

## SEVENTH DIVISION

[ CA-G.R. SP NO. 66055, September 18, 2006 ]

**PIRRA CONSTRUCTION ENTERPRISES, PETITIONER, VS.  
NATIONAL POWER CORPORATION, RESPONDENT.**

**BERSAMIN, L.P., J.:**

Contractor Pirra Construction Enterprises partially appeals by petition for review the award promulgated on June 18, 2001 by the Arbitral Tribunal of the Construction Industry Arbitration Commission (CIAC), decreeing thuswise:

WHEREFORE, premises considered, this Arbitral Tribunal hereby issues the following awards:

1. In favor of Claimant PIRRA CONSTRUCTION ENTERPRISES, represented by its owner, Mr. Artemio Perez, the amount of P1,192,206.17 representing the unpaid value of its accomplished work, to be paid by Respondent NATIONAL POWER CORPORATION, minus the corresponding withholding tax and VAT;
2. In favor of both parties, declaring their contract executed on January 5, 2000 to be mutually rescinded and terminated; and
3. Against both parties, ordering each of them to pay the cost of arbitration in equal shares or amounts.

SO AWARDED.<sup>[1]</sup>

The background follows.

On May 21, 1995, respondent National Power Corporation (NPC) advertised an invitation to bid for the Supply of Labor, Materials, Tools, Equipment and Supervision for the Repainting of Boiler and Mill House and Outdoor Piping of Batangas Coal-Fired Thermal Power Plant Unit No. 1. When only a single bidder was prequalified, a second advertisement was made on July 30, 1995.

On September 5, 1997, the petitioner was among those prequalified. A site inspection of the project was held on November 3, 1997 and a pre-bid conference took place on November 7, 1997.

Again, however, the bidding held on November 28, 1997 resulted in a failure because all the bids submitted were higher than the Approved Agency Estimate (AAE) of NPC.

The bidding for the project was readvertised and another site inspection of the project was undertaken on August 2, 1999. The pre-bid conference was held on August 10, 1999 and the re-bidding was conducted on August 26, 1999 in which the

petitioner took part. Yet, oncemore, the bidding resulted in a failure as all the bids exceeded the AAE.

In the meanwhile, several *addenda* were issued to clarify some provisions of the issued bid documents and to limit the scope of the works of the project.<sup>[2]</sup>

A sealed canvass was subsequently conducted by NPC, for which another site inspection by the bidders was required and undertaken on September 29, 1999.<sup>[3]</sup> A third pre-bid conference was conducted on October 5, 1999, during which the scope of the project was again explained to the prospective bidders. In such occasions, the petitioner actively participated in the discussions.

The bidding was held on October 27, 1999. After the opening of the bids, the petitioner's bid at P4,089,999.98 was considered the lowest complying bid; hence, the petitioner was awarded the project. On the same date, the notice to proceed was issued to and received by the petitioner, the project to be completed within 120 calendar days from such receipt. Upon receipt of the *notice to proceed*, the petitioner mobilized its personnel to commence the project.<sup>[4]</sup>

On January 5, 2000, the parties signed GENCO-1-NPC RCC-99-20.<sup>[5]</sup> The value of the contract was P4,089,999.98.<sup>[6]</sup>

On June 14, 2000, the petitioner submitted its first progress billing for P937,122.71.

In the meanwhile, the repainting and cleaning work on the BCFTPP continued. Adverse weather and other factors prompted the petitioner to request several extensions in the completion of the project. Its requests were duly granted in letters dated June 1, 2000; July 14, 2000; and August 8, 2000.<sup>[7]</sup>

On August 4, 2000, the petitioner wrote to NPC requesting, among others, that the painting of a portion of the project be off-set with alleged excess area it had painted.<sup>[8]</sup> NPC replied through its letter dated August 24, 2000, denying the request due to lack of basis therefor and no excess area to speak of, citing that the Contract was clear in its requiring the painting of the boiler up to elevation 22.504 meters. NPC also thereby reminded the petitioner that the painting works had not been completed and was advised to finish them.<sup>[9]</sup>

On August 14, 2000, the petitioner unilaterally suspended works on the project due to the non-payment of the first billing according to P.D. 1594.<sup>[10]</sup> In a letter dated August 16, 2000, NPC replied that there was no basis for the work suspension and that any delay in the payment of its billing was solely attributable to the petitioner's fault.<sup>[11]</sup>

On August 29, 2000, the petitioner submitted its second progress billing for P3,622,376.24.<sup>[12]</sup> On August 31, 2000, NPC paid the petitioner the amount of P596,350.82 for its first billing.<sup>[13]</sup>

Through its letter dated September 1, 2000,<sup>[14]</sup> the petitioner inquired on the respondent's action on its June 30, 2000 written request for a variation order, citing

additional works requested by the respondent that were not included in the original contract. It also requested payment of the progress billing, complaining that that the partial payment of August 31, 2000 was 34.21% short of its original 57.12% request. It advised NPC that it might seek recourse to the Arbitration Board to settle their disagreement.

The respondent replied by letter dated September 11, 2000, denying payment of the second progress billing and the request for a variation order on the ground that the contract was for a lump-sum bid and for that reason there could be no progress billing. It further stated that there was no basis for the petitioner's claim for extra work done, as the purported extra work was actually within the scope of work defined under TP-01 of the Bid Document. It indicated that it would not offer any objection to the petitioner's intention to bring their contractual disagreement to arbitration.<sup>[15]</sup>

The denial of payment of the second progress billing prompted the petitioner to file on November 29, 2000 its *request for adjudication*, seeking, among others, the payment of P2,685,253.53.

In the preliminary conference held on February 19, 2001, the parties signed the *terms of reference* (TOR) pursuant to the CIAC Rules of Procedure, thereby identifying the following to be the issues for resolution:

1. Was the bid called by Respondent a Lump Sum Bid or a Unit Price Bid?
2. Whether there were extra works performed by the Claimant? If there were, were these duly authorized by Respondent?
3. Whether Respondent is liable to pay such extra works, if any, if so, how much?
4. Is Claimant delayed in the completion of the project? If so, is Respondent entitled to liquidated damages? If so, how much?
5. Who among the parties will shoulder the cost of arbitration?<sup>[16]</sup>

On March 13, 2001 a hearing was conducted at which the parties were required to simultaneously submit their respective memorandum or draft decision by April 16, 2001 and the case would thereafter be deemed submitted for decision.

On June 18, 2001, the CIAC Arbitral Tribunal promulgated its arbitral award, finding the contract to be a unit price contract based on the following reasons: (1) the contract was ambiguous and could be interpreted either as a lump sum contract or a unit price contract; hence, the contract was interpreted as for a unit price bid, considering that it was NPC, being the party that had prepared the contract and had caused such ambiguity, should not be allowed to benefit from the ambiguity; and (2) the inclusion in the contract of the unit prices in a lump sum bid was recognized in the construction industry for the purpose of adjustment of the contract price in case of extra work performed, especially in this case where NPC failed to give an exact measurement of the surface area of the actual area of work, thereby justifying the finding that the contract was a unit price contract.