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[G.R. No. 217590, March 10, 2020]

PHILIPPINE CONTRACTORS ACCREDITATION BOARD, PETITIONER, V. MANILA WATER COMPANY, INC., RESPONDENT.

D E C I S I O N

GESMUNDO, J.:

In this Petition for Review on *Certiorari*[1] under Rule 45 of the Rules of Court, the Philippine Contractors Accreditation Board (*PCAB; hereinafter referred to as petitioner*) seeks the reversal of the February 24, 2014 Resolution[2] and the February 10, 2015 Order[3] of the Regional Trial Court, Quezon City, Branch 83 (*RTC*) which granted the petition for declaratory relief filed by Manila Water Company, Inc. (*respondent*) and declared Section 3.1, Rule 3 of the Revised Rules and Regulations Governing Licensing and Accreditation of Constructors in the Philippines or the Implementing Rules and Regulations (*IRR*) of Republic Act (*R.A.*) No. 4566[4] void.

The Court is asked to determine the validity of Section 3.1, Rule 3 of the IRR which provides:

> Rule 3 CONTRACTOR'S LICENSE
>
> Section 3.1 License Types
>
> Two types of licenses are hereby instituted and designated as follows:
>
> a) The Regular License
>
> "Regular License" means a license of the type issued to a domestic construction firm which shall authorize the licensee to engage in construction contracting within the field and scope of his license classification(s) for as long as the license validity is maintained through annual renewal; unless renewal is denied or the license is suspended, cancelled or revoked for cause(s).
>
> The Regular License shall be reserved for and issued only to constructor-firms of Filipino sole proprietorship, or partnership/corporation with at least seventy percent (70)* Filipino equity participation and duly organized and existing under and by virtue of the laws of the Philippines.
>
> * Adjusted to 60% under Art. 48 of Chapter III, Book II of the Omnibus Investment Code of 1987.
>
> b) The Special License

"Special License" means a license of the type issued to a joint venture, a consortium, a foreign constructor or a project owner which shall authorize the licensee to engage only in the construction of a single specific undertaking/project. In case the licensee is a foreign firm, the license authorization shall be further subject to condition(s) as may have been imposed by the proper Philippine government authority in the grant of the privilege for him to so engage in construction contracting in the Philippines. Annual renewal shall be required for as long as the undertaking/project is in progress, but shall be restricted to only as many times as necessary for completion of the same.

The following can qualify only for the Special License:

ba) A joint venture, consortium or any such similar association organized for a single specific undertaking/project;

bb) A foreign firm legally allowed by the proper Philippine government authority to undertake construction activities in the Philippines.

bc) A project owner undertaking by himself, sans the service of a constructor, the construction of a project intended for sale, lease, commercial/industrial use or any other income generating purpose.[5]

Antecedents

On July 9, 2012, respondent wrote petitioner seeking accreditation of its foreign contractors to undertake its contracts for the construction of necessary facilities for its waterworks and sewerage system. On November 8, 2012, petitioner replied stating that under Section 3.1 of the IRR, regular licenses are reserved for, and issued only to, contractor-firms of Filipino sole proprietorship or partnership/corporation with at least 60% Filipino equity participation and duly organized and existing, under and by virtue of the laws of the Philippines. Petitioner also pointed out that since the purported construction contracts adverted to by respondent do not appear as Build-Operate-Transfer (*BOT*) contracts and are not foreign assisted/financed projects required to undergo international competitive biddings which are exempted under R.A. No. 7718, then the issuance of the contractor's license in the context of the said law is not warranted.[6]

Thereafter, respondent filed a Petition for Declaratory Relief[7] before the trial court which sought for the determination of the validity of Section 3.1, Rule 3 of the IRR issued by petitioner. Respondent claimed that the said provision is unconstitutional since it creates restrictions on foreign investments, a power exclusively vested on Congress by the Constitution. It also argued that the same provision adds restrictions to R.A. No. 4566 which the latter does not provide.[8]

Petitioner, represented by the Office of the Solicitor General (*OSG*), countered that R.A. No. 4566 grants petitioner the authority to effect classification of contractors and limit the scope of each contractor to those in which he is classified to engage in.

