

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

Ponente: CORALES, J.

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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 EM[2]A Partners & Co. (EM[2]A), 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 EM[2]A'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)

Aggrieved, BSP is now before Us via the instant petition for review arguing that the CIAC erred “and/or acted in excess of jurisdiction”:[17]

A.

IN RULING ON THE CORE ISSUE OF DELAY ON THE MERE BASIS OF THE EQUITABLE PRINCIPLE OF ESTOPPEL.

B.

IN RULING THAT THE DEFECTIVE ROOF DECK SLAB AFFECTING MODULE 2 CAUSED DELAY ATTRIBUTABLE TO BSP'S FAULT.

C.

IN AWARDING PROLONGATION COSTS IN FAVOR OF SKI FOR BOTH MODULES 2 AND 3 COVERING THE PERIOD UP TO 3 DECEMBER 2005.

D.

IN RULING THAT SKI WAS ENTITLED TO ANOTHER CONTRACT TIME EXTENSION FOR MODULE 2 FROM 3 DECEMBER 2005 UP TO 24 AUGUST 2007 AND WHEN IT RULED, FURTHER, THAT SKI WAS ENTITLED TO PROLONGATION COSTS COVERING THE SAID PERIOD.

E.

IN RULING THAT BSP IS NOT ENTITLED TO ITS COUNTER-CLAIM FOR LIQUIDATED DAMAGES ON MODULE 2.

F.

IN RULING THAT BSP IS NOT ENTITLED TO ITS COUNTER-CLAIM FOR THE DAMAGE TO THE ROOF DECK SLAB BASED ON THE EQUITABLE PRINCIPLE OF ESTOPPEL.

G.

IN RULING THAT BSP IS NOT ENTITLED TO ITS COUNTER-CLAIM FOR THE REMAINING BALANCE OF WORKS FOR TESTING AND COMMISSIONING FOR MODULE 3.

H.

IN RULING THAT BSP IS MERELY ENTITLED TO NOMINAL DAMAGES ON ITS COUNTER-CLAIM FOR THE REPAIR OF THE DAMAGED BRIQUETTING MACHINE FOR MODULE 2.

I.

IN RULING THAT THE RETENTION MONEY IS DUE FOR RELEASE TO SKI. THUS, CIAC COMMITTED GRIEVOUS ERROR AND/OR ACTED IN EXCESS OF ITS JURISDICTION.

The BSP contends that the CIAC committed a jurisdictional error in failing to rule squarely on certain issues set

forth in the parties' Terms of Reference regarding causes of delay. It argues that SKI failed to comply with the requirement of Article 21.03 for timely notice of claims for extension considering that SKI's requests for Modules 2 and 3 were respectively filed six (6) months and eight (8) months late from the original deadlines and it was already behind the original schedule at the time the first request for extension was made. It also insists that SKI's extensions were far longer than necessary and were not shown to involve activities falling within the critical path that should have justified their grant. It explains that the grant of the requested extension was for mere expediency and as an act of generosity and accommodation on BSP's part, not as an admission that the delay was due to causes beyond SKI's control; the original periods having already elapsed and time being of the essence in the projects, BSP had no choice but to grant the extensions. It also adds that pursuant to Article 33.03 of the GCC, the grant of SKI's requested time extensions cannot be deemed a waiver of BSP's right to hold SKI liable for the unjustified delay.

It further assails CIAC's application of the principle of estoppel in ruling that BSP admitted that SKI was faultless for the delay and the defective designs of the roof deck slab caused delay in Module 2 which justified a time extension. According to BSP, only SKI has signed its conformity to the agreement to engage the services of EM2A and SKI should be held solely liable for the rectification of works and payment of Engr. Morales' professional fees because it had deviated from the original design of the roof deck slab and the damage was due to its poor workmanship. It also avers that the roof deck slab was already completed, albeit defective, as of April 2005, thus, it is not among SKI's reason in requesting for a time extension. In fact, SKI did not request a time extension in view of the defective roof deck slab but merely responded to BSP's correspondence which reply letters were even dated several months after the lapse of the granted time extension; as such, they could not possibly constitute seasonable requests for extensions.

