

[G.R. No. 131367, August 31, 2000]

**HUTCHISON PORTS PHILIPPINES LIMITED, PETITIONER, VS.
SUBIC BAY METROPOLITAN AUTHORITY, INTERNATIONAL
CONTAINER TERMINAL SERVICES INC., ROYAL PORT SERVICES
INC. AND THE EXECUTIVE SECRETARY, RESPONDENTS.**

D E C I S I O N

YNARES-SANTIAGO, J.:

On February 12, 1996, the Subic Bay Metropolitan Authority (or SBMA) advertised in leading national daily newspapers and in one international publication,^[1] an invitation offering to the private sector the opportunity to develop and operate a modern marine container terminal within the Subic Bay Freeport Zone. Out of seven bidders who responded to the published invitation, three were declared by the SBMA as qualified bidders after passing the pre-qualification evaluation conducted by the SBMA's Technical Evaluation Committee (or SBMA-TEC). These are: (1) International Container Terminal Services, Inc. (or ICTSI); (2) a consortium consisting of Royal Port Services, Inc. and HPC Hamburg Port Consulting GMBH (or RPSI); and (3) Hutchison Ports Philippines Limited (or HPPL), representing a consortium composed of HPPL, Guoco Holdings (Phils.), Inc. and Unicol Management Services, Inc. All three qualified bidders were required to submit their respective formal bid package on or before July 1, 1996 by the SBMA's Pre-qualification, Bids and Awards Committee (or SBMA-PBAC).

Thereafter, the services of three (3) international consultants^[2] recommended by the World Bank for their expertise were hired by SBMA to evaluate the business plans submitted by each of the bidders, and to ensure that there would be a transparent and comprehensive review of the submitted bids. The SBMA also hired the firm of Davis, Langdon and Seah Philippines, Inc. to assist in the evaluation of the bids and in the negotiation process after the winning bidder is chosen. All the consultants, after such review and evaluation unanimously concluded that HPPL's Business Plan was "far superior to that of the two other bidders."^[3]

However, even before the sealed envelopes containing the bidders' proposed royalty fees could be opened at the appointed time and place, RPSI formally protested that ICTSI is legally barred from operating a second port in the Philippines based on Executive Order No. 212 and Department of Transportation and Communication (DOTC) Order 95-863. RPSI thus requested that the financial bid of ICTSI should be set aside.^[4]

Nevertheless, the opening of the sealed financial bids proceeded "under advisement" relative to the protest signified by RPSI. The financial bids, more particularly the proposed royalty fee of each bidder, was as follows:

ICTSI -----US\$57.80 TEU

HPPL -----US\$20.50 TEU

The SBMA-PBAC decided to suspend the announcement of the winning bid, however, and instead gave ICTSI seven (7) days within which to respond to the letter-protest lodged by RPSI. The HPPL joined in RPSI's protest, stating that ICTSI should be disqualified because it was already operating the Manila International Container Port (or MICP), which would give rise to inevitable conflict of interest between the MICP and the Subic Bay Container Terminal facility.^[5]

On August 15, 1996, the SBMA-PBAC issued a resolution rejecting the bid of ICTSI because "said bid does not comply with the requirements of the tender documents and the laws of the Philippines." The said resolution also declared that:

RESOLVED FURTHER, that the winning bid be awarded to HUTCHISON PORTS PHILIPPINES LIMITED (HPPL) and that negotiations commence immediately with HPPL (HUTCHISON) with a view to concluding an acceptable agreement within 45 days of this date failing which negotiations with RPSI (ROYAL) will commence with a view to concluding an acceptable agreement within 45 days thereafter failing which there will be declared a failure of bids.^[6] (Underscoring supplied)

The following day, ICTSI filed a letter-appeal with SBMA's Board of Directors requesting the nullification and reversal of the above-quoted resolution rejecting ICTSI's bid while awarding the same to HPPL. But even before the SBMA Board could act on the appeal, ICTSI filed a similar appeal before the Office of the President.^[7] On August 30, 1996, then Chief Presidential Legal Counsel (CPLC) Renato L. Cayetano submitted a memorandum to then President Fidel V. Ramos, containing the following recommendations:

We therefore suggest that the President direct SBMA Chairman Gordon to consider option number 4 – that is to re-evaluate the financial bids submitted by the parties, taking into consideration all the following factors:

1. Reinstate ICTSI's bid;
2. Disregard all arguments relating to "monopoly";
3. The re-evaluation must be limited to the parties' financial bids.
 - 3.1 Considering that the parties' business have been accepted (passed), strictly follow the criteria for bid evaluation provided for in pars. (c) and (d), Part B (1) of the Tender Document.
4. In the re-evaluation, the COA should actively participate to determine which of the financial bids is more advantageous.
5. In addition, all the parties should be given ample opportunity to elucidate or clarify the components/justification for their respective financial bids in order to ensure fair play and transparency in the proceedings.
6. The President's authority to review the final award shall remain."^[8] (Underscoring supplied)

The recommendation of CPLC Cayetano was approved by President Ramos, and a copy of President Ramos' handwritten approval was sent to the SBMA Board of Directors. Accordingly, the SBMA Board, with the concurrence of representatives of the Commission on Audit, agreed to focus the reevaluation of the bids in accordance with the evaluation criteria and the detailed components contained in the Tender Document, including all relevant information gleaned from the bidding documents, as well as the reports of the three international experts and the consultancy firm hired by the SBMA.

On September 19, 1996, the SBMA Board issued a Resolution, declaring:

NOW, THEREFORE, IT IS HEREBY RESOLVED that the bid that conforms to the Invitation to Tender, that has a realistic Business Plan offering the greatest financial return to SBMA, the best possible offer and the most advantageous to the government is that of HPPL and HPPL is accordingly selected as the winning bidder and is hereby awarded the concession for the operation and development of the Subic Bay Container Terminal.^[9]
(Underscoring supplied)

In a letter dated September 24, 1996, the SBMA Board of Directors submitted to the Office of the President the results of the re-evaluation of the bid proposals, to wit:

SBMA, through the unanimous vote of all the Board Members, excluding the Chairman of the Board who voluntarily inhibited himself from participating in the re-evaluation, selected the HPPL bid as the winning bid, being: the conforming bid with a realistic Business Plan offering the greatest financial return to the SBMA; the best possible offer in the market, and the most advantageous to the government in accordance with the Tender Document.^[10]

Notwithstanding the SBMA Board's recommendations and action awarding the project to HPPL, then Executive Secretary Ruben Torres submitted a memorandum to the Office of the President recommending that another rebidding be conducted.^[11] Consequently, the Office of the President issued a Memorandum directing the SBMA Board of Directors to refrain from signing the Concession Contract with HPPL and to conduct a rebidding of the project.^[12]

In the meantime, the Resident Ombudsman for the DOTC filed a complaint against members of the SBMA-PBAC before the Office of the Ombudsman for alleged violation of Section 3(e) of Republic Act No. 3019 for awarding the contract to HPPL. On April 16, 1997, the Evaluation and Preliminary Investigation Bureau of the Office of the Ombudsman issued a Resolution absolving the members of the SBMA-PBAC of any liability and dismissing the complaint against them, ruling thus:

After an assiduous study of the respective contentions of both parties, we are inclined to hold, as it is hereby held, that there is no proof on record pinpointing respondents to have acted in excess of their discretion when they awarded the bid to HPPL. Records revealed that respondents, in the exercise of their discretion in determining the financial packages offered by the applicants, were guided by the expert report of Davis, Langdon and Seah (DLS) that fairly evaluated which of the bidders tender the greatest financial return to the government. There is no showing that respondents had abused their prerogatives. As succinctly set forth in the

DLS report it stated, among others, that, "in assessing the full financial return to SBMA offered by the bidders, it is necessary to consider the following critical matters:

1. Royalty fees
2. Volume of TEU's as affected by:
 - a. Tariff rates;
 - b. Marketing strategy;
 - c. Port facilities; and
 - d. Efficient reliable services.

With the preceding parameters for the evaluation of bidder's business plan, the respondents were fairly guided by, as they aligned their judgment in congruence with, the opinion of the panel of experts and the SBMA's Technical Evaluation Committee to the effect that HPPL's business is superior while that of ICTSI's appeared to be unrealistically high which may eventually hinder the competitiveness of the SBMA port with the rest of the world. Respondents averred that the panel of World Bank experts noted that ICTSI's high tariff rates at U.S. \$119.00 per TEU is already higher by 37% through HPPL, which could further increase by 20% in the first two (2) years and by 5% hike thereafter. In short, high tariffs would discourage potential customers which may be translated into low cargo volume that will eventually reduce financial return to SBMA. Respondents asserted that HPPL's business plan offers the greatest financial return which could be equated that over the five years, HPPL offers 1.25 billion pesos while ICTSI offers P0.859 billion, and RPSI offers P.420 billion. Over the first ten years HPPL gives P2.430 billion, ICTSI tenders P2.197 billion and RPSI has P1.632 billion.

Viewed from this perspective alongside with the evidence on record, the undersigned panel does not find respondents to have exceeded their discretion in awarding the bid to HPPL. Consequently, it could not be said that respondents' act had placed the government at a grossly disadvantageous plight that could have jeopardized the interest of the Republic of the Philippines.^[13]

On July 7, 1997, the HPPL, feeling aggrieved by the SBMA's failure and refusal to commence negotiations and to execute the Concession Agreement despite its earlier pronouncements that HPPL was the winning bidder, filed a complaint^[14] against SBMA before the Regional Trial Court (RTC) of Olongapo City, Branch 75, for specific performance, mandatory injunction and damages. In due time, ICTSI, RPSI and the Office of the President filed separate Answers-in-Intervention^[15] to the complaint opposing the reliefs sought by complainant HPPL.

Complainant HPPL alleged and argued therein that a binding and legally enforceable contract had been established between HPPL and defendant SBMA under Article 1305 of the Civil Code, considering that SBMA had repeatedly declared and confirmed that HPPL was the winning bidder. Having accepted HPPL's offer to operate and develop the proposed container terminal, defendant SBMA is duty-bound to comply with its obligation by commencing negotiations and drawing up a Concession Agreement with plaintiff HPPL. HPPL also pointed out that the bidding procedure followed by the SBMA faithfully complied with existing laws and rules

established by SBMA itself; thus, when HPPL was declared the winning bidder it acquired the exclusive right to negotiate with the SBMA. Consequently, plaintiff HPPL posited that SBMA should be: (1) barred from conducting a re-bidding of the proposed project and/or performing any such acts relating thereto; and (2) prohibited from negotiating with any party other than plaintiff HPPL until negotiations between HPPL and SBMA have been concluded or in the event that no acceptable agreement could be arrived at. Plaintiff HPPL also alleged that SBMA's continued refusal to negotiate the Concession Contract is a substantial infringement of its proprietary rights, and caused damage and prejudice to plaintiff HPPL.

Hence, HPPL prayed that:

(1) Upon the filing of this complaint, hearings be scheduled to determine the propriety of plaintiff's mandatory injunction application which seeks to order defendant or any of its appropriate officers or committees to forthwith specify the date as well as to perform any and all such acts (e.g. laying the ground rules for discussion) for the commencement of negotiations with plaintiff with the view to signing at the earliest possible time a Concession Agreement for the development and operation of the Subic Bay Container Terminal.

(2) Thereafter, judgment be rendered in favor of plaintiff and against defendant:

2.1. Making permanent the preliminary mandatory injunction it had issued;

2.2. Ordering defendant to implement the Concession Agreement it had executed with plaintiff in respect of the development and operation of the proposed Subic Bay Container Terminal;

2.3. Ordering defendant to pay for the cost of plaintiff's attorney's fees in the amount of P500,000.00, or as otherwise proven during the trial.

Plaintiff prays for other equitable reliefs.^[16]

During the pre-trial hearing, one of the issues raised and submitted for resolution was whether or not the Office of the President can set aside the award made by SBMA in favor of plaintiff HPPL and if so, can the Office of the President direct the SBMA to conduct a re-bidding of the proposed project.

While the case before the trial court was pending litigation, on August 4, 1997, the SBMA sent notices to plaintiff HPPL, ICTSI and RPSI requesting them to declare their interest in participating in a rebidding of the proposed project.^[17] On October 20, 1997, plaintiff HPPL received a copy of the minutes of the pre-bid conference which stated that the winning bidder would be announced on December 5, 1997.^[18] Then on November 4, 1997, plaintiff HPPL learned that the SBMA had accepted the bids of ICTSI and RPSI who were the only bidders who qualified.

In order to enjoin the rebidding while the case was still pending, plaintiff HPPL filed a motion for maintenance of the *status quo*^[19] on October 28, 1997. The said motion was denied by the court *a quo* in an Order dated November 3, 1997, to wit: