

AMALIO L. SARMIENTO, DOING BUSINESS UNDER THE NAME AND STYLE OF A.L. SARMIENTO CONSTRUCTION, PETITIONER, VS. COURT OF APPEALS (NINTH DIVISION) AND METROPOLITAN WATERWORKS AND SE...

G.R. No. 110871. July 02, 1998

Ponente: KAPUNAN, J.

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KAPUNAN, J.:

In this petition for review on certiorari, petitioner seeks the annulment of the decision of the Court of Appeals (CA-G.R. Civil Case No. 31602) promulgated on 23 October 1992 and its resolution dated 30 June 1993 denying petitioner's motion for reconsideration.

The facts leading to the present controversy are as follows:

On 15 December 1981, private respondent MWSS advertised for bidding by pre-qualified contractors, Contract No. RS-4 which involved the:

- 1) Modification and improvement of its eleven (11) existing pumping stations within Metro Manila;
- 2) Demolition and complete reconstruction of the existing Cubao Booster Pumping Station;
- 3) Construction of a new Booster pumping station at Novaliches and a 7 megalitre (ML) reinforced concrete reservoir, as well as other accessories and services necessary and incidental to construct and complete the work in accordance with the technical specification No. 1.1 of the Contract Documents.

On 6 April 1982, MWSS held the public bidding which petitioner won, his bid in the amount of P60,000,000.00 being the lowest. Included in said amount was the price of P13,500,000.00 for the supply, delivery and supervision of installation of new pump units (prime cost items) for the project.

On 14 October 1982, MWSS awarded petitioner the contract pursuant to Board Resolution No. 121-82 adopted on 9 September 1982.

On 21 December 1982, MWSS and petitioner executed the contract for the RS-4 project.

On 15 March 1983, MWSS issued petitioner the Notice to Proceed, upon receipt of which petitioner commenced construction of the project.

On 3 May 1983, MWSS released P9,000,000.00 to petitioner as advance payment for mobilization.

During the construction period, petitioner furnished MWSS eight (8) vehicles to be used in the RS-4 project and for which MWSS agreed to compensate petitioner.

On 14 August 1984, due to his tight financial situation brought about by rising inflation, petitioner wrote MWSS requesting a joint termination of the contract.

On 16 July 1984, pursuant to General Condition No. 62[1] of the bid documents providing force majeure as basis for joint termination, MWSS and petitioner approved the joint termination of said project.

On 28 September 1984, MWSS informed petitioner that effective 1 October 1984, it would take over the rehabilitation of the Cubao, Makati and Novaliches pumping stations.

On 14 February 1989, due to MWSS' refusal to pay petitioner its alleged indebtedness, the latter filed a complaint for sum of money with the Regional Trial Court of Quezon City, to collect from MWSS the following:

1). The amount of P13,735,095.18 as net payable to plaintiff Sarmiento broken down as follows:

a). Exceeded quantities/overrun for civil works accomplished by plaintiff Sarmiento

P 10,925.62

b). For the use by MWSS of plaintiff Sarmiento's vehicles

101,849.65

c). For the loss by MWSS of plaintiff Sarmiento's vehicles

180,000.00

d). For foreign currency adjustment in the import of materials and equipment under SGC 10 of the contract documents

11,822,082.37

e). For the cost of exceeded quantities in the materials and equipment imported and delivered by plaintiff Sarmiento to MWSS

1,236,562.96

f). For the balance unspent in the prime cost items

6,135,784.14

g). For price escalation on plaintiff's accomplishment per Presidential Decree No. 1594

192,000.00

Total

P9,679,207.74

Less: Partial Payment made by MWSS to plaintiff Sarmiento

1,854,303.19

Gross Amount Payable
by MWSS to plaintiff
Sarmiento

17,824,904.55

Less: Balance on 15%

Advance Payment For

Mobilization Given by
MWSS

4,089,809.37

Net payable of MWSS to

Plaintiff

P13,735,095.18

2) The amount of P500,000.00 as plaintiff's loss on trade discount for prime cost pump units.

3) The amount of P1,000,000.00 by way of attorney's fees.

4) The cost of suit.[2]

The Commission on Audit (COA) was impleaded as a nominal party. However, in an Order dated 29 June 1989, the trial court dismissed the complaint against the COA.

