

FIRST DIVISION

[G.R. No. 235853, July 13, 2020]

**DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS, PETITIONER,
VS. ITALIAN-THAI DEVELOPMENT PUBLIC COMPANY, LTD. AND
KATAHIRA & ENGINEERS INTERNATIONAL, RESPONDENTS.**

DECISION

REYES, J. JR., J.:

This resolves the Petition for Review under Rule 45 of the Rules of Court, seeking the reversal of the Decision dated November 27, 2017 issued by the Court of Appeals (CA) in CA-G.R. SP No. 133771.

The Facts

On March 15, 2002, petitioner Department of Public Works and Highways (DPWH) and the Joint Venture of Katahira & Engineers International (KEI), Pertconsult international, Techniks Group Corporation, Multi-Infra Konsult, Inc. and E.FL Sison Engineers Co. entered into an "Agreement for Consultancy Services for the Detailed Engineering Design and Construction Supervision of the Patapat Viaduct, Suyo-Cervantes-Mankayan-Abatan, Cervantes Sabangan, and Ligao-Pio Duran Road Improvement Project under the Arterial Road Links Development Project V, PH-217 (Consultancy Agreement)." DPWH appointed the Joint Venture to be its engineering consulting firm, which carries out, among others, the following: a) detailed engineering design of the project; b) bidding assistance to DPWH; c) construction supervision; d) monitoring of Environmental Compliance Certificate (ECC) requirements; e) assistance to DPWH in land acquisition; f) assistance to DPWH in coordinating with concerned Local Government Units; and g) other technical services deemed relevant to the Contract Package IV-A, Suyo-Cervantes Road Section of the Arterial Road Links Development Project, Phase V (the Project).

In 2003, DPWH and KEI expanded the scope of work under the Consultancy Agreement under Realignment No. 1 and caused the preparation of the Engineering Geological and Geohazard Assessment Report (EGGAR), which contains a thorough analysis of the geological characteristics and engineering properties of the project site. Specifically, the EGGAR was conducted in order for KEI to gather information necessary for the planning and design of the Project and to investigate its geological condition.

As Project Consultant and Project Engineer, KEI created the original sloping design (.20:1 to .50:1, II:V) and a road width of 4.0 to 5.0 meters. The original sloping design was included in the Bid documents, formed part of the Contract documents and became the design of the Project. Subsequently, however, KEI, with agreement of DPWH, abandoned the original sloping design, and created and imposed the Overhang Design.

The civil works for the Patapat Viaduct, Suyo-Cervantes-Mankayan-Abatan, Cervantes-Sabangan, and Ligao-Pio Duran Roads were divided into different sections. Separate biddings were then conducted for the construction of these sections.

Italian-Thai Development Public Company, Ltd. (ITD) submitted the lowest bid for the rehabilitation and/or widening of the existing road of the Suyo-Cervantes Road Section. On March 27, 2006, the parties entered into a Contract Agreement for the implementation of civil works for the Project. The Project consisted of: 1) construction of 45.01 kilometers of concrete road; 2) improvement of drainage system; 3) construction of slope protection structures and countermeasure works against floods; 4) construction and replacement of nine bridges, one multi-barrel RCBC spillway type and three special-type RCBC; and 5) rehabilitation and repair of one existing bridge.

Under the Contract Agreement, DPWH undertakes to pay ITD the amount of P1, 164,622,570.23. After the approval of Variation Order No. 4, the contract amount increased to P1, 184,169,948.20.

The Contract Agreement consists of two parts: Part I - General Conditions (Conditions of Contracts for Works of Civil Engineering Constructions [FIDIC], Fourth Edition 1987), and 1988 with Editorial Amendments and 1992 with further Amendments (FIDIC Conditions); and Part II - Conditions of Particular Application (COPA).

On December 17, 2006, ITD was instructed by KEI's Senior Highway Engineer Hideki Yasuyama, to widen the carriageway of the road to a uniform width of 6.10 m instead of the original 4.0 m to 5.0 m and to limit the height of the stone masonry to 1.0 m.

Subsequently, several Variation Orders were issued, with approval of DPWH. On February 22, 2007, DPWH approved the Variation Order No. 1 which provided for a shift from Asphalt Cement Pavement (ACP) to Portland Cement Concrete Pavement (PCCP). On the other hand, the standardization of the road width from the original width of 4.0 m to 5.0 m to a uniform road width of 6.10 m with overhang design was reflected in Variation Order No. 2, which was approved by DPWH on June 5, 2008. On February 20, 2009, Variation Order No. 3 was also approved, which provided for the addition of the Butac Slope Protection. Subsequently, Variation Order No. 4 was likewise approved, providing for additional slope protection for both sides of the road and reinstatement of a catch fence.

In July 2010, ITD submitted its claim for overrun earthwork quantities to DPWH and KEI. KEI, however, submitted to DPWH a technical evaluation report, where it outlined the reasons why ITD's claims should be denied. Consequently, a joint survey was conducted by the parties on the 314 cross-sections with overhang design of the Suyo-Cervantes Road Section, which is the subject of ITD's claim.

On August 23, 2011, KEI informed ITD that its claim for additional compensation on the overrun earthwork quantities could not be allowed. Thus, in September 2011, ITD informed DPWH of its intention to commence arbitration proceedings with the Construction Industry Arbitration Commission (CIAC) in order to resolve the dispute.

The matter was subsequently referred to CIAC, where ITD claimed for overiTun earthwork quantities due to: 1) overhang design in the amount of PI 84,957,341.20; 2) road realignment in the amount of PI 15,616,592.15; 3) road improvement in the amount of P12,138,852.37. ITD also claimed for miscellaneous works in the amount of P7,226,406.07 and legal expenses including the expert's fees and expenses in the amount of 1^5,000,000.00.

On the other hand, the DPWH has counterclaims against ITD for temperate damages, exemplary damages and litigation expenses, while KEI claimed for attorney's fees, litigation expenses, moral damages, and exemplary damages.

Ruling of the CIAC

In the Final Award dated January 14, 2014, CIAC found that the DPWH was liable for ITD's claim for overrun earthwork quantities, the dispositive portion of which reads:

WHEREFORE, judgment is hereby rendered in favor of **Claimant Italian-Thai Development Company, Ltd. ("ITD")** and **against Respondent Department of Public Works and Highways (DPWH)** in the total amount of **One Hundred Six Million Five Hundred Nine Thousand Seven Hundred Twenty Four & 49/100 (P106,509,724.49) Pesos only**, broken down as follows:

In favor of Claimant Italian-Thai Development
Public Company, Ltd. ("ITD"):

Claims on Respondents
DPWH and KEI:

Overrun earthwork
quantities due to
overhang design

Overrun earthwork
quantities due to road
alignment

Overran earthwork
quantities due to road
improvement

Miscellaneous works

Total PI
16,755,596. 96
0. 00

Legal exnenses
including the expert's
fees and expenses

Total
P116,755,596.96

Less: Deduction for	10,245,872.47
payment of FVO to ITD	
	Net
	F106,509,724.49

**In favor of Respondent Department of
Public Works and Highways (DPWH):**

Counterclaims on	
Claimant ITD:	
Temperate damages	P 0.00
Exemplary damages	0.00
Litigation expenses	0.00
Total	P 0.00

Cross[-]claims on Co-	
Respondent KEI	
Overrun earthwork	
quantities due to	
overhang design	
Overrun earthwork	
quantities due to road	
alignment	
Overrun earthwork	
quantities due to road	
improvement	
Legal expenses	
including the expert's	
fees and expenses	
Total	P 0.00

**In favor of Respondent Katahira &
Engineers International (KEI):**

Counterclaim [s] on	
Claimant ITD:	
Attorney's fees	P 0.00
Litigation expenses	0.00
Moral damages	0.00
Exemplary damages	0.00
Total	0.00
P	

Upon the award becoming final and executory, interest of Six (6%) Percent per annum shall be further paid to Claimant ITD on the outstanding amount until full payment thereof shall have been made (BSP Circular No. 799 Series of 2013).3

(Emphases in the original)

With regard to ITD's claim for overrun earthwork quantities due to overhang design, the CIAC ruled that the change from the original sloping design to overhang design resulted to the overrun earthwork quantities as evidenced by rock collapse, slope failures, collapse of overhang portion and side slopes, and landslides and cliff edge collapse. According to the CIAC, ITD, during its blasting activities, consistently experienced collapses at the mountain side of the Project area even beyond the intended area of the blasting, collapses from the overhang portion and side slopes, and landslides. For CIAC, these prove that the overhang design is inappropriate as the nature of the rocks and their composition are too unstable to support this design.

On ITD's claim for overrun earthwork quantities due to road realignment, CIAC held that KEI's instruction to widen the carriageway of the road to a uniform width of 6.10 m instead of the original 4.0 m to 5.0 m, and to limit the height of the stone masonry to 1.0 m, constrained ITD to realign the road and excavate into the mountain in order to maintain the required road width. Moreover, in order to reduce the height of the stone masonry to 1.0 m, ITD also excavated into the mountains to construct it on more stable ground.

CIAC also held that ITD is entitled to its claim for additional earthwork quantities due to road improvements amounting to P9,119,385.91. According to CIAC, ITD was only paid of its miscellaneous works and overrun earthwork quantities for the Bessang Pass, the Bessang Bridge and the two ends of the High Slope of Sta. 362, while the middle portion of the road improvement for the High Slope of Sta. 362 remained unpaid.

While CIAC found ITD entitled to its claims for overrun earthwork quantities, it ruled that ITD is only entitled to temperate damages in the amount of PI 16,755,596.96 instead of actual damages as the latter could not be determined because the joint survey was not completed by the parties.

According to CIAC, ITD's claims are not barred by waiver, abandonment or estoppel despite its failure to comply with the notice requirement under the FIDIC and COPA. CIAC reasoned that ITD's non-compliance with the notice requirement is mooted by the express provision under FIDIC which allows claims decided under arbitration even though a party failed to comply with timely notice and submission of contemporary records requirement. Moreover, when DPWH, through Undersecretary Romeo S. Momo, decided to conduct a joint survey to evaluate and resolve ITD's claims, DPWH is estopped from raising this issue. Finally, CIAC held that there can be no waiver because ITD officially notified DPWH and KEI of its intention to be paid for its claims for overrun earthwork quantities.

CIAC, however, found no basis for the grant of attorney's fees/legal fees, including expert's fees expenses. CIAC reasoned that while there were lapses on the part of the DPWH and KEI, these lapses do not constitute gross and evident bad faith as to justify the award of these fees and expenses. Thus, CIAC ruled that it would be more equitable and reasonable if all the parties shoulder their respective expenses.

The counterclaims of DPWH and KEI against ITD, on the other hand, were denied.