BSP also raises the following arguments in challenging the CIAC's findings of delay due to defective designs of roof deck slab, to wit: there was no proof that the roof deck slab caused any delay or rendered SKI unable to perform other work; assuming SKI was at fault for the defective roof deck slab, SKI is obliged to rectify the same without benefit of a time extension as provided in Article 20.08 of the GCC and Republic Act No. 9184; if BSP instead was responsible, it is not obligated to have the work corrected by SKI or any other contractor; and SKI is not entitled to extension of time and prolongation costs from December 3, 2005 until August 24, 2007, the period when the defects in the roof deck slab was rectified by TERP Asia, considering that SKI did not perform any work during that period.

With respect to the installation of vinyl tiles, BSP maintains that the same was a result of SKI's own defective work. It finds CIAC's awards of overhead costs for Modules 2 and 3 as unjustified and unconscionable. It also objects to CIAC's citation of CIAP Document No. 101 and its analogous application to CIAP Document No. 102, arguing that the latter refers to private, and not government, construction projects. It adds that CIAC Document No. 101 was likewise rendered inapplicable by the fact that the time extensions granted to SKI were not grounded on delays due to suspension of activities along the critical path and did not involve work variation.

The BSP also questions the denial of its prayers for liquidated damages despite SKI's admitted delay in Module 2. The BSP emphasizes that Article 20.14 of the GCC should prevail over CIAP Document No. 101 and reiterates its arguments as to the balance of work as of December 3, 2005. The BSP also takes exception to CIAC's denial, for supposed lack of evidence, of its counterclaim for testing and commissioning works in Module 3 and argues that SKI failed to prove that it accomplished these works in 2006 and 2007, whereas the BSP presented testimonial and documentary evidence to demonstrate otherwise.

As for the briquetting machine, BSP insists that it sustained damage solely through SKI's fault, negligence and defective work which caused flooding in the briquetting room where the machine was located. The BSP dismisses

the CIAC's findings that long periods of disuse contributed to the machine's condition and insists that SKI should be held liable for the full cost of the machine's repairs. Further, the BSP refutes the CIAC's order for the release of SKI's retention money, asserting that the same should be held liable for liquidated and other damages.

For its part, SKI invokes the doctrine of giving respect, if not finality, to the findings of facts of administrative bodies like the CIAC on account of their expertise and there being substantial evidence to support its ruling.[18] SKI argues that BSP granted the time extensions without qualifications or reservations, or any invocation of procedural prerequisites or attribution of fault for the delay. It insists that even JAA agrees that SKI is entitled to overhead costs for the granted time extension. SKI also echoes the CIAC's findings that the defects in the roof deck slab resulted from flaws in design and that BSP is estopped from refuting EM2A's report. SKI likewise calls the attention of the Court to the supposed admission by BSP's own witness that the project would not be deemed complete as long as the issue of the roof deck slab, particularly the rectification works, remained pending. Lastly, it denied any liability for BSP's counterclaim for liquidated damages for Module 2 and for damages on account of testing and commissioning works and on the briquetting machine. It also reiterates its demand for the release of the retention money.[19]

This Court's Ruling

The petition is partially meritorious.

Findings of fact and conclusions of an adjudicative body like the CIAC are generally considered binding and conclusive upon the appellate courts considering their expertise on specific matters. However, this doctrine holds true only when such findings and conclusions are supported by substantial evidence[20] which is not the case here.

In arriving at some aspect of its January 19, 2009 Award, the CIAC based its conclusion and findings on the principle of estoppel despite the presence of material evidence and applicable provisions in the GCC. The principle of estoppel should be applied only from necessity and in extraordinary circumstances. It should neither be given effect beyond what is necessary to accomplish justice between the parties nor should it be applied where the facts and circumstances, established in the record, negate such application and where truth, gleaned from the evidence, essentially contradicts it.[21] Notably, neither the BSP nor SKI have disputed the validity and due execution of the contracts governing Modules 2 and 3, or have shown that the same are contrary to law, morals, good customs, and public policy; therefore, these contracts are the law between the parties, and courts have no choice but to enforce them.[22] Simply put, the courts will not relieve the parties from the effects even of unwise or unfavorable contracts freely entered into.[23]

Guided by the foregoing principles, We modify some aspects of the January 19, 2009 CIAC Award in accordance with the provisions of the GCC.

Expenses for the Reconstruction of the Roof Deck Slab and Overhead Expenses for Module 2 for the period of December 3, 2005 to August 24, 2007

Contrary to the ruling of the CIAC, estoppel does not find application in deciding whether the defects in the roof deck slab was caused by defective designs from LM. The CIAC relied heavily on the so-called "agreement to engage the services of EM[2]A" but there is no showing that LM, one of the parties thereto, actually consented to be bound by the stipulation cited in the January 19, 2009 Award. Without such mutual acceptance of the proposed terms, no agreement could have been perfected between the parties to prohibit LM from disputing EM[2]A's findings.[24] Even assuming that LM was nevertheless bound by the proposed agreement, its application is expressly limited to SKI and LM because the parties stipulated that "the findings of the TPC shall not be

challenged by the LM nor SKI". The basic principle of relativity of contracts precludes the proposed agreement from favoring or prejudicing third persons, in the instant case, the BSP. Thus, the CIAC's ruling which extended the effects of the proposed stipulation to BSP was purely speculative and devoid of factual and legal basis.[25]

Resort to the principle of estoppel is indeed unwarranted by the facts of this case and the evidence on records. The Court notes that aside from the flawed designs of the roof deck slab, Engr. Morales also reported SKI's deviation from the work plans, as "the contractor saw it necessary to introduce additional Negative Moment Rebars during construction".[26] When physically examined on June 4 to 5, 2007, it was found that the finished roof deck slab have deviated from the provided plans and specifications in terms of concrete slab thickness and rebar spacing.[27] However, there is dearth of evidence as to SKI's referral of the roof deck slab plans to BSP for interpretation before willfully departing from the same in performing the work. SKI obviously failed to comply with what is mandated of it under Article 3.03 (b) of the GCC which reads:

3.03

CLARIFICATION OF MEANING OF DRAWINGS AND SPECIFICATIONS

xxx

b.

If, in the Contractor's opinion, any work indicated on the Drawings or specified in such manner as will make it impossible to produce a first class work, he shall refer same to BSP for interpretation before proceeding with work. If the Contractor fails to make such reference, no excuse will thereafter be entertained for failure to carry out work in the most satisfactory manner. (Emphasis supplied)

Accordingly, SKI should be held liable for the the rectification of, or reimbursement for, the unauthorized and defective works as provided in Articles 20.08 and 32.04 of the GCC, viz.:

20.08

REMOVAL AND CORRECTION OF DEFECTIVE AND UNAUTHORIZED WORKS

Any defective work, whether it be the result of poor workmanship, use of defective materials, damage through carelessness or of any other cause, which is found to exist prior to the final acceptance or final payment for the works, shall be removed immediately and replaced by work and materials which shall conform to the specifications, or shall be remedied otherwise in a manner acceptable to the BSP. This clause shall have full effect regardless of the fact that the defective materials used are with the full knowledge of the Engineer. The fact that the Engineer may have previously overlooked such defective work shall not constitute an acceptance of such work of [sic] material or any part of it.

No work shall be done without lines and grades given by the Engineer. Work done contrary to or in violation of the instruction of the Engineer, and work done beyond the lines on plans or as given, except as herein provided, or any extra work done without authority will be considered as unauthorized and will not be paid for under the provisions of the Contract. Work so done may be ordered removed or replaced at the Contractor's expense. Any area of a finished surface that exceeds the applicable variation limit specified where imperfect places or spots develop or that does not comply with the plans and specifications, in any other respect shall be corrected before final acceptance. Areas ordered removed and replaced shall be reconstructed in accordance with the specifications or as directed by the Engineer. All removal and replacement of unsatisfactory materials and correction of work of any description shall be done at the expense of the Contractor.

xxx

32.04

CONTRACTOR'S RESPONSIBILITY FOR WORKS

Until the final acceptance of the works by the BSP, the Contractor shall have charge and care of the works and shall take every precaution against damage or injury to any part thereof by the action of the elements or from any other cause, whether arising from the execution or from the non-execution of work. The Contractor shall rebuild, repair, restore and make good all damages or injuries to any portion of the works and occasioned by any of the above causes before final acceptance and shall bear the expense thereof, except damages to the works due to Force Majeure and without fault or negligence of the Contractor, including, but not restricted to, public enemy, acts of Government, and strikes, considered by the BSP to have been unavoidable or due to ordinary wear and tear.

xxx

It is quite plain from the foregoing that between BSP and SKI, the latter is more accountable to pay the contract price for the services rendered by TERP Asia in rectifying the roof deck slab. However, Engr. Morales' professional fees cannot be deemed part of SKI's liability under Article 20.08 of the GCC which contemplates only the removal, replacement, and remediation of unsatisfactory materials and the correction or reconstruction of work. Where the language of a contract is plain and unambiguous, its meaning should be determined literally, without reference to extrinsic aids.[28]

The award of overhead cost in favor of SKI must also be modified. The CIAC included the overhead expenses for December 3, 2005 to August 24, 2007 although SKI failed to prove that it has presented a written claim for extension within 30 days from the occurrence of the cause of that supposed delay as required in Section 21.03 of the GCC, viz.:

21.03

EXTENSION OF CONTRACT TIME

a.

Should the amount of additional work of any kind or other special circumstances of any kind whatsoever occur such as to fairly entitle the Contractor to an extension of contract time, the BSP shall determine the amount of such extension; provided that the BSP is not bound to take into account any claim for an extension of time unless the Contractor has, prior to the expiration of the contract time and within thirty (30) calendar days after such work has been commenced or after the circumstances leading to such claim have arisen, delivered to the BSP notices in order that it could have investigated them at that time. Failure to provide such notice shall constitute a waiver by the Contractor of any claim. Upon receipt of full and detailed particulars, the BSP shall examine the facts and extent of the delay and shall extend the contract time for completing the contract work when, in the BSP's opinion, the findings of facts justify an extension.

xxx

c.

Extension of contract time may be granted only when the affected activities fall within the critical path of the PERT/CPM network. (Emphasis supplied) xxx

xxx

As shown by the records, SKI only requested for extensions of time in June 2006 despite having discovered the defects in roof deck slab in April 2005.[29] SKI did not also substantiate its assertions that the roof deck slab

works were so interrelated with other aspects of the project that the problems therein inevitably delayed other works. SKI must perforce be deemed to have waived any possible request for extension of time as well as the corresponding overhead costs. Therefore, the award of P3,962,258.85 overhead cost for Module 2 for the period of December 3, 2005 to August 24, 2007 must be deleted.

Nonetheless, We affirm the award of overhead costs for those time extensions granted by the BSP. As found by the CIAC, and based on JAA's initial evaluation of SKI's claim, such costs are specifically identified items which are directly related to overhead and reasonably incurred or arising during the granted extensions of time. We recognize the CIAC's special knowledge and expertise in this eminently factual and technical matter.[30]

BSP Entitled to Liquidated Damages for Module 2

In denying BSP's claim for liquidated damages for Module 2, the CIAC erroneously relied on CIAP Document No. 101 which is not among the contract documents enumerated in Article 2[31] of the GCC. The relationship and liabilities of SKI and BSP should be determined based on their agreement, which is stated in their contract documents, pursuant to the well-entrenched rule that an agreement reduced into writing is deemed to contain all the terms agreed upon by the parties; thus, as between SKI and BSP, there can be no other evidence of any such terms.[32]

In the GCC, liquidated damages are explicitly provided in Articles 20.14 and 21.06 which state:

20.14 CONTRACT COMPLETION

Once the Project reaches an accomplishment of 95% of the total contract amount, BSP may create an inspectorate team to make preliminary inspection and submit a punch-list to the contractor in preparation for the final turn-over of the Project. Said punchlist will contain, among others, the remaining works, work deficiencies for necessary corrections, and the specific duration/time to fully complete the Project considering the approved remaining contract time as to the date of contract suspension. This, however, shall not preclude the BSP's claim for liquidated damages.

21.06

LIQUIDATED DAMAGES

a.

Where the Contractor refuses or fails to satisfactorily complete the work within the specified contract time, plus any time extension duly granted and is hereby in default under the contract, the Contractor shall pay the BSP for liquidated damages, and not by way of penalty, an amount to be determined in accordance with the following formula until the work is completed and accepted or taken over by the BSP:

xxx

c.

To be entitled to such liquidated damages, the BSP does not have to prove that it has incurred actual damages. Such amount shall be deducted from any money due or which may become due the Contractor under the contract and/or collect such liquidated damages from the retention money or other Securities posted by the Contractor whichever is convenient to the BSP.

xxx

e.

In no case however, shall the total sum of liquidated damages exceed ten percent (10%) of the total Contract Price. xxx

xxx

Clearly, the parties agreed to an award of liquidated damages in case SKI failed to satisfactorily complete the work within the time allotted, including extensions duly granted, and regardless of the possible reasons for such failure. The unambiguous phrasing of Article 20.14 also lays to rest any further doubt as to the intention of the parties to grant liquidated damages even if there was substantial completion of each project. Considering that SKI's accumulative accomplishment for Module 2 as of December 3, 2005 is only 96.70%,^[33] it should be held liable for liquidated damages for December 3, 2005 and August 24, 2007. Significantly, CIAC accepted BSP's computation of liquidated damages at the maximum 10% of the contract price under Article 21.06(e) of the GCC, reckoning the completion of Module 3 as early as September 2007.^[34] Using the same formula, BSP is also entitled to P19,336,635.70 or the maximum 10% of the contract price for Module 2.

BSP and SKI Proportionately Liable for the Damage in the Briquetting Machine

Undisputedly, the briquetting machine was damaged while it was under the control and possession of SKI. Despite the timely notice from JAA that the briquetting room had been flooded, SKI did not take any precautions to prevent the damage. It obviously failed to observe the duty imposed on it by Article 17^[35] of the GCC. However, the CIAC observed that the damage may have been compounded by long periods of disuse and BSP has not controverted such findings. Aware of the sensitivity of the equipment, BSP should have at least exercised the diligence of a good father of a family to minimize the damage.^[36] BSP is therefore guilty of contributory negligence which refers to conduct on the part of the injured party contributing as a legal cause to the harm he has suffered and falling below the standard to which he is required to conform for his own protection.^[37]

Given this factual circumstances, SKI and the BSP should both be deemed responsible for the condition of the machine and the proximately resulting expenses. SKI's liability includes the natural and probable consequences of the breach of its contractual obligation to prevent damage to the briquetting machine, as well as such damages which the parties have foreseen or could have reasonably foreseen when they constituted the obligation.^[38] Pursuant to Article 17.01 and 17.02^[39] of the GCC, SKI must pay for all damages occasioned by its acts or neglect and repair, at its own expense, any existing BSP utilities damaged due to its fault or negligence. This liability shall be tempered accordingly^[40] as a result of BSP's contributory negligence. Thus, BSP must bear 40% of its own loss in line with prevailing jurisprudence.^[41]

No Evidence to Support BSP's Claims for Balance of Works in Modules 2 and 3 and Unliquidated Advance Payments; SKI's Retention Money May Be Withheld for Payment of Liquidated Damages

There is also no sufficient evidence to support BSP's entitlement to balance of works and unliquidated advance payments. BSP failed to prove the alleged balance of works in Module 2 and testing and commissioning in Module 3. It did not also controvert SKI's counter-arguments that the specified water heater plug was too large; that SKI had already conducted testing and commissioning in Module 2 but the same could not be evaluated due to unpaid billings on the part of a third-party contractor; and that the late removal of the ceiling installed by a different contractor led to the consequent delay in Module 3. He who alleges must prove.^[42] BSP's failure to adduce adequate evidence as basis for the grant of relief prayed for must necessarily result in denial.^[43]

Similarly, BSP failed to substantiate its claim for unliquidated advance payments. BSP alleges that during the execution proceedings of the January 19, 2009 Award, it issued in favor of SKI a P33,021,486.46 check for the full payment of Progress Billings No. 38 and 39 for Module 2 and Progress Billing No. 39 for Module 3.^[44] However, evidence of such check does not appear in the records. At any rate, it must be stressed that the mere

issuance or delivery of a check does not ordinarily produce the effect of payment until the same has been encashed.[45] Thus, without proof of such delivery and receipt, the obligation to return the thing does not arise. The principle of solutio indebiti does not find application in the absence of evidence showing that (1) something has been unduly delivered through mistake; and (2) that something was received when there was no right to demand it.[46]

The Court also denies SKI's claims for the release of its retention money. Admittedly, SKI failed to submit the required documents for the release of the money and it merely explained that such requirements cannot be met in view of the pending proceedings, "some issues (being) inextricably linked to the various claims and counter claims [sic]".[47] However, nothing in the records supports these bare allegations. Moreover, the release of retention money may be validly withheld considering that BSP has been awarded liquidated damages. Under Article 21.06 of the GCC, BSP may collect such liquidated damages from the retention money posted by SKI.

WHEREFORE, the petition for review is hereby partially GRANTED. Accordingly, the January 19, 2009 Award of the Construction Industry Arbitration Commission in CIAC Case No. 13-2008 is MODIFIED as follows: the award of P3,962,258.85 in favor of SKI Construction Group, Inc. as overhead or prolongation costs in Module 2 is DELETED; SKI is ORDERED to pay the Bangko Sentral ng Pilipinas (a) P19,336,635.70 liquidated damages for its failure to complete Module 2 on time, (b) P4,388,780.39 as reimbursement of BSP's expenses in reconstructing the defective roof deck slab; and P2,340,000.00 or 60% of P3,900,000.00 as SKI's share for the cost of repairing the briquetting machine. All other aspects of the January 19, 2009 Award stand.

SO ORDERED.

Villon (Chairperson) and Garcia,[1] JJ., concur.

[1] Vice Justice Florito S. Macalino, per raffle dated October 8, 2013.

[2] Rollo, pages 7-104.

[3] The Arbitral Tribunal was composed of Chairman Alfredo F. Tadiar and Members Ernesto S. de Castro and Ramon F. Allado. The Award was dated December 18, 2008 but the first page thereof indicates that it was promulgated only on January 19, 2009, *ibid.*, pages 115-195.

[4] *Ibid.*, pages 1135-1140.

[5] *Ibid.*, pages 1141-1146.

[6] See par. 5, page 2 of Module 2 Contract and par. 5, page 2 of Module 3 Contract, *ibid.*, pages 1136 and 1142, respectively.

[7] *Ibid.*, pages 1153-1198.

[8] See admitted facts as stated in the January 19, 2009 Awards, *supra*, at note 3.

[9] See letter dated November 26, 2007 addressed to Commission on Audit through BSP COA Resident Auditor, rollo, pages 239-240.

[10] See letter dated February 15, 2008 signed by BSP's Deputy Governor Armando L. Suratos as well as the attached status and comments on the issues raised by SKI, *ibid.*, pages 242-243.

[11] *Ibid.*, pages 199-232.

[12] Art. 1721. If, in the execution of the work, an act of the employer is required, and he incurs in delay or fails to perform the act, the contractor is entitled to a reasonable compensation.

The amount of the compensation is computed, on the one hand, by the duration of the delay and amount of the compensation stipulated, and on the other hand, by what the contractor has saved in expenses by reason of the delay, or is able to earn by a different employment of his time and industry.

[13] Art. 1722. If the work cannot be completed on account of a defect in the material furnished by the employer, or because of orders from the employer, without any fault on the part of the contractor, the latter has a right to an equitable part of the compensation proportionally to the work done, and reimbursement for proper expenses made.

[14] See Answer with Compulsory Counterclaims, Annex “G” of Petition, rollo, pages 289-502.

[15] Supra, at note 3.

[16] Pages 79-81 of the January 19, 2009 Award, supra, at note 3.

[17] Pages 15-16 of the Petition, rollo, pages 21-22.

[18] See Memorandum of Authorities, *ibid.*, pages 2021-2027.

[19] See Comment, *ibid.*, pages 1967-1978.

[20] See *Genato v. Viola*, G.R. No. 169706. February 5, 2010.

[21] See *C&S Fishfarm v. Court of Appeals*, G.R. No. 122720. December 16, 2002. Cited with approval in *Figueroa v. People*, G.R. No. 147406. July 14, 2006.

[22] See *Norton Resources v. All Asia Bank*, G.R. No. 162523. November 25, 2009.

[23] See *William Golangco Construction v. Philippine Commercial International Bank*, G.R. No. 142830. March 24, 2006.

[24] See *Starbright Sales v. Philippine Realty*, G.R. No. 177936. January 18, 2012.

[25] See *National Power v. Province of Quezon*, G.R. No. 171586. July 15, 2009.

[26] Page iv of December 6, 2006 Executive Brief, Structural Investigation of Roof Deck Slab Cracking, Revision 4.0, rollo, page 1367.

