Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

HEIRS OF DIOSDADO M. MENDOZA, namely: LICINIA V. MENDOZA, PETER VAL V. MENDOZA, CONSTANCIA V. MENDOZA YOUNG, CRISTINA V. MENDOZA FIGUEROA, DIOSDADO V. MENDOZA, JR., JOSEPHINE V. MENDOZA JASA, and RIZALINA V. MENDOZA PUSO, Petitioners,	**G.R. No. 203834** Present: CARPIO, *J.*, Chairperson, BRION, DEL CASTILLO, PEREZ, and PERLAS-BERNABE, *JJ.*
- versus -	
DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS and the DPWH SECRETARY, Respondents.	Promulgated: JUL 09 2014

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DECISION

CARPIO, *J.*:

The Case

Before the Court is a petition for review on certiorari[1] assailing the 20 June 2012 Decision[2] and the 15 October 2012 Resolution[3] of the Court of Appeals in CA-G.R. CV No. 86433. The Court of Appeals set aside the 29 October 2001 Decision[4] of the Regional Trial Court of Manila, Branch 36, in Civil Case No. 90-53649.

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[1] Under Rule 45 of the 1997 Rules of Civil Procedure.

[2] *Rollo*, pp. 26-54. Penned by Associate Justice Remedios A. Salazar-Fernando with Associate Justices Ramon M. Bato, Jr. and Florito S. Macalino, concurring.

[3] Id. at 56-62.

[4] CA *rollo*, pp. 148-162. Penned by Judge Wilfredo D. Reyes.

The Antecedent Facts

The case stemmed from an action for specific performance and damages, with prayer for preliminary injunction, filed by Diosdado M. Mendoza (Mendoza), doing business under the name and style of D' Superior Builders (Superior Builders) against the defendants Department of Public Works and Highways (DPWH), then DPWH Secretary Fiorello R. Estuar (Estuar), Undersecretary Edmundo V. Mir (Mir), Nestor Abarca (Abarca), United Technologies, Inc. (UTI), UTI's President Pedro Templo (Templo) and UTI's Project Manager Rodante Samonte (Samonte). The case was docketed as Civil Case No. 90-53649.

Mendoza was the winning bidder for the construction of the 15-kilometer Madaymen Masala Amsuling Road in Benguet and the engineers' quarters and laboratory, designated as Package VI, of the Highland Agriculture Development Project (HADP). His total bid for materials and labor was ₱16,176,878.58. He was also the winning bidder for the construction of the 15-kilometer barangay roads (Sinipsip-Akiki, Sinipsip-Maalad, and Madaymen) in Benguet, designated as Package IX of the HADP, with a bid of ₱10,527,192.14. The DPWH hired UTI as consultant for Packages VI and IX, under the direct charge of Templo and Samonte.

On 2 March 1989, Mendoza received the Notice to Proceed for Package VI of the HADP. During the pre-construction survey, Mendoza alleged that he discovered that the whole stretch of the 15-kilometer project had no right-of-way, in violation of Ministry Order No. 65. He brought the matter to the attention of the DPWH and UTI but according to him, it was only resolved on 29 November 1989 when the affected landowners and farmers allowed passage at Mendoza's risk. Mendoza alleged that the defendants, except for Estuar, conspired to make it appear that Superior Builders incurred negative slippage of 29% and recommended the forfeiture of the contract.

Mendoza further alleged that as regards Package IX, the DPWH did not execute any contract despite the Superior Builders' compliance with all the post-evaluation requirements. The DPWH also recommended the rebidding of Package IX. Package IX was, in effect, canceled together with the forfeiture of the contract for Package VI. The DPWH blacklisted the Superior Builders from participating in any bidding or entering into any contract with it for a period of one year.

On 2 August 1990, the Regional Trial Court of Manila, Branch 36 (trial court) issued a Temporary Restraining Order enjoining the defendants from rebidding Package VI and from awarding Package IX to another contractor, and to cease and desist from withholding the equipment of Superior Builders.

On 20 August 1990, the DPWH, Estuar, Mir and Abarca filed an opposition to the prayer for the issuance of a preliminary injunction, citing Section 1 of Presidential Decree No. 1818 that the trial court has no jurisdiction to issue a writ of preliminary injunction. They likewise alleged that Superior Builders failed to exhaust its administrative remedies. They further alleged that the owner of the road, Gregorio Abalos (Abalos) issued a certification that he never disallowed passage to Superior Builders' vehicles and equipment and road right-of-way was never a problem. They also alleged that Superior Builders started mobilization from 12 to 15 July 1989 and resumed its operations for one week in December 1989. They also alleged that on 20 November 1989, the Office of the *Sangguniang Panlalawigan* of Benguet passed Resolution No. 1176 recommending the termination of the contract between the DPWH and Superior Builders. They reiterated the allegations in their Opposition in their Answer.

For their part, UTI, Templo and Samonte alleged that Superior Builders had 10 calendar days to commence with the project from the time it received the Notice to Proceed on 2 March 1989 or until 12 March 1989 but it failed to do so. They alleged that Superior Builders only mobilized one bulldozer and one loader out of the 47 units required in the contract. They alleged that at the time of the filing of the case, Superior Builders had only mobilized eight units, a majority of which were not working. They alleged that Superior Builders failed to mobilize sufficient number of materials, equipment and personnel and that by 25 October 1989, it already incurred negative slippage of 27.97% that they were compelled to recommend the termination of the contract for Package VI and rebidding of Package IX.

The Decision of the Trial Court

In its 29 October 2001 Decision, the trial court ruled that the termination of the contract over Package VI and the non-award of Package IX to Superior Builders were arbitrary and unjustified. The trial court ruled that under the original plan, Package VI was inaccessible from the starting point which is a privately-owned road. The trial court ruled that there was no showing of any attempt by the government to secure right-of-way by expropriation or other legal means. The trial court held that Superior Builders could not be faulted for its failure to perform the obligation within the stipulated period because the DPWH made it impossible by its failure to acquire the necessary right-of-way and as such, no negative slippage could be attributed to Superior Builders.

The trial court further ruled that in entering into a contract, the DPWH divested itself of immunity from suit and assumed the character of an ordinary litigant.

The dispositive portion of the trial court's decision reads:

> WHEREFORE, judgment is hereby rendered ordering defendants Department of Public Works and Highway thru its Secretary, United Technologies, Inc. and Rodante Samonte to pay plaintiff Diosdado M. Mendoza, jointly and severally, ₱1,565,317.70 as reimbursement for materials and labor on the accomplishment and ₱1,617,187.86 performance bond forfeited, ₱8,817,926.00 as rental value for eight (8) units of equipment for twenty-six (26) months from December 21, 1989 to January 24, 1992 at ₱339,151.00 per month, with interest at the legal rate until fully paid; ₱300,000.00 for moral damages, ₱150,000.00 for attorney's fees, and costs.
>
> The writ of preliminary injunction earlier issued is declared moot and academic but defendant Department of Public Works and Highways thru its Secretary is ordered to turn over to plaintiff, and the latter is authorized to take delivery of the construction equipment still under the control of the DPWH.
>
> The counterclaim of the private defendants not being substantiated is dismissed.
>
> SO ORDERED.[5]

The DPWH and the DPWH Secretary (respondents before us) appealed from the trial court's decision.

The Decision of the Court of Appeals

In its 20 June 2012 Decision, the Court of Appeals set aside the trial court's decision and dismissed Mendoza's complaint for specific performance and damages for lack of merit.