It is their position that the IRR does not discriminate since it does not totally prohibit foreign contractors but, instead, requires them to obtain a special license.[9]

The RTC ruled in favor of respondent and declared Section 3.1, Rule 3 of the IRR void. It held that the same does not merely interpret or implement the law but creates an entirely new restriction that is not found in the law. While Section 17 of R.A. No. 4566 allows the board to effect classifications, the same provision requires the qualification to be reasonable. The trial court believed that the classification effected by the IRR is unreasonable as it imposes additional burdens on foreign entities which are not found in the law or the Constitution.[10]

Petitioner's motion for reconsideration was denied.[11] Hence, this petition.

Petitioner PCAB s contentions

Petitioner contends that it is within its duty and authority to issue the assailed IRR. Section 5 of R.A. No. 4566 expressly confers upon petitioner the duty and power to issue the IRR of the same act. Section 17 of the same law also empowers petitioner to adopt the necessary rules and regulations to effect the classification of contractors. Considering also that the construction business is a highly technical industry, R.A. No. 4566 cannot, by itself, thoroughly address all issues and factors in the issuance of licenses in such industry. Thus, the same can only be effectively regulated by petitioner pursuant to its powers and functions under R.A. No. 4566, which includes the authority to issue the assailed IRR.[12]

Further, the questioned provision of the IRR is consistent with the 1987 Constitution and existing laws, rules, regulations and policies. The IRR does not restrict the construction industry to Filipinos, but merely regulates the issuance of licenses to foreign contractors, subject to reasonable regulatory measures pertinent to their nature of being based outside the Philippines. The questioned provision of the IRR is consistent with the reasonable necessity of ensuring continuous and updated monitoring and regulation of foreign contractors, who are distinct from local contractors since they are not based in the Philippines and thus, may be situated beyond the reach of the government for possible enforcement of the contractor's liability/warranty such as Article 1723 of the Civil Code and Rule 62.2.3.1 of the revised IRR of R.A. No. 9184,[13] among others. Finally, the regulatory measures contained in the IRR are consistent with Section 14, Article XII of the 1987 Constitution, which mandates that practice of all professions in the Philippines be limited to Filipino citizens, save in cases prescribed by law, in relation to R.A. No. 465,[14] as amended by R.A. No. 6511,[15] which in turn considers construction as a profession by including contractors in its list of professionals. The IRR is consistent with the aforesaid provision of the law in as much as the law itself recognizes the distinction between foreign and local contractors.[16]

Respondent Manila Waters arguments

In its Comment,[17] respondent avers that petitioner exceeded its jurisdiction by issuing Section 3.1, Rule 3 of the IRR, as the power to impose nationality requirements in areas of investment is exclusively vested on Congress under Section 10, Article XII of the Constitution and not to a mere administrative agency. The assailed provision of the IRR contradicts and pre-empts statutory provisions as nowhere in R.A. No. 4566 does the legislature authorize petitioner to impose

nationality qualifications in order for an entity to obtain a license in the construction business. It is also the view of respondent that petitioner's stand contradicts the executive policy which already commits the removal of restrictions in the construction industry that are evident in the following:

1) The Department of Justice (*DOJ*) Memorandum dated September 21, 2011 addressed to the Department of Finance (*DOF*) opined that the assailed section of the IRR should be amended in order to align itself with the current policy of liberalizing and rationalizing investments as it has observed that: a) R.A. No. 4566 is silent as to the nationality requirement for constructors with regard to the 60% Filipino equity participation in case of issuance of a license; b) that the construction industry is not among the investment areas or activities which are specifically reserved to Philippine nationals; and c) the Filipino equity requirement is not consistent with the present policy of the state to rationalize investments.[18]

2) The Department of Trade and Industry (*DTI*) and the Construction Industry Authority of the Philippines (*CIAP*) have recognized, in an article posted in its website, that for the local construction industry to be globally competitive, there is a need to strengthen the Philippines' international participation through free trade agreements.[19]

3) The DTI, thru the Philippine Overseas Construction Board (*POCB*), in a consultation meeting with stakeholders from the construction industry, requested for the removal of restrictions in order to establish better ties with the international trade community.[20]

There is also nothing in the Constitution or any law that imposes nationality or Filipino equity requirements with respect to the construction industry. Petitioner insists that contracting for construction is not a profession; rather, construction is an industry. It follows that it is not within the ambit of Section 14, Article XII of the 1987 Constitution in relation to R.A. No. 465, as amended by R.A. No. 6511, that covers individuals and not corporations or firms, which cannot be considered professionals.[21]

The assailed section of the IRR violates Executive Order (*E.O.*) No. 858[22] (now E.O. No. 98)[23] and R.A. No. 7718,[24] as it excludes waterworks and sewerages from the coverage of infrastructure projects. Petitioner likewise has no basis in changing the meaning of R.A. No. 7718 by excluding works that are, in fact, specifically mentioned by the said law and E.O. No. 98, by imposing a requirement that is not supported by any single word or phrase thereof.[25]

Amicus Curiae Brief of the Philippine Competition Commission[26]

The Philippine Competition Commission (*PCC*) moved to intervene as *amicus curiae* in this case, asserting that under the Philippine Competition Act (*PCA*) otherwise known as R.A. No. 10667, from which it owes its existence, it is mandated to issue advisory opinions and guidelines on competition matters and to advocate pro-competitive policies of the government.[27]

The PCC had a different view with the OSG and mainly argues that: 1) the nationality-based restriction imposed by the assailed regulation is a "barrier to entry," and 2) barriers to entry violate the constitutional state policy against unfair competition.[28]

The nationality requirement imposed under the assailed provision of the IRR erects a substantial barrier to the entry of foreign contractors in the construction industry. As a minority participant in the entity, a foreign firm is exposed to the risk of pursuing major management decisions over which it does not have full control. The assailed provision results in a scenario where foreign firms are deterred from investing in the Philippines as they do not have the comfort of having full control and management over their investments, unless they are able to find a reliable local partner.[29]

A survey of data also indicates the restrictiveness of the nationality requirement on foreign firms. Bearing in mind that ease of entry into an industry is a positive sign of competitiveness, the data from petitioner shows that statistics from 2013-2015 indicate that a large majority of the total licenses issued during the period did not automatically translate to the entry of new participants in the construction industry. The contractors undertake major infrastructure projects which facilitate the development of Filipino skills and bring in much needed investment and advanced technology; however, their potential to share these benefits to the entire industry is blunted by their very limited participation. Insofar as the rate of entry of new participants indicating the level of competition within the given industry, the consistently minuscule rate of entry of both foreign firms and new players in the construction industry is quite indicative of how competition in the industry remained relatively stagnant and inert throughout the years. Comparative data also shows that restrictive policies translate to lower levels of foreign direct investments (*FDI*) inflows. These FDI represent investment in production facilities and its significance for developing countries is considerably great. Not only can FDI add to investible resources and capital formation but, more importantly, they are means of transferring production technology, skills, innovative capacity, and organizational and managerial practices between locations, as well as of accessing international marketing networks.[30]

The advantages of lifting the nationality-based restriction in the assailed regulation cannot be overemphasized. Noting the infrastructure backlog in the Philippines, foreign contractors have expressed willingness to help address this concern. Foreign contractors expect to undertake large projects which would involve the application of the newest and most advanced technologies should the restrictions be lifted.[31]

The PCC also points out that the stricter and broader language of Section 19, Article XII of the Constitution provides the legal impetus for nullifying governmental acts that restrain competition. Such acts can range from laws passed by Congress, to rules and regulations issued by administrative agencies, and even contracts entered into by the government with a private party. A more comprehensive competition