

SPECIAL SIXTEENTH DIVISION

[CA-G.R. SP NO. 107213, June 09, 2014]

BANGKO SENTRAL NG PILIPINAS, PETITIONER, VS. SKI CONSTRUCTION GROUP, INC., RESPONDENT.

DECISION

CORALES, J.:

This is a Petition for Review^[2] under Rule 43 of the Rules of Court assailing the January 19, 2009 Award^[3] of the Construction Industry Arbitration Commission (CIAC) Arbitral Tribunal in CIAC Case No. 13-2008 entitled "*SKI Construction Group, Inc. v. Bangko Sentral ng Pilipinas*".

The Antecedents

SKI Construction Group, Inc. (SKI) was the highest bidder for the rehabilitation, redesign, and upgrading of Bangko Sentral ng Pilipinas' (BSP) facilities at its Security Plant Complex along East Avenue, Quezon City. On January 17, 2005, the parties entered into a "*Contract for the Supply of Labor and Materials for the Construction of Cash/CIRO Department Transfer and Re-Waterproofing Works at Building D, Loading/Unloading Bays, Medical/Dental Clinic at Building A, Barrier Fence and Armored Car Parking and Warehouse, Machine Maintenance, Compressor Area and Vault No. 3 at Building B, at Bangko Sentral ng Pilipinas Property at East Avenue corner B.I.R. Road, Quezon City and Security Holding Area at DENR, East Ave., Quezon City*" (Module 2 Contract) for the price of P193,366,357.00.^[4] The "*Contract for the Supply of Labor and Materials for the Construction of Security Related Facilities: SITD Offices and Armory at Bldg. C, Security Guardhouse at East Ave. Gates, Container Van Parking, and Access Control at Ramp between Bldgs. A & B at Bangko Sentral ng Pilipinas Property at East Avenue corner B.I.R. Road, Quezon City*" (Module 3 Contract) was executed on February 18, 2005 for the price of P47,213,047.00.^[5] Notably, both contracts stipulated that "(t)ime (was) of the essence" with respect to completion of the projects "and that any delay, except those occasioned by fortuitous events, (would) result in damage and injury" to the BSP.^[6] Thereafter, BSP issued to SKI the General Conditions of Contract (GCC)^[7] for each project.

The completion dates for Modules 2 and 3 were originally scheduled on May 5, 2005 and April 24, 2005, respectively. However, SKI's total billable accomplishments as of said dates were only 42.15% of Module 2 and 22.97% of Module 3. Upon SKI's request for extensions of period, the completion date for both projects was moved to December 3, 2005. When the newly agreed period came, only the "testing and commissioning in the amount of (P92,315.00) and close-out documents" were unfinished for Module 3 while 92.88% of Module 2 was completed and BSP had already occupied certain portions of it and paid 98% of the contract price.^[8]

Thereafter, an exchange of communications between the parties ensued as to settlement of their financial issues. On November 26, 2007, SKI wrote to the Resident Auditor of BSP asking assistance in resolving the following concerns: (1) unpaid variations for changes in flooring finish from vinyl sheets to tiles; (2) unpaid increased costs of labor, materials and equipment provided for in Article 2.12 of their contract where BSP agreed in principle that the labor resource component, being part of the resources used, entitles SKI to contract price adjustment; (3) unpaid additional 2% VAT due to increased VAT rate from 10% to 12%; (4) unpaid claims for costs incurred due to approved prolonged execution of the works from April 2005 to December 2005; (5) claims for prolongation costs from December 2005 to November 2007 considering that the projects continued as of the date of the letter and SKI has submitted to BSP the justification for the time extension; and (6) unpaid retention money amounting to P23,800,000.00.^[9]

When sought for comment, BSP pointed out that the request for contract price adjustment and the proposed claims for the costs incurred due to approved prolonged execution of works from April 2005 to November 2007 had already been disapproved for lack of merit and there being no precedence to the claim. It also stressed that there is no legal basis in granting SKI's claim for the costs of installation and removal of the rolled vinyl sheets considering that the change was decided by the "MPC because the vinyl sheets when installed was not acceptable". BSP invoked payment with respect to the 2% additional VAT and stated that the retention money shall be paid upon SKI's submission of certain documents such as surety bond and quitclaim.^[10]

The parties failed to amicably settle their dispute resulting to SKI's complaint^[11] filed before the CIAC on April 11, 2008. SKI reiterated its claim for overhead expenses incurred during the approved extension of time, additional expenses for direct labor, unpaid work both billed and unbilled, costs of variation work in changing the vinyl tiles, balance of VAT differentials for Modules 2 and 3, labor adjustment costs on account of legislated wage increase, and unpaid retention money. According to SKI, the extensions of the contract period were due to various reasons beyond its control which caused additional manpower, material, and overhead expenses that must be reimbursed by BSP in accordance with Section 21.04 of the GCC. It also invoked Articles 1721^[12] and 1722^[13] of the New Civil Code (NCC) to support the argument that reasonable compensation and reimbursement are warranted when the claimant was not responsible or was not the primary cause or reason for the delay that gave rise to additional expenses. Among the factors of delay enumerated by SKI allegedly attributable to BSP are the: (a) discovery of cracks after the construction of the roof deck slab at the loading and unloading area; (b) late decision and delayed approval of method to seal the cracks; (c) unworkable weather conditions; (d) late possession of Vault No. 3; (e) time consumed in changing and unsure decisions of BSP to use either glass cloth or original material as under slab insulation materials; and (f) delays due to BSP's required change from the original vinyl sheets to vinyl tiles. SKI also alleged that there was a variation order for the change of vinyl materials, thus, it is entitled to recover payment for additional works pursuant to sub-section 6, Section 20.10 of the GCC. SKI further averred that its retention money for Modules 2 and 3 as well as the work done on variation orders should be immediately released because the project has been completed and now in possession of BSP.

BSP filed its Answer with Compulsory Counter-Claims^[14] denying liability for SKI's monetary claims. It insisted, among others, that most, if not all, of the delays in the work were actually SKI's fault and the latter would not have incurred the VAT and labor costs differentials had it met the original project deadlines. BSP also argued that SKI is not entitled to the release of its retention money or its substitution with a surety bond as the final acceptance of the work is yet to be done and the projects had not been satisfactorily and timely finished. As counterclaims, BSP prayed for liquidated damages under Section 21.05 of the GCC for SKI's delay in completing Modules 2 and 3; for the deterioration of the briquetting machine allegedly caused by SKI's negligence that resulted in the occurrence of flood in the briquetting room; for the cracks in the roof deck slab of the loading/unloading bay of Building D which are attributable to SKI's poor workmanship or use of defective materials and which constrained BSP to engage the services of another contractor to repair the damages; for other various expenses incurred as a result of the non-completion of the projects within the stipulated time.

The Ruling of the CIAC

In its January 19, 2009 Award,^[15] the CIAC determined whether the factors of delay enumerated by SKI were attributable to BSP and based on its findings, it granted several of SKI's monetary claims and denied BSP's prayer for liquidated damages, except those pertaining to the delay in the completion of Module 3. The CIAC considered the definition of "contract time extensions" under Art. 1 of the GCC and held that upon BSP's approval of SKI's extension request, it is now estopped from faulting SKI for the admitted delay. According to the CIAC, the grant of time extensions requested by SKI is a binding admission on the part of the BSP that the cause of delay was beyond SKI's control; thus, BSP is liable for overhead costs incurred during the allowed time extensions.

The CIAC agreed with SKI that it is entitled to an extension of time due to the delay caused by the defective design of the roof deck slab. It considered the report of Engr. Emilio M. Morales (Engr. Morales) of EM²A Partners & Co. (EM²A), the third-party consultant (TPC) engaged by BSP, that the defects stemmed from the flaws in the designs furnished to BSP by its Architectural and Engineering Consultant, Luis Marquez (LM), which rendered the roof slab structurally inadequate. It ruled that BSP is estopped from questioning the findings of Engr. Morales considering the provision in the agreement engaging EM²A's services that "the findings of TPC shall not be challenged by the LM nor SKI and will be considered final and accepted by both parties" It thus held BSP liable for the overhead expenses incurred by SKI between December 3, 2005 and August 24, 2007, the period when BSP contracted TERP Asia Construction (TERP Asia) for the remediation of the roof deck slab, and allowed SKI's time extension for the same period with respect to Module 2. However, a similar extension for Module 3 was disallowed by CIAC because sufficient extension had already been granted by the BSP.

Furthermore, the CIAC found merit in SKI's claims for unpaid progress billings, expenses for variations of work in vinyl tiles, VAT and minimum wage differentials, and release of retention money. It also held that SKI was justified in suspending work in both Modules 2 and 3 considering BSP's unexplained failure to pay SKI's billings. However, it denied SKI's prayer for main office overhead and lost of profits for being unsubstantiated.

As to BSP's counterclaims, the CIAC granted liquidated damages for SKI's admitted delay in Module 3 as provided in CIAP Document No. 101. It stressed that BSP's counterclaim for utilities consumed by SKI, extensions made on the contract with BSP's Project Manager Jose Aliling & Associates (JAA), and lease of the temporary facilities lot are all deemed included in the award of liquidated damages because they are premised on the delay in Module 3. The CIAC also found merit in BSP's claims that SKI was liable for the defects in plumbing and the use of off-specification glass panels but awarded only temperate damages in favor of BSP due to its failure to prove the actual damages caused by the defective materials. In the same vein, it awarded only nominal damages in favor of BSP with respect to the damages on the briquetting machine and held that the damage could not be solely attributed to the flooding or the moisture in the surrounding air but also to the long period of disuse.

Lastly, the CIAC denied the parties' claims for litigation expenses and ruled that arbitration costs should be divided between them in proportion to their respective claims and counterclaims. It then disposed the case in this wise:

WHEREFORE, judgment is hereby rendered and **AWARD** is made on the monetary claims of the parties as follows:

FOR THE CLAIMANT.

1. **Overhead Expenses** during the extended period of construction.

P7,504,886.89 – for MODULE 2.

P1,953,010.68 – for MODULE 3.

P9,457,897.57 – TOTAL OVERHEAD EXPENSES AWARDED

2. Retention moneys

MODULE 2

P18,949,983.99 – Retention Money for the Main Contract

354,543.09 – Retention Money for Variation Works

P19,304,527.08 Total retention money claimed for Module 2

MODULE 3

P4,562,863.85 – Retention money for the Main Contract

151,690.37 – Retention money for Variation Works

P4,714,554.22 - Total retention money claimed for Module 3

P24,019,081.30 – TOTAL RETENTION MONEYS AWARDED

3. Unpaid billings

FOR MODULE 2

P946,488.10 – Progress Billing No. 38 –

P2,920,028.67 – Progress Billing No. 39 –

70,300.30 – 2% VAT (due to increase from 10% to 12%)

P3,936,817.07 – Total unpaid billings for Module 2

FOR MODULE 3

P1,576,288.30 – Progress Billing No. 38 –

28,659.79 – 2% VAT (due to increase from 10% to 12% -)

P1,604,948.09 – Total unpaid billings for Module 3

P5,541,765.16 – TOTAL AWARD FOR UNPAID BILLINGS FOR BOTH MODULES 2 & 3

4. Variation Works for Vinyl Tiles

FOR MODULE 2

P536,717.00 – on its Third Cause of Action for its work on vinyl tiles in Module 2

P551,973.00 on its Third Cause of Action for its work on vinyl tiles in Module 3.

P1,088,690.00 – TOTAL VARIATION WORK ON VINYL TILES FOR BOTH MODULES 2 & 3

5. VAT differential on the Fifth Cause of Action

P36,623.28 – VAT differential by reason of supervening tax rate increase.

6. Cost of Legislated Wage Increase on the Sixth Cause of Action

P428,835.04 – Wage Order Mandated Wage Increase

P40,572,892.35 – TOTAL AWARDS ON CLAIMANT'S CLAIMS

FOR THE RESPONDENT

P415,488.00 which is **50%** of the counterclaim for defective works (Plumbing fixtures and punchlisted items.)

P600,000.00 which is **50%** of the counterclaim for defective works (Off-Specifications Glass)

P780,000.00 – which is **20%** of its counterclaim for damage to the briquetting machine.

P4,721,304.70 – as liquidated damages for failure to complete Module 3

P6,516,792.70 – TOTAL AWARDS ON RESPONDENT'S COUNTERCLAIMS

OFFSETTING the awards on claims and counterclaims made respectively to the Claimant and the Respondent, a net award remains in favor of the Claimant in the amount of **P34,056,099.65** which is hereby directed to be paid by Respondent to the Claimant.

Interest on the foregoing net amount at the **legal rate of 6% per annum** computed from the date of this Award shall be paid by Respondent. After finality thereof, interest at the rate of **12%** per annum shall be paid thereon until full payment of the awarded amount shall have been made, *“this interim period being deemed to be at that time already a forbearance of credit”* (*Eastern Shipping Lines, Inc. v Court of Appeals, et al* (243 SCRA 78 [1994])

SO ORDERED.^[16] (Emphasis and italics appear in the original text of the Award)