The Court of Appeals ruled that the DPWH's forfeiture order of Package VI of the HADP as well as the non-award of Package IX to Superior Builders was justified. The Court of Appeals found that Superior Builders incurred a negative slippage of 31.852%, which is double the limit set by the government under DPWH Circular No. 102, series of 1988. Tracing the slippages incurred by Superior Builders, the Court of Appeals declared:

> As early as May 25, 1989, or about two (2) months after the notice to proceed was issued, defendant UTI, the consultant for the government's HADP, issued a *"first warning"* to plaintiff-appellee D' Superior Builders for having already incurred a slippage of 7.648% due to late implementation, with time elapse of 13.80%. Defendant UTI instructed plaintiff-appellee D' Superior Builders to submit a "catch-up" program to

[5] Id. at 161-162.

address the slippage.

Subsequently, on June 25, 1989, plaintiff-appellee D' Superior Builders incurred a slippage of 11.743% with corresponding time elapse of 19.63% (106 days from effectivity of contract) and was given a *"second warning."*

On July 25, 1989, the negative slippage reached 16.32%, with corresponding time elapse of 25.18% (136 days from effectivity of the contract). As a consequence, plaintiff-appellee D' Superior Builders was issued a *"final warning."*

In its August 11, 1989 letter, defendant UTI reminded plaintiff-appellee D' Superior Builders of its previous instructions to bring the construction materials for the engineers' quarters, office, and laboratory. Defendant UTI noted:

> "We could not find reasons why you cannot immediately bring your construction materials at site, 50 kms. from Baguio City, when in fact, there [were] [continuous] deliveries of some construction materials under Contract Package XI, whose site is located 102 kms. from Baguio City."

Thereafter, on September 25, 1989, the negative slippage of plaintiff-appellee D' Superior Builders reached 21.109% with elapsed time of 36.66% (equivalent to 198 calendar days), or already at *"terminal stage"* pursuant to DPWH Circular No. 102. Defendant UTI, thus, urged plaintiff-appellee D' Superior Builders to show positive actions and speed up its operations, otherwise the former would be compelled to recommend the termination of its contract.

The following month, on October 25, 1989, plaintiff-appellee D' Superior Builders' negative slippage reached 27.970%, still at *"terminal stage."* The consultant mentioned several reasons for the slippage, such as: (1) late implementation of construction of the engineers' building, (2) non-implementation of work items due to lack or non-operational equipment as site, and (3) continued absence of plaintiff-appellee's Project Manager.

In November 1989, the negative slippage of plaintiff-appellee D' Superior Builders was already 31.852%, or more than double the limit of what is considered as being at "terminal stage", which is 15%.[6]

Superior Builders' performance prompted the *Sangguniang Panlalawigan* of the Province of Benguet to pass a Resolution on 20 November 1989 recommending the termination of the contract for Package VI that also eventually led to the forfeiture of the contract for Package VI.

The Court of Appeals noted that there were letters and monthly conferences where UTI, through Samonte and UTI's Resident Engineer

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[6] *Rollo*, pp. 39-41. Footnotes omitted.

Federico Vinson, Jr. (Vinson), consistently reminded Superior Builders of its obligations and deficiencies. The Court of Appeals concluded that the delay in the execution of Package VI was due to Superior Builders' delay, particularly its failure to mobilize its personnel and equipment to the project site.

The Court of Appeals ruled that the area where there was a right-of-way problem was only the first 3.2 kilometers of the 15.5-kilometer project. Hence, Superior Builders could have worked on the other areas and the right-of-way issue could not justify the 31.852% negative slippage it incurred.

The Court of Appeals faulted the trial court for skirting the issue on state immunity from suit. The Court of Appeals ruled that there should be a distinction whether the DPWH entered the contracts for Package VI and Package XI in its governmental or proprietary capacity. In this case, the Court of Appeals ruled that the DPWH's contractual obligation was made in the exercise of its governmental functions and was imbued with public interest.

The dispositive portion of the Court of Appeals' decision reads:

> WHEREFORE, premises considered, the appeal is GRANTED. The assailed Decision dated October 29, 2001 of the Regional Trial Court (RTC), National Capital Judicial Region, Branch 36, Manila in Civil Case No. 90-53649 is hereby REVERSED and SET ASIDE. Plaintiff-appellee's complaint for specific performance and damages with prayer for preliminary injunction is hereby DISMISSED for lack of merit. No costs.
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> SO ORDERED.[7]

The heirs of Mendoza, namely, Licinia V. Mendoza, Peter Val V. Mendoza, Constancia V. Mendoza Young, Cristina V. Mendoza Figueroa, Diosdado V. Mendoza, Jr., Josephine V. Mendoza Jasa, and Rizalina V. Mendoza Puso (petitioners in this case) filed a motion for reconsideration, at the same time seeking to substitute Mendoza as the plaintiff-appellee in view of Mendoza's death on 25 April 2005 during the pendency of the case before the Court of Appeals.

In its 15 October 2012 Resolution, the Court of Appeals granted the motion for substitution. In the same resolution, the Court of Appeals denied the motion for reconsideration for lack of merit.

The Court of Appeals ruled that first, petitioners were not denied due process when they were not informed that the case was re-raffled when the original *ponente* inhibited himself from the case. The Court of Appeals ruled that there was no requirement of notification under Section 2(b), Rule III of

[7] Id. at 54.

the Internal Rules of the Court of Appeals (IRCA). Further, the action on the inhibition was attached to the *rollo* and duly paged in compliance with Section 4, Rule V of the IRCA. Second, the Court of Appeals ruled that contrary to petitioners' claim, the issue on the absence of road right-of-way was considered in its 20 June 2012 decision. The Court of Appeals emphasized that under DPWH Circular No. 102, series of 1988, the allowable rate of slippage is only 15%. In this case, Superior Builders reached 31.852% negative slippage and thus, the termination of the contract was justified. The Court of Appeals noted that Abalos issued a certification that he never disallowed the passage of Superior Builders' vehicles and equipment. The Court of Appeals also noted that as early as May 1989, Superior Builders was instructed to carry out road works where there were no right-of-way problems. Third, the Court of Appeals ruled that mere entering into a contract by the government does not automatically amount to a waiver of immunity from suit. The Court of Appeals ruled that in this case, the road construction was in the exercise of the DPWH's governmental functions. The Court of Appeals also ruled that it was established that Superior Builders was at fault and that it exceeded the allowable limit of slippage set by law.

Petitioners came to this Court assailing the 20 June 2012 Decision and 15 October 2012 Resolution of the Court of Appeals.

The Issues

Petitioners raise two issues before us:

(1) Whether the Court of Appeals committed a reversible error in ruling that the forfeiture of the contract in Package VI of HADP and the non-payment of the cost of materials, labor on the accomplishment and the rental value of the heavy equipment were justified; and

(2) Whether the Court of Appeals committed a reversible error in ruling that the DPWH has no juridical personality of its own and that Mendoza's action was a suit against the State.

The Ruling of this Court

We deny the petition.

On Negative Slippages

The first issue raised by petitioners requires a review of the negative slippages incurred by Superior Builders and the reasons for the slippages.

The records of the case showed that Superior Builders incurred the following negative slippages:

1. As of 25 May 1989 – 7.648%
2. As of 25 June 1989 - 11.743%
3. As of 25 July 1989 – 16.32%
4. As of 25 September 1989 - 21.109%
5. As of 25 October 1989 – 27.970%
6. As of November 1989 - 31.852%

Presidential Decree No. 1870, series of 1983 (PD 1870),[8] states:

> 1. Whenever a contractor is behind schedule in its contract work and incur 15% or more negative slippage based on its approved PERT/CPM, the implementing agency, at the discretion of the Minister concerned, may undertake by administration the whole or a portion of the unfinished work, or have the whole or a portion of such unfinished work done by another qualified contractor through negotiated contract at the current valuation price.

Undeniably, the negative slippage incurred by Superior Builders, which reached 31.852%, far exceeded the allowable slippage under PD 1870.

Under Department Order No. 102, series of 1988 (DO 102),[9] the following calibrated actions are required to be done for infrastructure projects that reached certain levels of negative slippage:

> 1. Negative slippage of 5% ("Early Warning" Stage): The contractor shall be given a warning and required to submit a "catch-up" program to eliminate the slippage. The PM/RD/DE[10] shall provide thorough supervision and monitoring of the work.
>
> 2. Negative slippage of 10% ("ICU" Stage): The contractor shall be given a second warning and required to submit a detailed action program on a fortnightly (two weeks) basis which commits him to accelerate the work and accomplish specific physical targets which will reduce the slippage over a defined time period. Furthermore, the contractor shall be instructed to specify the additional input resources – money, manpower, materials, machines, and management – which he should mobilize for this action program. The PM/RD/DE shall exercise closer supervision and meet the contractor every other week to evaluate the progress of work and resolve any problems and bottlenecks.
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> 3. Negative slippage of 15% ("Make-or-Break" Stage): The contractor shall be issued a final warning and required to come up with a more detailed program of activities with weekly physical targets, together

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[8] Authorizing the Government's Take Over by Administration of Delayed Infrastructure Projects or Awarding of the Contract to Other Qualified Contractors, dated 12 July 1983.

[9] Calibrated Actions on Contracts with Negative Slippages, dated 8 November 1988.

[10] Project Managers/Regional Directors/District Engineers.

> with the required additional input resources. On-site supervision shall be done at least once a week. At the same time, the PM/RD/DE shall prepare contingency plans for the termination/rescission of the contract and/or take-over of the work by administration or contract.
>
> 4. Negative slippage beyond 15% ("Terminal" Stage): The PM/RD/DE shall initiate termination/rescission of the contract and/or take-over of the remaining work by administration or assignment to another contractor/appropriate agency. Proper transitory measures shall be taken to minimize work disruptions, e.g., take-over by administration while rebidding is going on.

The discretion of the DPWH to terminate or rescind the contract comes into play when the contractor shall have incurred a negative slippage of 15% or more.[11]

In this case, Superior Builders was warned of its considerable delay in the implementation of the project as early as 29 April 1989[12] when the progress slippage reached 4.534% due to the late implementation of the project. Thereafter, Superior Builders received the first,[13] second[14] and final[15] warnings when the negative slippages reached 7.648%, 11.743% and 16.32%, respectively. By the time the contract was terminated, the negative slippage already reached 31.852% or more than twice the terminal stage under DO 102.

Petitioners claimed that the negative slippages were attributable to the government. Petitioners cited the right-of-way problem because the construction site was privately owned. The construction of the building for the field office laboratory and engineers' quarters was also delayed because it took months for the DPWH to approve the revision of the building layout.

We note that Superior Builders received the Notice to Proceed dated 22 February 1989 on 2 March 1989.[16] The Notice to Proceed stated that "the number of days allowable under [the] contract will be counted from the date [the contractor] commence[s] work or not later than the 8th of March 1989."[17] On 17 April 1989, more than a month after the project was supposed to start, Mendoza wrote Templo that Superior Builders would start the construction of Package VI and that their "Survey Team [would] immediately start the preconstruction survey of the project x x x."[18] In two separate letters dated 27 April 1989, both addressed to Samonte, Mendoza informed UTI that: (1) there was an existing building on the site where the

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11 *Genaro R. Reyes Construction, Inc. v. Court of Appeals*, G.R. No. 108718, 14 July 1994, 234 SCRA 116.
12 Records, Vol. 1, p. 745.
13 Id. at 748.
14 Id. at 86-87.
15 Id. at 91-92.
16 Plaintiff's Folder of Exhibits, Vol. 3, no pagination.
17 Id.
18 Id.

