

## SECOND DIVISION

**[ G.R. Nos. 173219-20, August 11, 2010 ]**

**ALC INDUSTRIES, INC., PETITIONER, VS. DEPARTMENT OF  
PUBLIC WORKS AND HIGHWAYS, RESPONDENT.**

### DECISION

**ABAD, J.:**

On May 29, 1996 respondent Department of Public Works and Highways (DPWH) awarded to petitioner ALC Industries, Inc. (ALC) the construction of a 105-kilometer section of the Davao-Bukidnon Road from Calinan to Maramag. The parties signed the covering contract, Contract Package 09B, on January 28, 1997. ALC began work after receipt on March 3, 1997 of the notice to proceed. Subsequently, however, the parties discovered that the original design plans and drawings failed to reflect actual ground levels. Thus, they undertook a full-scale redesign of the project.

Because ALC had fallen behind schedule, it agreed with DPWH to reduce the scope of works by executing about a year later on July 17, 1998 a Reduction in Scope Agreement (RISA),<sup>[1]</sup> shrinking the project from 105 kilometers to 46.2 kilometers and from a contract price of P396,336,381.48 to P194,802,386.89. But, despite the reduction in scope of work, ALC continued to fall behind schedule. On August 7, 1998 the DPWH warned ALC about it, followed on August 13, 1998 by another warning from the project consultant, and a third warning from the DPWH on September 3, 1998.

But with the delay unabated, in March 1999 the DPWH proposed to ALC a Supplemental Agreement which required ALC, among other things, to pay the DPWH about P30 million to enable it to recoup its advances to ALC based on the original scope of the project. But ALC rejected the proposed supplemental agreement. This prompted the DPWH to send it another letter dated April 19, 1999, rescinding its the contract with ALC on the ground that it had incurred a negative slippage in excess of 15%, the threshold set under Presidential Decree (P.D.) 1870.

ALC sought reconsideration, claiming that what essentially delayed the project were actually the errors in the original design plans and drawings. It took the DPWH resident engineer eight months to approve the first sheet of the redesigned plans and drawings that covered a five-kilometer stretch of the project. Then it still had to be approved by the DPWH Bureau of Construction. ALC alleged that it in fact got no approved construction plan even after the rescission of the project. The delay of 14 months in the issuance of the notice to proceed and the inclement weather at the project site compounded the causes of the delay.

Since the DPWH did not act on its request for reconsideration, ALC submitted the matter for arbitration by the Construction Industry Arbitration Commission (CIAC).

<sup>[2]</sup> Appallingly, the DPWH did not adequately respond to the action. It did not file

an answer, seek modification of the Terms of Reference, file its memorandum, or submit the required draft decision, despite several extensions and postponements. It also neither presented a witness nor cross-examined ALC's witnesses.

At any rate, ALC claimed that the target accomplishment of the project for December 1998 was 39.52% and it finished 30.80%. ALC pointed out that its negative slippage was, therefore, only 8.72%, which was still below the negative slippage threshold of 15%. But the CIAC had a different computation of the slippage. It reached 22.06% because ALC accomplished only 77.94% of the project as scheduled (30.80 divided by 39.52).

Surprisingly, despite this finding in the rate of ALC's negative slippage, the CIAC voided DPWH's order of rescission on the ground that, factoring in the delays attributable to bad weather, the slippage should be adjusted to 12.85% only. Further, the CIAC found that, while ALC was guilty of breach of contract, the DPWH was not without fault. It failed to give ALC the opportunity to refute its finding of negative slippage. It had moreover been shown that other contractors had incurred negative slippages of more than 15%, yet the DPWH did not resort to rescission. Thus, the CIAC modified the rescission to a mutual termination.

Out of the P655,647,869.82 that ALC originally claimed, the CIAC ruled that ALC was entitled only to P136,105,236.25. On ALC's urgent motion for partial correction, the CIAC modified its decision and increased the award to P190,355,820.84. From this amount, however, the CIAC offset P64,732,536.75 representing payments that the DPWH already made or advanced, resulting in a net award of P125,623,284.09 to ALC.

Both ALC and the DPWH appealed the decision of the CIAC to the Court of Appeals (CA).<sup>[3]</sup> In a decision, the CA agreed with the CIAC that ALC's negative slippage did not exceed the 15% threshold. The CA, however, upheld the DPWH rescission order based on the ALC's other contractual breaches.

Regarding the monetary awards, the CA affirmed nearly all that the CIAC provided but eliminated its award for stand by costs for equipment and manpower that ALC allegedly incurred on account of the DPWH's late issuance of the notice to proceed. The CA also denied ALC's additional claims for stand by costs due to the redesign works and bad weather conditions. Ultimately, the CA reduced the award to ALC from P190,355,820.84 to P45,687,595.25. But, offsetting prior payments that the DPWH already made, the CA ordered ALC to instead return P19,044,941.50 to the DPWH.<sup>[4]</sup> With the denial of its motion for reconsideration, ALC filed the present petition for review on *certiorari*.

### **The Issues Presented**

The issues presented in this case are:

1. Whether or not the CA erred in failing to dismiss the DPWH's appeal on the ground that it was filed beyond the reglementary period;
2. Whether or not the CA erred in upholding the DPWH's rescission of its contract with ALC; and
3. Whether or not the CA erred in not allowing ALC to recover stand by costs for equipment and manpower.

## **The Court's Rulings**

**One.** ALC claims that the DPWH received, through the Office of the Solicitor General (OSG), copy of the CIAC decision on November 29, 2002, hence, it needed to perfect its appeal on or before December 13, 2002. But, as the CA found, the OSG received the CIAC decision only on December 2, 2002.<sup>[5]</sup> The DPWH filed a motion for extension of 15 days within which to file its petition for review on December 17, 2002 and a second motion for extension also of 15 days on December 27, 2002. The CA granted both motions and the DPWH filed its petition within the last extension asked for.

**Two.** ALC insists that the DPWH premised its rescission of the contract solely on the basis of ALC's negative slippage. Since both the CIAC and the CA found ALC's negative slippage to be below the 15% threshold provided by P.D. 1870, the CA had no basis for affirming the DPWH's rescission order. ALC points out that the CA erred when it considered other factors supposedly constituting breach of the agreement other than the negative slippage.

But the DPWH rescission order did not cite only the negative slippage as ground for its action. The pertinent portion of its order of April 19, 1999 reads:

**In view of your failure to comply with Clause 10 of the Reduction of Scope Agreement x x x and your continuing commission of acts amounting to breach of contract resulting to a negative slippage of twenty six point sixty nine (26.69%) percent to protect the interest of the Government we hereby forfeit/rescind your contract for the above-mentioned project pursuant to Clause 63.1 of the conditions of Contract (International) for Works of Civil Engineering Construction and Presidential Decree 1870.**<sup>[6]</sup>

Clearly, the DPWH gave two reasons for the rescission: 1) ALC's failure to comply with Clause 10 of the RISA; and 2) its continuing commission of acts amounting to breaches of contract, resulting in negative slippage in its performance.

The negative slippage, an evidence of the breach, is not itself the cause of the delay in the project but an evidence of it. And what were the acts that amounted to breaches of the contract? The CA found, based on a DPWH memorandum dated February 15, 1999, that ALC failed to perform several obligations that the RISA required of it. Specifically, ALC failed to: 1) submit a program of work; 2) submit its month-by-month cash flow summary; 3) complete the verification survey; 4) complete and maintain facilities for the resident engineer; 5) provide data for the resident engineer to process orders for power generators; 6) provide a service vehicle; and 7) delegate the necessary technical, financial and administrative authority to the Project Manager.

ALC argues that, in considering these breaches, the CA violated its right to due process since the DPWH did not specify them in its rescission order and since the same were not raised as issues on appeal. But these breaches of the contract were mentioned as the cause of the negative slippage. Since the parties raised this