[27] See pages 2-3 of Supplemental Joint Affidavit of Generoso B. Bituin and Carlito R. Clapano, *ibid.*, pages 665-666.

[28] See *Norton Resources v. All Asia Bank*, supra, at note 22, citing *Benguet Corporation v. Cabildo*, G.R. No. 151402. August 22, 2008. See also Civil Code, Art. 1370.

[29] See SKI's Chronology as reproduced from its Draft Decision in pages 35-40 of the January 19, 2009 Award, rollo, pages 149-154.

[30] See *Hipolito v. Cinco*, G.R. No. 174143. November 28, 2011.

[31] 2.01 CONTRACT DOCUMENTS

- Contract Agreement

- General Conditions of Contract

- Drawings/Plans
- Specifications
- Invitation to Bid
- Instructions to Bidders
- Addenda (if any)
- Bid Form including the following Annexes in two (2) envelopes:
xxx
- Performance Security
- Prequalification Statements
- Notice of Award of Contract and Contractor's "Conforme" thereto
- Other Contract Documents that may be required by the BSP

[32] Rules of Court, Rule 130, Sec. 9. Evidence of written agreements. – When the terms of an agreement have been reduced to writing, it is considered as containing all the terms agreed upon and there can be, between the parties and their successors in interest, no evidence of such terms other than the contents of the written agreement.

xxx

[33] See page 47 of the January 19, 2009 Award, *supra*, at note 3.

[34] See pages 49-52 of the January 19, 2009 Award, *supra*, at note 3.

[35] ARTICLE 17 PROTECTION OF ADJACENT PROPERTY AND EXISTING UTILITIES 17.01
CONTRACTOR'S SOLE RESPONSIBILITY

The Contractor shall adequately protect adjacent properties as provided by law and the Contract Documents. The construction, building or work, in addition to any neighboring property or building which may be jeopardized in any manner, must be thoroughly and substantially braced against winds, floods, settling, falling, or like similar occurrences, and when necessary, covered and protected from sun and rain at the Contractor's expense. The Contractor shall solely be liable and pay for all damages occasioned in any manner by his acts or neglect, or of his agents, employees, or workmen.

[36] Civil Code, Art. 2203. The party suffering loss or injury must exercise the diligence of a good father of a family to minimize the damages resulting from the act or omission in question.

[37] See *Estacion v. Bernardo*, G.R. No. 144723. February 27, 2006 and *Philippine National Bank v. Cheah Chee Chong*, G.R. No. 170865 and 170892. April 25, 2012, citing *Valenzuela v. Court of Appeals*, G.R. No. 115024. February 7, 1996.

[38] Civil Code, Art. 2201. In contracts and quasi-contracts, the damages for which the obligor who acted in good faith is liable shall be those that are the natural and probable consequences of the breach of the obligation, and which the parties have foreseen or could have reasonably foreseen at the time the obligation was constituted.

xxx

[39] 17.02 EXISTING UTILITIES

Existing utilities, if damaged due to negligence or fault of the Contractor, shall be repaired by the Contractor at his expense.

[40] Civil Code, Art. 2179. When the plaintiff's own negligence was the immediate and proximate cause of his injury, he cannot recover damages. But if his negligence was only contributory, the immediate and proximate cause of the injury being the defendant's lack of due care, the plaintiff may recover damages, but the courts shall mitigate the damages to be awarded.

[41] See *Allied Banking v. Bank of the Philippine Islands*, G.R. No. 188363. February 27, 2013, citing *Bank of the Philippine Islands v. Court of Appeals*, G.R. No. 102383. November 26, 1992 and *Bank of America NT & SA v. Philippine Racing Club*, G.R. No. 150228. July 30, 2009.

[42] See *Boyboy v. Yabut*, A.C. No. 5225. April 29, 2003.

[43] See *UST Faculty Union v. University of Santo Tomas*, G.R. No. 180892. April 7, 2009.

[44] See pages 12-16 of Reply and pages 15-18 of Memorandum of Authorities, rollo, pages 1995-1999 and 2046-2049, respectively.

[45] See *Vitarich v. Losin*, G.R. No. 181560. November 15, 2010.

[46] New Civil Code, Art. 2154.

[47] See pages 55-56 of the January 19, 2009 Award citing pages 26-27 and 82-83 of SKI's Draft Decision, *supra*, at note 3.

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