bunkhouse was supposed to be constructed, which had to be cleared and demolished first; and (2) the first five kilometers of Package VI allegedly belonged to private residents who were asking for compensation before they could proceed with the road construction.[19]

The right-of-way problem was confirmed in a letter dated 2 May 1989 sent by Vinson to DPWH Director Heraldo B. Daway of the Cordillera Administrative Region.[20] In a letter dated 9 May 1989 addressed to "The Project Manager," Mendoza requested for the temporary suspension of work effective 22 April 1989 due to the right-of-way problem regarding the first five kilometers of the project.[21] Samonte denied the request in a letter dated 24 May 1989 on the ground that Superior Builders can carry out work in sections without right-of-way conflict. Samonte likewise reminded Superior Builders to mobilize all the required construction resources in order not to prejudice its performance on the project.[22]

Apparently, despite the denial of its request for temporary suspension of work, Superior Builders did not mobilize all the required resources as directed by Samonte. In a letter dated 15 June 1989 to Mir, Mendoza stated that Superior Builders had started the "mobilization of equipment and personnel since last week,"[23] meaning, the mobilization of the construction resources started on the first week of June. However, in a letter dated 24 June 1989, Vinson called the Superior Builders' attention that as of 21 June 1989, it only mobilized one dozer and one loader at the jobsite.[24]

The Minutes of the Meeting dated 7 July 1989[25] showed that Gloria Areniego (Areniego), the Superior Builders' representative, assured the delivery of additional equipment on site "next week" or the second week of July. The minutes also showed that Superior Builders was again advised to start working on the sections not affected by the right-of-way problem.[26] In addition, Samonte asked Areniego for the time when Superior Builders would start the demolition of the building where the engineers' office and quarters would be built. Areniego promised that it would start on July 14.[27] However, Superior Builders still failed to comply, prompting Vinson to send another letter dated 22 July 1989 to Superior Builders, noting that "since the arrival of your One (1) unit Dozer and One (1) unit Loader last 21 June 1989, no other construction equipment had been mobilized on site to date."[28]

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19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Records, Vol. 1, p. 84.
25 Plaintiff's Folder of Exhibits, Vol. 3, no pagination.
26 Id.
27 Id.
28 Records, Vol. 1, p. 85.

The right-of-way problem turned out to affect only the first 3.2 kilometers of the project. However, as the Court of Appeals pointed out, Superior Builders was not able to go beyond the 3.2 kilometers because of the limited equipment it mobilized on the project site. Further, the Court of Appeals noted that Superior Builders' bulldozer broke down after three days of work, proving that Superior Builders had been remiss in its responsibilities as a contractor. In addition, Abalos denied in a certification that he disallowed the passage of Superior Builders' vehicles and equipment on the road within his property from the time of the commencement of the contract in March 1989.[29]

In short, Superior Builders could have proceeded with the project, as it was constantly reminded to do so, but it capitalized on the right-of-way problem to justify its delays.

In a letter[30] dated 2 October 1989 by Bial A. Palaez (Palaez), Provincial Planning and Development Coordinator, addressed to Benguet Provincial Governor Andres R. Bugnosen (Bugnosen), Palaez informed Bugnosen that when he visited the project with Kibungan Mayor Albert Mayamnes on 14 July 1989, they observed the following: (1) Superior Builders only constructed 100 linear meters of road at Masala; (2) there was no sign of work activity; and (3) there were only one bulldozer, one payloader and a fiera on the project site, which were all under repair and not functional. When they visited the project on 31 August 1989, there were no activities and they were not able to meet the project engineer or the workers on the project site. In addition, the construction of the building for engineering purposes had not started as of 27 September 1989. Thus, the Provincial Government of Benguet passed Resolution No. 1176[31] on 20 November 1989 recommending to the DPWH the "Termination of Contract or Disqualification of Contractor Pertinent to HADP Project."