On 5 May 1989, MWSS filed its answer and set up the following counter-claims:

a) Unpaid balance of the
mobilization fund

P4,089,809.37

b) Interest on the unpaid
balance of the mobilization fund

3,896,043.20

c) Interest on the interest on
the unpaid balance of the
mobilization fund

3,178,530.82

d) Interest on the loan availed
of by the defendant MWSS
from Asian Development
Bank for importation of

materials and equipment

1,002,943.46

e)Interest on the interest on

the loan availed of by

MWSS from ADB

456,019.13

f)Customs charges advanced

by defendant

317,861.36

g)Interest on the amount paid

for customs charges advanced

by defendant

86,812.89

h)Additional 3% mark-up for

the cost of the imported

equipment paid by defendant

MWSS but disallowed by the

Commission on Audit

503,628.38

i) Amount representing

liquidated damages

6,000,000.00

j) Amount representing

exemplary damages

2,000,000.00

k)Amount as and for attorney's

fees equivalent to 10%

of the total amount claimed

1,744,183.92[3]

On 28 February 1991, the trial court rendered a decision in favor of petitioner, the dispositive portion of which reads:

WHEREFORE, premises considered, judgment is hereby (sic) ordering defendant MWSS to pay plaintiff the net amount of P13,555,095.18 itemized as follows:

A. For overrun in civil works:

10,925.62

B. For defendant's use of plaintiff's vehicles:

101,849.65

C. For foreign currency adjustment under SGC 10:

11,822,082.37

D. For costs of exceeded quantities of imported materials and equipments:

1,236,562.96

E. For the balance of the bid price for prime cost items:

6,135,784.14

F. For trade discount for the prime cost items:

500,000.00

Total

P 19,499,207.74

Less: partial payment P1,854,303.19

17,644,904.56

Less: Bal. of 15% advance payment: 4,089,809.37

Net payable to plaintiff:

P 13,555,095.18

Defendant is likewise ordered to pay plaintiff the sum of P1,000,000.00 as and by way of attorney's fees.

All other items (i.e. value of carnapped vehicle) are hereby excluded. Defendant's counterclaims are hereby DISMISSED.

Costs against defendant.

SO ORDERED.[4]

Aggrieved by the trial court's decision, MWSS sought redress from the Court of Appeals.

On 23 October 1992, the Court of Appeals reversed the decision of the trial court:

WHEREFORE, the decision appealed from is hereby REVERSED to the extent that the amounts awarded to Amalio L. Sarmiento by the lower court are offset by MWSS's counterclaim which we have granted in the amount of P6,385,713.1 (excluding attorney's fees) computed as follows:

Amounts due MWSS

A. Unpaid balance of advance amount for mobilization

P3,896,043.20

B. Interest on A from June 18, 1983 to September 30, 1992 at 6% p.a

P2,170,745.30

C. Customs charges of imported Butterfly valves

P 317,861.36

D. Interest on C from April 23, 1987 and July 20, 1987,

respectively, to September 30, 1992 at 6% p.a.

P 103,018.79

T O T A L

P6,487,758.50

Less

Amounts due A.L. Sarmiento

A. For overrun in civil works due A.L. Sarmiento

P 195.78

B. Compensation for use of A.L. Sarmiento's eight (8) vehicles

P 101,849.65

T O T A L

P 102,045.43

NET AMOUNT DUE MWSS

P6,385,713.1

With attorney's fees of P638,571.31 added to the above counterclaims, the total sum hereby adjudged in favor of MWSS amounts to P7,024,284.41.

The dismissal by the trial court of MWSS' counterclaim for the 3% mark up for the cost of materials and equipment and its denial of A.L. Sarmiento's claim for the carnapped vehicle, are hereby SUSTAINED. No costs.

SO ORDERED.[5]

Not satisfied with the decision of the Court of Appeals, petitioner filed the present petition for review and raised the following issues:

1. RESPONDENT COURT OF APPEALS MANIFESTLY OVERLOOKED CERTAIN RELEVANT FACTS, GRAVELY MISAPPREHENDED THE FACTS OF THE CASE AND GROSSLY MISAPPRECIATED THE EVIDENCE, AND THUS COMMITTED PATENT ERROR WHEN IT REVERSED THE DECISION OF THE REGIONAL TRIAL COURT WHICH WAS SUPPORTED BY SUFFICIENT, COMPETENT AND

CONVINCING EVIDENCE, THE LAW AND JURISPRUDENCE.2. RESPONDENT COURT OF APPEALS GRAVELY ERRED IN AWARDING THE COUNTERCLAIMS OF THE RESPONDENT MWSS DESPITE THE ABSENCE OF COMPETENT, CONVINCING AND SUBSTANTIAL EVIDENCE TO SUPPORT THE SAID FINDING.3. THE RESPONDENT COURT OF APPEALS SERIOUSLY ERRED IN AWARDING ATTORNEY'S FEES IN FAVOR OF THE RESPONDENT MWSS DESPITE THE FACT THAT SAID AWARD IS WITHOUT LEGAL, FACTUAL AND EQUITABLE JUSTIFICATION ESPECIALLY CONSIDERING THAT PETITIONER HAD NOT ACTED IN BAD FAITH IN ASKING FOR JOINT TERMINATION OF CONTRACT AND MORE IMPORTANTLY, THE TERMINATION OF THE CONTRACT WAS DULY APPROVED BY THE RESPONDENT MWSS.[6]

Before going to the merits, we shall first resolve the procedural issue raised by private respondent.

MWSS contends that the petition should be dismissed on the ground that it raises only questions of fact. This contention lacks merit. Although Section 2, Rule 45 of the Revised Rules of Court[7] provides that only questions of law may be raised on appeal, this rule is not without exception. In the following instances, factual issues may be resolved by this Court.

(1) x x x the conclusion is a finding grounded entirely on speculation, surmise and conjecture; (2) the inference made is manifestly mistaken; (3) there is grave abuse of discretion; (4) the judgment is based on a misapprehension of facts; (5) the findings of fact are conflicting; (6) the Court of Appeals went beyond the issues of the case and its findings are contrary to the admissions of both appellant and appellees; (7) the findings of fact of the Court of Appeals are contrary to those of the trial court; (8) said findings of fact are conclusions without citation of specific evidence on which they are based; (9) the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondents; and (10) the findings of fact of the Court of Appeals are premised on the supposed absence of evidence and contradicted by the evidence on record.[8]

In this case, as can readily be discerned, the findings of fact of the trial court and respondent appellate court are at variance. We are, therefore, compelled to review the evidence on record[9] in order that justice may be served.

We shall resolve the assigned errors separately.

For exceeded quantities or
overruns in civil works in
the amount of P 10,925.62.

Petitioner claims that MWSS has not paid for the overruns or the quantities of work accomplished by petitioner in excess of the bidded quantity.[10] MWSS does not deny its liability for the overruns but avers that the same has already been paid. Respondent court ruled in favor of private respondent on the strength of the vouchers and receipts[11] presented as proof allegedly of such payment.

We disagree. The vouchers and receipts referred to do not contain specific indications of payment of the overruns. What is reflected in these vouchers are merely the general payments for petitioner's lump-sum accomplishments in the project.[12]

Moreover, the testimony of Mrs. Zaida L. Pulido, financial control officer of MWSS cannot be relied upon as it contains serious discrepancies.

Mrs. Pulido testified that for the overruns, private respondent has paid petitioner P10,729.84 thus leaving a balance of only P195.78.[13] She explained that she was able to identify the particular vouchers representing payment for the overruns based on the progress estimates where the overruns were allegedly indicated.[14] She

referred particularly to progress estimate No. 16[15] and specified therein all the works categorized as overruns paid for by private respondent. Upon closer scrutiny, however, we find that the total value or cost of these alleged overruns[16] exceeds P10,729.84, the amount she previously stated that MWSS paid for the overruns. It is even more than the amount being claimed by petitioner. Quoted hereunder are portions of Mrs. Pulido's testimony:

x x x

Atty.Sunga:

Q

You testified during the last hearing that the claim of the plaintiff of exceeded quantity over ran is already paid is that correct?

A

Yes, sir.

Q

And that you testified that the items referring to over runs being claimed by plaintiff are: Item K, B, 3-B, which was paid in the amount of P2,945.00. Item K, B-4-A which was paid in the amount of P2,097.83, item B, 11-B, which was paid in the amount of P2858.54, item KB 11-G, which was paid in the amount of P1,766.25 and item KG 10-A which was paid in the amount of P4,286.55 or for the total of 13,954.17 is that correct?

A

Yes, sir.

Q

But the claim of the plaintiff is only in the amount of P10,952.62 for exceeded quantity over ran in civil work are you aware of that?

A

Yes, sir.

Q

How come you paid P13,954.17?

Witness:

A

We paid the over runs based on the recommendation of the resident engineers.

x x x.[17]

From the foregoing, MWSS, thus, has not sufficiently proven that it had paid petitioner's claim for overruns.

Foreign currency adjustment in the import of materials and equipment under SGC-10 of the contract documents

Petitioner insists that it is entitled to compensation in the amount of P11,822,082.37 for the loss resulting from the fluctuation of the value of the peso in relation to the dollar under Supplemental General Condition No. 10 (SGC-10) which states that:

All payments to a Philippine Contractor will be in Philippine pesos. The Contractor shall make his own arrangements through the Central Bank of the Philippines to convert pesos into foreign currencies as necessary for payment of foreign expenses incurred by him for this Contract. MWSS will support an application by a Philippine Contractor for purchase of foreign currencies with pesos, to the extent of the Foreign Currency requirements submitted with the Contractor's bid and accepted or modified for award of Contract. To compensate a Philippine Contractor for any devaluation or revaluation in the exchange rate of the Peso during the construction, completion and Guarantee Period of the Work, the equivalent in pesos of the foreign exchange requirements shall be increased or decreased in the same proportion as the Current Value of each foreign currency bears in relation to its Base Value. For this purpose the Base Value of a foreign currency in relation to the Peso shall be the Philippine National Bank's official selling rate as established in IB-18 for determination of bid prices in pesos and the Current Value of a foreign currency in relation to the Peso shall be the Philippine National Bank's official selling rate prevailing on the last day of the period relating to a Payment Certificate. In the event that a currency is not covered by the PNB's official rates, the CO will determine and adopt a conversion rate.[18] (Underscoring ours.)

Petitioner's contention is without merit. Petitioner is entitled to foreign currency adjustment only if he procured and used his own dollars to purchase the needed materials from the foreign suppliers. In this case, however, said suppliers were paid by MWSS itself through its loan with the ADB under the latter's Qualified Commitment Procedure.[19]

Although it is his duty to furnish all materials, supplies and tools,[20] due to difficulties in procuring his own dollars to import the required equipment,[21] petitioner agreed with MWSS to avail of the latter's standing credit with ADB. The terms and conditions of this agreement were embodied in the letter of MWSS to petitioner dated 29 February 1984, (which was duly accepted and signed by petitioner)[22] which in effect modified the original contract between the parties.

Petitioner's argument that the aforementioned letter was actually a loan agreement between MWSS and himself and that what ADB charged to MWSS' account for paying the foreign suppliers was in turn charged by the latter to him under the alleged loan contract and therefore he, in effect, used his own pesos to purchase the dollars to pay the said suppliers, is simply untenable. There is nothing in the aforesaid agreement that indicates that it is a contract of loan. It is more logical to consider the agreement as a modification of the original contract (RS-4) between the two parties pursuant to Art. 15.01[23] of the same. Hence, under this new arrangement, MWSS in effect became the importer of the materials and equipment since it paid for the same and petitioner was relegated to the role of a conduit.

Unmeritorious, likewise, is the claim of petitioner that the payments made to the foreign suppliers by the ADB should be deemed as his own payment since he was the one who made all the arrangements for the importation (opening the letters of credit, for instance). The records show that petitioner has been separately and duly compensated for these arrangements with a 5% mark-up based on the cost of all imported items.[24]

Further, when petitioner opened the letters of credit for use in the importation of equipment, he indubitably stated therein that said letters of credit were for his and MWSS' account.[25]

Finally, since it was its loan with ADB that was used to import the required materials, any and all foreign currency exchange risks were naturally shouldered by MWSS. Petitioner, therefore, did not suffer and could not have suffered any such loss that would justify compensation.

For cost of the excess materials and equipment in the amount of P1,236,562.96

The foregoing discussion also applies to petitioner's claim for the cost of excess materials imported. Indeed, MWSS has no obligation to pay petitioner's claim because, as previously emphasized, all the imported materials

and equipment were paid for by MWSS through the loan it acquired from ADB.

The primordial consideration in resolving this issue is not who made the physical arrangements to import the materials but who actually paid for the importation.

To grant petitioner's claim is to require MWSS to pay twice for the same imported items. This we cannot allow for it would be tantamount to unjust enrichment on the part of petitioner.

For the balance of the bid price for
prime cost items in the
amount of P13,500,000.00

Regarding this item, we fully concur with the findings of the Court of Appeals, thus:

Re the fifth assigned error: In his complaint Sarmiento alleged that the P13,500,000.00 for prime cost items was part of his bid price of P60,000,000.00; and that since the actual cost for the prime cost items and their installation amounted only to P7,364,212.86, he is therefore entitled to the difference between the said actual cost of P7,364,212.86 and the prime cost of P13,500,000.00 as the latter amount was part of his bid price of P60,000,000.00. Thus, the lower court awarded Sarmiento the difference which amounts to P6,135,784.14.

The lower court erred. The explanation given by MWSS regarding this P13,500,000.00 for prime cost items is clear and substantiated by testimonial and documentary evidence (TSN, May 22, 1990, pp. 8-9; TSN, May 24, 1990, p. 9; Exhs. C & 19-A). This amount was not bid in by Sarmiento. If it appears in the RS-4 Bid Form (Exh. C), corresponding to the description "Allow the Prime Cost Sum for the Supply, Delivery and Supervision of Installation of New Pump Units as Outlined in TS-15.6," it is because MWSS typed the entries therein prior to the bidding, and the form was distributed to all the prospective bidders. This amount was made part of the total bid for budgetary purposes only so that MWSS would have a uniform basis in comparing the bid amounts submitted later since during the bidding period there was yet no exact specification upon which the bidders could base the amount of their bid.

Under the section "Prime Cost Items" in General Conditions Clause (GC-53) (should be GC-54), the following stipulation appears:

'Where Prime Cost lump sums or unit prices are designated under particular items in the Bid Form, they are intended to cover the purchase price of materials or equipment where the exact details or quality of the materials or equipment is not determined at the time of Contract Document preparation, but where the Contractor is able to determine the cost of installation, the unit prices of lump sum prices as bid by the Contractor shall include for the purchase of the materials or equipment at the Prime Cost stated and all profit, overhead and installation costs.

'Subsequent to execution of Contract, the Contractor shall, upon request of the CO, obtain at least three (3) quotations for equipment or materials meeting the Specifications, or such amplified Specifications as may be provided by the CO, and shall submit them to the CO. The CO will review the quotations and will instruct the Contractor to proceed with purchase in accordance with the quotation selected by the CO.

'The unit prices or lump sums as bid, will be adjusted by deduction of the Prime Cost stated and the addition of the actual net cost to the Contractor of the materials or equipment. Actual net cost shall allow for any trade discounts. No adjustment will be made to the Contractor's overhead, profit or installation rates regardless of any difference between the Prime Cost stated and the final actual net cost.' (Exh. 19-A). (Underscoring Ours).

Thus, applying the aforequoted provision, this amount of P13,500.00 shall be deducted from Sarmiento's bid price of P60,000,000.00, resulting in the difference of P46,500,000.00; and, after such deduction, the actual net cost of the prime items which is P7,364,212.86 shall be added to said amount of P46,500,000.00. The result then is that Sarmiento's actual bid price was only P53,864,212.85 and not P60,000,000.00.

We rule therefore that Sarmiento is not entitled to be paid the amount of P6,135,784.14 representing the unexpended portion of the provisional or budgeted amount of P13,500,000.00 for the prime cost items.[26]

Although the amount of P13,500,000.00 was included in petitioner's total bid of P60,000,000.00, GC-54 specifically laid down the condition that the actual cost shall be deducted from the prime cost stated in the bid form. There is, therefore, no basis for petitioner's claim. To award petitioner the balance of P6,135,784.14 would, likewise, be tantamount to enriching him unjustly.

The amount of P500,000.00 as
petitioner's loss on trade
discount for prime cost pump units.

Petitioner anchors his claim for trade discount on the third paragraph of General Condition No. 54 which provides that:

PRIME COST ITEMS

xxx.

The unit prices or lump sums as bid, will be adjusted by deduction of the Prime Cost stated and the addition of the actual net cost to the Contractor of the materials or equipment. Actual net cost shall allow for any trade discounts. No adjustment will be made to the Contractor's overhead, profit or installation rates regardless of any difference between the Prime Cost stated and the final actual net cost. (Underscoring ours)

The Court of Appeals, however, denied this claim and ruled in this wise:

However, GC 54 was amended or supplemented by Supplemental General Conditions (SGC). The effect of such amendment or supplement is provided for under SGC-1 thereof which reads in full as follows:

“General

The Supplemental General Conditions amend or supplement the General Conditions. Both shall be read together, with the Supplemental General Conditions prevailing where there is conflict. Clauses of the General Conditions not specifically amended or supplemented shall remain in effect.” (Exh. 18).

Of the General Conditions (GC), one was affected by the Supplemental General Conditions (SGC). Thus, SGC-21 provides:

“PRIME COST PROCUREMENT OF NEW PUMP UNITS

This Clause supplements GC-54.

The twenty-two (22) New Pump Units, each consisting of a pump bed plate and associated electric motor, will be procured on a Prime Cost basis.

Specifically, for this Contract the following procedure will apply.

- a) Immediately after contract award the CO will be issued detailed specifications for the pump units to the Contractor.
- b) The Contractor shall invite quotations from a list of potential suppliers prepared by the CO. The CO may also at his discretion cause invitations to Quote to be placed in various publications.
- c) Quotations will be received by the Contractor at a place and time to be mutually agreed upon and opened under the supervision of the CO.

d) The CO will assume custody of the original and one copy of the quotations and will analyze and advise the Contractor of the selected supplier.

e) Subsequent to notification by the CO of the selected supplier the Contractor shall assume responsibility of the procurement of the pump units in exactly the same manner as for any other item of equipment which he is supplying under this contract (including purchase, submission of shop drawings, customs clearance, transportation in the Philippines, storage, installation, etc.). There will be no direct contract between the pump unit supplier and the Owner.

f) The actual net cost to the Contractor will be the C.I.F. Manila value paid by him, plus the paid cost of installation supervision which will be included as a separately priced item in the quotation. Only this net cost will be used in the adjustment of the original Price Cost Allowance.

g) The basis of payment (which will be stated in the Invitation to Quote) by the Contractor to the pump unit supplier will be by Letter of Credit for the full C.I.F. Manila value. All costs incurred by the Contractor to open the Letter of Credit will be for the Contractor's account and will not form part of the net costs to the Contractor under the Prime Cost amount. The Letter of Credit will be subject to the usual shipping documentation plus shop inspection and approval of shop tests. All inspection in the manufacturer's shop will be arranged and paid for separately by the CO. (Exhs. 17, 17-A & 17-B).

Under GC-54, before it was supplemented by SGC-21, the original net cost used for adjustment, i.e. the net cost to be added to the P60,000,000.00 bid price after deducting the provisional or budget amount of P13,500,000.00 for the prime cost items, consisted of these amounts, namely: 1) trade discount, 2) profit, 3) overhead, and 4) installation costs.

However, under SGC-21, the net cost to be used for adjustment consisted only of the amounts paid by Sarmiento on the following: 1) C.I.F. Manila value of the pump units paid by Sarmiento, and 2) cost of installation supervision. There is no mention of profit and trade discount. And only this statement appears that is related to overhead: "All costs incurred by the Contractor to open the Letter of Credit will be for the Contractor's account and will not form part of the net cost to the Contractor under the Prime Cost amount."

Clearly, there is a conflict between G.C-54 and SGC-21 insofar as concerns what constitutes the "actual net cost" for the purpose of adjusting the P60,000,000.00 bid price. In which case, as provided for by the aforementioned SGC-1, the provisions in the Supplemental General Conditions shall prevail.

Thus, under the subject contract RS-4, Sarmiento is not entitled to trade discount in the procurement of the 22 pump units of the prime cost items.[27]

We disagree. There is no conflict between GC-54 and SGC-21. Paragraph (f) of SGC-21, which states that only the CIF Manila value paid by petitioner shall be used in the adjustment of the original price cost allowance (with the cost of installation supervision to be priced as a separate item) refers specifically and solely to the procurement of the pump units. In other words, in going through the process of, or following the procedure for, the acquisition of the pump units, this is the only expense that petitioner may include in his net cost.

SGC-21 supplements or is an addition to GC-54. Nowhere in the said provision (SGC-21) is it stated that the costs for overhead, installation, profit and trade discount are no longer included in petitioner's actual net cost. The two provisions must be read together and harmonized, otherwise, petitioner would be greatly disadvantaged. Hence, petitioner's claim for trade discount in the amount of P500,000.00 is granted.

Price escalation in the amount of P192,000.00

We grant this claim on the basis of private respondent's own admission, thus:

xxx

Q

Aside from this price escalation that was already paid, how much price escalation that has not yet been paid to the contractor, more or less?

A

The approximate amount is P192,000.00.

Q

That is not yet paid up to the present madam witness?

A

Yes, sir.

Q

And the contractor is entitled to that amount?

A

Yes, sir.[28]

xxx.

MWSS' Counterclaims

Regarding its counterclaims, we rule that MWSS is entitled to the balance of the mobilization fund it advanced to petitioner in the amount of P4,089,809.37. Petitioner has clearly admitted this liability and only contends that the amount has been set-off against his own claims against MWSS.

We delete the award of interest on the unpaid balance of the mobilization fund which is but fair since MWSS has also been remiss in its duty to settle its own obligation with petitioner under 18.05[29] of the RS-4 contract.[30] Under the said provision, both parties were required to settle their respective accountabilities upon termination of said agreement.

MWSS is, likewise, entitled to P317,861.36 for customs paid, under paragraph (f) of their modified agreement regarding petitioner's availment of respondent's loan with ADB under the qualified commitment procedure for importation of the required materials and equipment:

(f) All undertakings and expenses related to the release of the goods from the customs gone up to delivery to the project site, any loss, damage to shortshipment, misdelivery of the imported materials including bad orders shall be for your (petitioner) sole account.[31]

We, however, delete the award of interest on the aforementioned claim on the same principle as above discussed.

As to the award of attorney's fees, there is a contractual stipulation between petitioner and MWSS which states that attorney's fees shall be awarded to the prevailing party.[32] In this case, however, no party actually prevailed. Both petitioner and MWSS have legitimate claims against each other and both have been remiss in their respective obligations. The award of attorney's fees is, therefore, deleted.

WHEREFORE, the assailed decision is hereby MODIFIED as follows:

Amounts due MWSS

A. Unpaid balance of advance
amount for modification

P4,089,809.37

B. Customs charges on imported
butterfly valves

317,861.36

T O T A L

4,407,670.73

Amounts due A.L. Sarmiento

A. For overruns in civil works

P 10,925.62

B. Compensation for use of A.L. Sarmiento's eight (8) vehicles

101,849.65

C. Price adjustment/escalation
per PD 1594

192,000.00

D. Trade Discount

500,000.00

T O T A L

P 804,775.27

Net Amount Due MWSS

P3,602,895.46

SO ORDERED.

Narvasa, C.J., (Chairman), Romero, and Purisima, JJ., concur.

[1] Rollo, pp. 113-114.

[2] Id., at 16-17.

[3] Id., at 18.

[4] Id., at 64.

[5] Id., at 81-82.

[6] Id., at 30-31.

[7] SEC. 2. Contents of petition.--The petition shall contain a concise statement of the matters involved, the

assignment of errors made in the court below, and the reasons relied on for the allowance of the petition, and it should be accompanied with a true copy of the judgment sought to be reviewed, together with twelve (12) copies of the record on appeal, if any, and of the petitioner's brief as filed in the Court of Appeals. A verified statement of the date when notice of judgment and denial of the motion for reconsideration, if any, were received shall accompany the petition.

Only questions of law may be raised in the petition and must distinctly set forth. If no record on appeal has been filed in the Court of Appeals, the clerk of the Supreme Court, upon admission of the petition, shall demand from the Court of Appeals the elevation of the whole record of the case. (Underscoring ours.)

[8] Bautista v. Mangaldan Rural Bank, 230 SCRA 16 (1994); See also Geronimo v. CA, 224 SCRA 494 (1993).

[9] Lee Eng Hong & Rosalinda Villacorta v. CA & Benjamin D. Yu, G.R. No. 114145, 15 February 1995, citing Quality Tobacco Corp. v. IAC, 187 SCRA 210 (1992); Shauf v. CA, 191 SCRA 713 (1990); See also Somodio v. CA, 235 SCRA 307 (1994) & Cayabyab v. IAC, 232 SCRA 1 (1994).

[10] TSN, 8 November 1985, p. 7.

[11] See Exhibits 30, 39-E, 39-H, 38-I, 39-J, 39-K, 39-L, 39-M, 39-N.

[12] Ibid.

[13] TSN, 21 June 1990, pp. 14-15.

[14] TSN, 18 July 1990, p. 5.

[15] Exhibit 41 and 41-A.

[16] P13, 954.17.

[17] TSN, 24 July 1990, pp. 22-23.

[18] Rollo, pp. 111-112.

[19] ADB Withdrawal Authorization and Loan Disbursement Vouchers; Exhibits 43-C, 44-C, 45-D, 45-E, 46-D, 47-C, 48-C, 49-C, 50-C, 51-L, 52-I, 52-J, 53-F, 53-G, 53-H, 53-I, 54-C, 55-C, 56-C, and 57-D. A qualified commitment is a commitment by a financing institution which in this case is the ADB (Asian Dev't. Bank), to pay or to finance the importation of equipments for Contract RS-4. The payment of which will be taken from the existing loan of the borrower which in this case is the MWSS thru its loan from ADB, ADB Loan No. 3518. (TSN, 21 August 1990, p. 26.)

[20] 2.01 of Contract No. RS-4, Rollo, p. 92.

[21] TSN, 23 January 1991, p. 10.

[22] Annex F of the petition; Rollo, pp. 108-110; Exhibit J, Original Records:

xxx.

This has reference to your request for assistance in the importation of materials/equipment needed for the subject contract.

Per discussions made between our staff, ADB people and yourself, please be advised that payment to the suppliers of imported materials/equipment shall be through the Qualified Commitment Procedure of the Asian Development Bank instead of the Direct Payment scheme as previously endorsed to you under our letter of 16

January 1984 subject to the following terms and conditions:

- a) Assistance will apply only for the procurement of materials/equipment that will be incorporated into or installed in the works required in the project.
- b) Any payment made by ADB under this assistance shall bear an interest rate of 18% per annum which will start as of the date MWSS loan account with ADB is debited as reflected in ADB advices of withdrawals up to the time the contractor would have been paid the progress billing against the pay item where the goods are installed until fully liquidated.
- c) The application of Price Escalation for the bid item where such imported materials/equipment are to be incorporated shall be in accordance with Section C 1-11 of the PD 1594 implementing rules and regulations as amended 17 June 1982.
- d) All importations should be consigned to MWSS.
- e) You shall be responsible and answerable to MWSS for the compliance of the imported materials as to the required specifications or its approved equivalent. In case goods delivered are rejected for the above reason, you shall be held solely accountable to your supplier.
- f) All undertakings and expenses related to the release of the goods from the customs zone up to delivery to the project site, any loss, damage to shortshipment, misdelivery of the imported materials including bad orders shall be for your sole account.
- g) Inventory from time to time shall be undertaken by MWSS once the goods have been accounted for by both parties and accepted by MWSS and any losses thereof shall be an outright deduction from any billing submitted to us for processing plus estimated cost of import duties and taxes.
- h) You shall insure with the Government Service Insurance System, expressly making the MWSS the beneficiary thereof the materials/equipment to be imported against marine and other perils of the sea, pilferages, misdelivery, shortmanship, including the risk of war and revolution, from port of origin to destination at project site, premium for the insurance shall be at your expense.
- i) In the availment of this assistance, the contractor shall be held responsible, and hold MWSS free of any delay that may arise out of and in connection with this assistance not due to the fault of MWSS, and it is expressly understood that such delay shall not be ground or reason for extension of contract time.
- j) This assistance shall be subject to availability of loan proceeds.

Under the qualified commitment procedure of the Asian Development Bank, hereunder are the detailed steps to avail such:

- a) You shall submit a master list of materials/ equipment (which should be limited to the requirement of the project and as per your foreign currency bid) to the MWSS for evaluation and approval (the list of equipment/materials should indicate the particular bid items where the goods are included, if not specified in the offer at the time of the bidding).
- b) MWSS shall then evaluate and approve the Master list and thence transmit a copy of the same to ADB, Ministry of Finance and Bureau of Customs.
- c) You shall prepare the application for commercial letter of credit with the PNB or other banks approved by MWSS, making the MWSS as consignee of the items to be imported.

d) You shall submit to MWSS the signed application for letter of credit with complete documentation for MWSS approval as to the terms and conditions of the letter of credit.

e) You shall be responsible for all undertakings necessary from the time the application is filed with and approved by the local commercial bank and the Central Bank of the Philippines and other approving agencies having jurisdiction over the same. All commission, cable charges, confirmation fees, commitment fees and other bank charges shall be borne solely by you.

f) Once the letter of credit is opened, you shall furnish MWSS a copy of the letter of credit for the latter's use in applying for qualified commitment to ADB.

g) ADB will process the MWSS application for qualified commitment and advise the paying bank abroad of such commitment who, in turn, inform the supplier of the opening of the letter of credit and receipt of the ADB commitment.

h) MWSS shall advise ADB to release payment upon compliance with the following:

a) Receipt and acceptance of the goods by MWSS at the designated delivery site.

b) Submission by contractor of chattel mortgage on the accepted goods duly registered and executed in favor of MWSS.

If you are agreeable to the above terms and conditions, please affix your signature hereunder and return this letter to us.

Very truly yours,

(SGD.) ABER P. CANLAS

Acting General Manager

(SGD.) A.L. SARMIENTO CO.

March 12, 1984

[23] ARTICLE XV. AGREEMENT MODIFICATION

"15.01 No modification, alteration or waiver of any provision herein contained shall be binding on the parties hereto unless evidenced by a written amendment signed by the General Manager, MWSS, and approved by the approving authorities."

[24] TSN, 18 July 1990, pp. 9-10; Exhibit 29.

[25] Exhibits 43-B, 44-B; 45-C; 46-C; 47-B; 48-B; 49-B; 50-B; 51-K; 52-H; 53-E; 54-B; 55-B; 56-B; TSN, 31 August 1990, pp. 19-22; TSN, 21 August 1990, pp. 22-23.

[26] Rollo, pp. 73-75.

[27] Id., at 75-77.

[28] TSN, 31 August 1990, pp. 8-9.

[29] 18.05 Within thirty (30) days after termination, cancellation or rescission of this Contract, the parties shall settle their respective accountabilities as of the date of termination, cancellation or rescission, including the refund

of any and all advances made plus legal interest from date of receipt of the amount of (sic) amounts advanced.

[30] Rollo, p. 342.

[31] Supra, see note 22.

[32] ARTICLE XVII

REMEDY AND RELIEF

17.01 Any dispute or disagreement of any kind whatsoever arising from a violation of any of the terms and conditions of this Contract shall be settled through negotiation and/or court action as provided for under existing laws. In any event, in case of court action, the prevailing party shall be entitled to collect attorney's fees equivalent to ten (10%) percentum of the amount litigated.

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