding sections shall be void, and the officer or officers entering into the contract shall be liable to the Government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties.

[65] Dated July 15, 1976.

[66] COA's only action was when it disallowed the amount of P900,000.00 as the excess of the estimated cost for the Bacolod Project; Vide CIAC Case No. 31-98 Records, Exhibit "1" and reiterated in petitioner's Answer dated January 21, 1999.

[67] 195 SCRA 730 [1991].

[68] G.R. No. 84202; Resolution dated November 22, 1988.

[69] Francisco S. Tantuico, Jr., STATE AUDIT CODE OF THE PHILIPPINES, ANNOTATED 473 (1st Ed., 1982).

[70] Ibid at 480.

[71] Dated November 28, 1980; the "Whereas" clauses state:

WHEREAS, the construction industry constitutes an important segment of the industrial sector and contributes significantly to the gross national product of the Philippines;

WHEREAS, construction is now a major industry, accounting for more than five hundred thousand workers and providing livelihood to more than three million Filipinos;

WHEREAS, the construction industry has begun to venture into international markets, generating foreign exchange and providing greater employment to Filipino workers;

WHEREAS, the orderly growth and development of the construction industry and the upgrading of the capability of construction contractors are in consonance with national interest and will benefit both public and private sector;

WHEREAS, the continued growth and development of the construction industry requires an increasing number of skilled construction workers; and

WHEREAS, such growth and development have been hampered by the lack of cohesive government policies and the absence of a central agency to deal with the problems of the industry and to coordinate with other government agencies on matters affecting the industry.

[72] Vide note 36; The "Whereas" clauses read:

WHEREAS, the construction industry provides employment to a large segment of the national labor force and is a leading contributor to the gross national product;

WHEREAS, it is of vital necessity that continued growth towards national goals shall not be hindered by problems arising from, or connected with, the construction industry;

WHEREAS, there is a need to establish an arbitral machinery to settle to such disputes expeditiously in order to maintain and promote a healthy partnership between the government and the private sector in the furtherance of national development goals;

WHEREAS, Presidential Decree No. 1746 created the Construction Industry Authority of the Philippine (CIAP) to exercise centralized authority for the optimum development of the construction industry and to enhance the growth of the local construction industry xxx

[73] Vide note 60.

[74] Ibid at 576.

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