Given the foregoing, the DPWH was justified in forfeiting Package VI for Superior Builders' failure to comply with its contractual obligations. We also note that Package IX of the HADP was tied to the completion of Package VI because the Asian Development Bank could not approve the award of Package IX to Superior Builders unless its work on Package VI was satisfactory to the DPWH.[32] This explains why Package IX had to be rebid despite the initial award of the project to Superior Builders.

The Court of Appeals likewise correctly ruled that the DPWH should not be made to pay for the rental of the unserviceable equipment of Superior Builders. The Court of Appeals noted that (1) Superior Builders failed to mobilize its equipment despite having the first 7.5% advance payment under

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29 Id. at 35.
30 Plaintiff's Folder of Exhibits, Vol. 3, no pagination.
31 Id.
32 Records, Vol. 1, pp. 639-640.

the contract, and (2) even when the trial court issued a temporary restraining order on 2 August 1990 in favor of Superior Builders, it failed to remove the equipment from the project site. As regards the delivery and value of the materials, the Court of Appeals found that the supposed delivery was only signed by Areniego without verification from UTI's Quantity Engineer and Resident Engineer. Thus, we agree with the Court of Appeals that Superior Builders should be made to bear its own losses.

On Governmental v. Proprietary Functions

Petitioners assail the Court of Appeals' ruling that the contract entered into by the DPWH was made in the exercise of its governmental, not proprietary, function and was imbued with public interest. Petitioners likewise assail the Court of Appeals' ruling that the DPWH has no juridical personality of its own and thus, the suit was against the agency's principal, the State. Petitioners further argue that the DPWH entered into a contract with Mendoza and by its act of entering into a contract, it already waived its immunity from suit.

The doctrine of immunity from suit is anchored on Section 3, Article XVI of the 1987 Constitution which provides:

> Section 3. The State may not be sued without its consent.

The general rule is that a state may not be sued, but it may be the subject of a suit if it consents to be sued, either expressly or impliedly.[33] There is express consent when a law so provides, while there is implied consent when the State enters into a contract or it itself commences litigation.[34] This Court explained that in order to determine implied waiver when the State or its agency entered into a contract, there is a need to distinguish whether the contract was entered into in its governmental or proprietary capacity, thus:

> x x x. However, it must be clarified that when a state enters into a contract, it does not automatically mean that it has waived its non-suability. The State "will be deemed to have impliedly waived its non-suability [only] if it has entered into a contract in its proprietary or private capacity. [However,] when the contract involves its sovereign or governmental capacity[,] x x x no such waiver may be implied." Statutory provisions waiving [s]tate immunity are construed *in strictissimi juris*. For, waiver of immunity is in derogation of sovereignty.[35]

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[33] *Department of Health v. Phil. Pharmawealth, Inc.*, G.R. No. 182358, 20 February 2013, 691 SCRA 421.
[34] Id.
[35] Id. at 434.

In *Air Transportation Office v. Ramos*,[36] the Court expounded:

> An unincorporated agency without any separate juridical personality of its own enjoys immunity from suit because it is invested with an inherent power of sovereignty. x x x. However, the need to distinguish between an unincorporated government agency performing governmental function and one performing proprietary functions has arisen. The immunity has been upheld in favor of the former because its function is governmental or incidental to such function; it has not been upheld in favor of the latter whose function was not in pursuit of a necessary function of government but was essentially a business.[37]

Having made this distinction, we reiterate that the DPWH is an unincorporated government agency without any separate juridical personality of its own and it enjoys immunity from suit.[38]

The then Ministry of Public Works and Highways, now DPWH, was created under Executive Order No. 710, series of 1981 (EO 710). EO 710 abolished the old Ministry of Public Works and the Ministry of Public Highways and transferred their functions to the newly-created Ministry of Public Works of Highways. Section 4 of EO 710 provides:

> SECTION 4. The Ministry shall exercise supervision and control over the following staff bureaus which are created in the Ministry:
>
> (1) Bureau of Construction, which shall provide technical services on the construction, rehabilitation, betterment, and improvement of infrastructure facilities;
>
> (2) Bureau of Design, which shall undertake project development, engineering surveys, and designs of infrastructure facilities;
>
> (3) Bureau of Equipment, which shall provide technical services on the management of construction and maintenance equipment and ancillary facilities;
>
> (4) Bureau of Maintenance, which shall provide technical services on the maintenance and repair of infrastructure facilities; and
>
> (5) Bureau of Materials and Quality Control, which shall provide research and technical services on quality control and on the management of materials plants and ancillary facilities for the production and processing of construction materials.

The Ministry of Public Works and Highways was later reorganized under Executive Order No. 124, series of 1987 (EO 124). Under Section 5 of EO 124, the Ministry shall have the following powers and functions:

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[36] G.R. No. 159402, 23 February 2011, 644 SCRA 36.

[37] Id. at 42-43.

[38] See *Republic of the Phils. v. Nolasco*, 496 Phil. 853 (2005); *Farolan, Jr. v. Court of Tax Appeals*, G.R. No. 42204, 21 January 1993, 217 SCRA 298; *Pacific Products, Inc. v. Ong*, G.R. No. 33777, 30 January 1990, 181 SCRA 536.

> Sec. 5. Powers and Functions. — The Ministry, in order to carry out its mandate, shall have the following powers and functions:
>
> (a) Provide technical services for the planning, design, construction, maintenance, and/or operation of infrastructure facilities;
>
> (b) Develop and implement effective codes, standards, and reasonable guidelines to ensure the safety of all public and private structures in the country and assure efficiency and proper quality in the construction of public works;
>
> (c) Ascertain that all public works plans and project implementation designs are consistent with current standards and guidelines;
>
> (d) Identify, plan, secure funding for, program, design, construct or undertake prequalification, bidding, and award of contracts of public works projects with the exception only of specialized projects undertaken by Government corporate entities with established technical capability and as directed by the President of the Philippines or as provided by law;
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> (e) Provide the works supervision function for all public works construction and ensure that actual construction is done in accordance with approved government plans and specifications;
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> (f) Assist other agencies, including the local governments, in determining the most suitable entity to undertake the actual construction of public works and projects;
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> (g) Maintain or cause to be maintained all highways, flood control, and other public works throughout the country except those that are the responsibility of other agencies as directed by the President of the Philippines as provided by law;
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> (h) Provide an integrated planning for highways, flood control and water resource development systems, and other public works;
>
> (i) Classify roads and highways into national, regional, provincial, city, municipal, and barangay roads and highways, based on objective criteria it shall adopt; provide or authorize the conversion of roads and highways from one category to another;
>
> (j) Delegate, to any agency it determines to have the adequate technical capability, any of the foregoing powers and functions.

It is clear from the enumeration of its functions that the DPWH performs governmental functions. Section 5(d) states that it has the power to "[i]dentify, plan, secure funding for, program, design, construct or undertake prequalification, bidding, and award of contracts of public works projects x x x" while Section 5(e) states that it shall "[p]rovide the works supervision function for all public works construction and ensure that actual construction is done in accordance with approved government plans and specifications."

The contracts that the DPWH entered into with Mendoza for the construction of Packages VI and IX of the HADP were done in the exercise of its governmental functions. Hence, petitioners cannot claim that there was an implied waiver by the DPWH simply by entering into a contract. Thus, the Court of Appeals correctly ruled that the DPWH enjoys immunity from suit and may not be sued without its consent.

WHEREFORE, we **DENY** the petition. We **AFFIRM** the 20 June 2012 Decision and the 15 October 2012 Resolution of the Court of Appeals in CA-G.R. CV. No. 86433.

SO ORDERED.

ANTONIO T. CARPIO
Associate Justice

WE CONCUR:

ARTURO D. BRION
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

ESTELA M. PERLAS-BERNABE
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ANTONIO T. CARPIO
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice