

LICOMCEN INCORPORATED, PETITIONER, VS. FOUNDATION SPECIALISTS, INC., RESPONDENT.

G.R. No. 167022. April 04, 2011

Ponente: BRION, J.

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BRION, J.:

THE FACTS

The petitioner, LICOMCEN Incorporated (LICOMCEN), is a domestic corporation engaged in the business of operating shopping malls in the country.

In March 1997, the City Government of Legaspi awarded to LICOMCEN, after a public bidding, a lease contract over a lot located in the central business district of the city. Under the contract, LICOMCEN was obliged to finance the construction of a commercial complex/mall to be known as the LCC Citimall (Citimall). It was also granted the right to operate and manage Citimall for 50 years, and was, thereafter, required to turn over the ownership and operation to the City Government.[1]

For the Citimall project, LICOMCEN hired E.S. de Castro and Associates (ESCA) to act as its engineering consultant. Since the Citimall was envisioned to be a high-rise structure, LICOMCEN contracted respondent Foundation Specialists, Inc. (FSI) to do initial construction works, specifically, the construction and installation of bored piles foundation.[2] LICOMCEN and FSI signed the Construction Agreement,[3] and the accompanying Bid Documents[4] and General Conditions of Contract[5] (GCC) on September 1, 1997. Immediately thereafter, FSI purchased the materials needed for the Citimall[6] project and began working in order to meet the 90-day deadline set by LICOMCEN.

On December 16, 1997, LICOMCEN sent word to FSI that it was considering major design revisions and the suspension of work on the Citimall project. FSI replied on December 18, 1997, expressing concern over the revisions and the suspension, as it had fully mobilized its manpower and equipment, and had ordered the delivery of steel bars. FSI also asked for the payment of accomplished work amounting to P3,627,818.00.[7] A series of correspondence between LICOMCEN and FSI then followed.

ESCA wrote FSI on January 6, 1998, stating that the revised design necessitated a change in the bored piles requirement and a substantial reduction in the number of piles. Thus, ESCA proposed to FSI that only 50% of the steel bars be delivered to the jobsite and the rest be shipped back to Manila.[8] Notwithstanding this instruction, all the ordered steel bars arrived in Legaspi City on January 14, 1998.[9]

On January 15, 1998, LICOMCEN instructed FSI to "hold all construction activities on the project,"[10] in view of a pending administrative case against the officials of the City Government of Legaspi and LICOMCEN filed before the Ombudsman (OMB-ADM-1-97-0622).[11] On January 19, 1998, ESCA formalized the suspension of construction activities and ordered the construction's demobilization until the case was resolved.[12] In response, FSI sent ESCA a letter, dated February 3, 1998, requesting payment of costs incurred on account of the

suspension which totaled P22,667,026.97.[13] FSI repeated its demand for payment on March 3, 1998.[14]

ESCA replied to FSI's demands for payment on March 24, 1998, objecting to some of the claims.[15] It denied the claim for the cost of the steel bars that were delivered, since the delivery was done in complete disregard of its instructions. It further disclaimed liability for the other FSI claims based on the suspension, as its cause was not due to LICOMCEN's fault. FSI rejected ESCA's evaluation of its claims in its April 15, 1998 letter.[16]

On March 14, 2001, FSI sent a final demand letter to LICOMCEN for payment of P29,232,672.83.[17] Since LICOMCEN took no positive action on FSI's demand for payment,[18] FSI filed a petition for arbitration with the Construction Industry Arbitration Commission (CIAC) on October 2, 2002, docketed as CIAC Case No. 37-2002.[19] In the arbitration petition, FSI demanded payment of the following amounts:

- a. Unpaid accomplished work billings..... P 1,264,404.12
- b. Material costs at site..... 15,143,638.51
- c. Equipment and labor standby costs..... 3,058,984.34
- d. Unrealized gross profit..... 9,023,575.29
- e. Attorney's fees..... 300,000.00
- f. Interest expenses equivalent to 15% of the total claim

LICOMCEN again denied liability for the amounts claimed by FSI. It justified its decision to indefinitely suspend the Citimall project due to the cases filed against it involving its Lease Contract with the City Government of Legaspi. LICOMCEN also assailed the CIAC's jurisdiction, contending that FSI's claims were matters not subject to arbitration under GC-61 of the GCC, but one that should have been filed before the regular courts of Legaspi City pursuant to GC-05.[20]

During the preliminary conference of January 28, 2003, LICOMCEN reiterated its objections to the CIAC's jurisdiction, which the arbitrators simply noted. Both FSI and LICOMCEN then proceeded to draft the Terms of Reference.[21]

On February 4, 2003, LICOMCEN, through a collaborating counsel, filed its Ex Abundanti Ad Cautela Omnibus Motion, insisting that FSI's petition before the CIAC should be dismissed for lack of jurisdiction; thus, it prayed for the suspension of the arbitration proceedings until the issue of jurisdiction was finally settled. The CIAC denied LICOMCEN's motion in its February 20, 2003 order,[22] finding that the question of jurisdiction depends on certain factual conditions that have yet to be established by ample evidence. As the CIAC's February 20, 2003 order stood uncontested, the arbitration proceedings continued, with both parties actively participating.

The CIAC issued its decision on July 7, 2003,[23] ruling in favor of FSI and awarding the following amounts:

- a. Unpaid accomplished work billings..... P 1,264,404.12
- b. Material costs at site..... 14,643,638.51
- c. Equipment and labor standby costs..... 2,957,989.94
- d. Unrealized gross profit..... 5,120,000.00

LICOMCEN was also required to bear the costs of arbitration in the total amount of P474,407.95.

LICOMCEN appealed the CIAC's decision before the Court of Appeals (CA). On November 23, 2004, the CA upheld the CIAC's decision, modifying only the amounts awarded by (a) reducing LICOMCEN's liability for

material costs at site to P5,694,939.87, and (b) deleting its liability for equipment and labor standby costs and unrealized gross profit; all the other awards were affirmed.[24] Both parties moved for the reconsideration of the CA's Decision; LICOMCEN's motion was denied in the CA's February 4, 2005 Resolution, while FSI's motion was denied in the CA's September 13, 2005 Resolution. Hence, the parties filed their own petition for review on certiorari before the Court.[25]

LICOMCEN's Arguments

LICOMCEN principally raises the question of the CIAC's jurisdiction, insisting that FSI's claims are non-arbitrable. In support of its position, LICOMCEN cites GC-61 of the GCC:

GC-61. DISPUTES AND ARBITRATION

Should any dispute of any kind arise between the LICOMCEN INCORPORATED and the Contractor [referring to FSI] or the Engineer [referring to ESCA] and the Contractor in connection with, or arising out of the execution of the Works, such dispute shall first be referred to and settled by the LICOMCEN, INCORPORATED who shall within a period of thirty (30) days after being formally requested by either party to resolve the dispute, issue a written decision to the Engineer and Contractor.

Such decision shall be final and binding upon the parties and the Contractor shall proceed with the execution of the Works with due diligence notwithstanding any Contractor's objection to the decision of the Engineer. If within a period of thirty (30) days from receipt of the LICOMCEN, INCORPORATED's decision on the dispute, either party does not officially give notice to contest such decision through arbitration, the said decision shall remain final and binding. However, should any party, within thirty (30) days from receipt of the LICOMCEN, INCORPORATED's decision, contest said decision, the dispute shall be submitted for arbitration under the Construction Industry Arbitration Law, Executive Order 1008. The arbitrators appointed under said rules and regulations shall have full power to open up, revise and review any decision, opinion, direction, certificate or valuation of the LICOMCEN, INCORPORATED. Neither party shall be limited to the evidence or arguments put before the LICOMCEN, INCORPORATED for the purpose of obtaining his said decision. No decision given by the LICOMCEN, INCORPORATED shall disqualify him from being called as a witness and giving evidence in the arbitration. It is understood that the obligations of the LICOMCEN, INCORPORATED, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.[26]

LICOMCEN posits that only disputes "in connection with or arising out of the execution of the Works" are subject to arbitration. LICOMCEN construes the phrase "execution of the Works" as referring to the physical construction activities, since "Works" under the GCC specifically refer to the "structures and facilities" required to be constructed and completed for the Citimall project.[27] It considers FSI's claims as mere contractual monetary claims that should be litigated before the courts of Legaspi City, as provided in GC-05 of the GCC:

GC-05. JURISDICTION

Any question between the contracting parties that may arise out of or in connection with the Contract, or breach thereof, shall be litigated in the courts of Legaspi City except where otherwise specifically stated or except when such question is submitted for settlement thru arbitration as provided herein.[28]

LICOMCEN also contends that FSI failed to comply with the condition precedent for arbitration laid down in GC-61 of the GCC. An arbitrable dispute under GC-61 must first be referred to and settled by LICOMCEN, which has 30 days to resolve it. If within a period of 30 days from receipt of LICOMCEN's decision on the dispute, either party does not officially give notice to contest such decision through arbitration, the said decision shall remain final and binding. However, should any party, within 30 days from receipt of LICOMCEN's decision, contest said decision, the dispute shall be submitted for arbitration under the Construction Industry

Arbitration Law.

LICOMCEN considers its March 24, 1998 letter as its final decision on FSI's claims, but declares that FSI's reply letter of April 15, 1998 is not the "notice to contest" required by GC-61 that authorizes resort to arbitration before the CIAC. It posits that nothing in FSI's April 15, 1998 letter states that FSI will avail of arbitration as a mode to settle its dispute with LICOMCEN. While FSI's final demand letter of March 14, 2001 mentioned its intention to refer the matter to arbitration, LICOMCEN declares that the letter was made three years after its March 24, 1998 letter, hence, long after the 30-day period provided in GC-61. Indeed, FSI filed the petition for arbitration with the CIAC only on October 2, 2002.[29] Considering FSI's delays in asserting its claims, LICOMCEN also contends that FSI's action is barred by laches.

With respect to the monetary claims of FSI, LICOMCEN alleges that the CA erred in upholding its liability for material costs at site for the reinforcing steel bars in the amount of P5,694,939.87, computed as follows[30]:

2[nd] initial rebar requirements purchased from Pag-Asa Steel Works, Inc.....	
P 799,506.83	
Reinforcing steel bars purchased from ARCA Industrial Sales (total net weight of 744,197.66 kilograms) - 50% of net amount due.....	
5,395,433.04	
Subtotal.....	6,194,939.87
Less	
Purchase cost of steel bars by Ramon Quinquileria.....	
(500,000.00)	
TOTAL LIABILITY OF LICOMCEN TO FSI FOR MATERIAL COSTS AT SITE.....	5,694,939.87

Citing GC-42(2) of the GCC, LICOMCEN says it shall be liable to pay FSI "[t]he cost of materials or goods reasonably ordered for the Permanent or Temporary Works which have been delivered to the Contractor but not yet used, and which delivery has been certified by the Engineer." [31] None of these requisites were allegedly complied with. It contends that FSI failed to establish that the steel bars delivered in Legaspi City, on January 14, 1998, were for the Citimall project. In fact, the steel bars were delivered not at the site of the Citimall project, but at FSI's batching plant called Tuanzon compound, a few hundred meters from the site. Even if delivery to Tuanzon was allowed, the delivery was done in violation of ESCA's instruction to ship only 50% of the materials. Advised as early as December 1997 to suspend the works, FSI proceeded with the delivery of the steel bars in January 1998. LICOMCEN declared that it should not be made to pay for costs that FSI willingly incurred for itself.[32]

Assuming that LICOMCEN is liable for the costs of the steel bars, it argues that its liability should be minimized by the fact that FSI incurred no actual damage from the purchase and delivery of the steel bars. During the suspension of the works, FSI sold 125,000 kg of steel bars for P500,000.00 to a third person (a certain Ramon Quinquileria). LICOMCEN alleges that FSI sold the steel bars for a ridiculously low price of P 4.00/kilo, when the prevailing rate was P20.00/kilo. The sale could have garnered a higher price that would offset LICOMCEN's liability. LICOMCEN also wants FSI to account for and deliver to it the remaining 744 metric tons of steel bars not sold. Otherwise, FSI would be unjustly enriched at LICOMCEN's expense, receiving payment for materials not delivered to LICOMCEN.[33]

LICOMCEN also disagrees with the CA ruling that declared it solely liable to pay the costs of arbitration. The ruling was apparently based on the finding that LICOMCEN's "failure or refusal to meet its obligations, legal, financial, and moral, caused FSI to bring the dispute to arbitration." [34] LICOMCEN asserts that it was FSI's decision to proceed with the delivery of the steel bars that actually caused the dispute; it insists that it is not the party at fault which should bear the arbitration costs. [35]

FSI's Arguments

FSI takes exception to the CA ruling that modified the amount for material costs at site, and deleted the awards for equipment and labor standby costs and unrealized profits.

Proof of damage to FSI is not required for LICOMCEN to be liable for the material costs of the steel bars. Under GC-42, it is enough that the materials were delivered to the contractor, although not used. FSI said that the 744 metric tons of steel bars were ordered and paid for by it for the Citimall project as early as November 1997. If LICOMCEN contends that these were procured for other projects FSI also had in Legaspi City, it should have presented proof of this claim, but it failed to do so. [36]

ESCA's January 6, 1998 letter simply suggested that only 50% of the steel bars be shipped to Legaspi City; it was not a clear and specific directive. Even if it was, the steel bars were ordered and paid for long before the notice to suspend was given; by then, it was too late to stop the delivery. FSI also claims that since it believed in good faith that the Citimall project was simply suspended, it expected work to resume soon after and decided to proceed with the shipment. [37]

Contrary to LICOMCEN's arguments, GC-42 of the GCC does not require delivery of the materials at the site of the Citimall project; it only requires delivery to the contractor, which is FSI. Moreover, the Tuanzon compound, where the steel bars were actually delivered, is very close to the Citimall project site. FSI contends that it is a normal construction practice for contractors to set up a "staging site," to prepare the materials and equipment to be used, rather than stock them in the crowded job/project site. FSI also asserts that it was useless to have the delivery certified by ESCA because by then the Citimall project had been suspended. It would be unfair to demand FSI to perform an act that ESCA and LICOMCEN themselves had prevented from happening. [38]

The CA deleted the awards for equipment and labor standby costs on the ground that FSI's documentary evidence was inadequate. FSI finds the ruling erroneous, since LICOMCEN never questioned the list of employees and equipments employed and rented by FSI for the duration of the suspension. [39]

FSI also alleges that LICOMCEN maliciously and unlawfully suspended the Citimall project. While LICOMCEN cited several other cases in its petition for review on certiorari as grounds for suspending the works, its letters/notices of suspension only referred to one case, OMB-ADM-1-97-0622, an administrative case before the Ombudsman that was dismissed as early as October 12, 1998. LICOMCEN never notified FSI of the dismissal of this case. More importantly, no restraining order or injunction was issued in any of these cases to justify the suspension of the Citimall project. [40] FSI posits that LICOMCEN's true intent was to terminate its contract with it, but, to avoid paying damages for breach of contract, simply declared it as "indefinitely suspended." That LICOMCEN conducted another public bidding for the "new designs" is a telling indication of LICOMCEN's intent to ease out FSI. [41] Thus, FSI states that LICOMCEN's bad faith in indefinitely suspending the Citimall project entitles it to claim unrealized profit. The restriction under GC-41 that "[t]he contractor shall have no claim for anticipated profits on the work thus terminated," [42] will not apply because the stipulation refers to a contract lawfully and properly terminated. FSI seeks to recover unrealized profits under Articles 1170 and 2201 of the Civil Code.

THE COURT'S RULING

The jurisdiction of the CIAC

The CIAC was created through Executive Order No. 1008 (E.O. 1008), in recognition of the need to establish an arbitral machinery that would expeditiously settle construction industry disputes. The prompt resolution of problems arising from or connected with the construction industry was considered of necessary and vital for the fulfillment of national development goals, as the construction industry provides employment to a large segment of the national labor force and is a leading contributor to the gross national product.[43] Section 4 of E.O. 1008 states:

Sec. 4. Jurisdiction. The CIAC shall have original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof. These disputes may involve government or private contracts. For the Board to acquire jurisdiction, the parties to a dispute must agree to submit the same to voluntary arbitration.

The jurisdiction of the CIAC may include but is not limited to violation of specifications for materials and workmanship; violation of the terms of agreement; interpretation and/or application of contractual time and delays; maintenance and defects; payment, default of employer or contractor and changes in contract cost.

Excluded from the coverage of this law are disputes arising from employer-employee relationships which shall continue to be covered by the Labor Code of the Philippines.

The jurisdiction of courts and quasi-judicial bodies is determined by the Constitution and the law.[44] It cannot be fixed by the will of the parties to a dispute;[45] the parties can neither expand nor diminish a tribunal's jurisdiction by stipulation or agreement. The text of Section 4 of E.O. 1008 is broad enough to cover any dispute arising from, or connected with construction contracts, whether these involve mere contractual money claims or execution of the works.[46] Considering the intent behind the law and the broad language adopted, LICOMCEN erred in insisting on its restrictive interpretation of GC-61. The CIAC's jurisdiction cannot be limited by the parties' stipulation that only disputes in connection with or arising out of the physical construction activities (execution of the works) are arbitrable before it.

In fact, all that is required for the CIAC to acquire jurisdiction is for the parties to a construction contract to agree to submit their dispute to arbitration. Section 1, Article III of the 1988 CIAC Rules of Procedure (as amended by CIAC Resolution Nos. 2-91 and 3-93) states:

Section 1. Submission to CIAC Jurisdiction. - An arbitration clause in a construction contract or a submission to arbitration of a construction dispute shall be deemed an agreement to submit an existing or future controversy to CIAC jurisdiction, notwithstanding the reference to a different arbitration institution or arbitral body in such contract or submission. When a contract contains a clause for the submission of a future controversy to arbitration, it is not necessary for the parties to enter into a submission agreement before the claimant may invoke the jurisdiction of CIAC.

An arbitration agreement or a submission to arbitration shall be in writing, but it need not be signed by the parties, as long as the intent is clear that the parties agree to submit a present or future controversy arising from a construction contract to arbitration.

In *HUTAMA-RSEA Joint Operations, Inc. v. Citra Metro Manila Tollways Corporation*,[47] the Court declared that "the bare fact that the parties x x x incorporated an arbitration clause in [their contract] is sufficient to vest the CIAC with jurisdiction over any construction controversy or claim between the parties. The arbitration clause in the construction contract ipso facto vested the CIAC with jurisdiction."

Under GC-61 and GC-05 of the GCC, read singly and in relation with one another, the Court sees no intent to limit resort to arbitration only to disputes relating to the physical construction activities.

First, consistent with the intent of the law, an arbitration clause pursuant to E.O. 1008 should be interpreted at its widest signification. Under GC-61, the voluntary arbitration clause covers any dispute of any kind, not only arising out of the execution of the works but also in connection therewith. The payments, demand and disputed issues in this case - namely, work billings, material costs, equipment and labor standby costs, unrealized profits - all arose because of the construction activities and/or are connected or related to these activities. In other words, they are there because of the construction activities. Attorney's fees and interests payment, on the other hand, are costs directly incidental to the dispute. Hence, the scope of the arbitration clause, as worded, covers all the disputed items.

Second and more importantly, in insisting that contractual money claims can be resolved only through court action, LICOMCEN deliberately ignores one of the exceptions to the general rule stated in GC-05:

GC-05. JURISDICTION

Any question between the contracting parties that may arise out of or in connection with the Contract, or breach thereof, shall be litigated in the courts of Legaspi City except where otherwise specifically stated or except when such question is submitted for settlement thru arbitration as provided herein.

The second exception clause authorizes the submission to arbitration of any dispute between LICOMCEN and FSI, even if the dispute does not directly involve the execution of physical construction works. This was precisely the avenue taken by FSI when it filed its petition for arbitration with the CIAC.

If the CIAC's jurisdiction can neither be enlarged nor diminished by the parties, it also cannot be subjected to a condition precedent. GC-61 requires a party disagreeing with LICOMCEN's decision to "officially give notice to contest such decision through arbitration" within 30 days from receipt of the decision. However, FSI's April 15, 1998 letter is not the notice contemplated by GC-61; it never mentioned FSI's plan to submit the dispute to arbitration and instead requested LICOMCEN to reevaluate its claims. Notwithstanding FSI's failure to make a proper and timely notice, LICOMCEN's decision (embodied in its March 24, 1998 letter) cannot become "final and binding" so as to preclude resort to the CIAC arbitration. To reiterate, all that is required for the CIAC to acquire jurisdiction is for the parties to agree to submit their dispute to voluntary arbitration:

[T]he mere existence of an arbitration clause in the construction contract is considered by law as an agreement by the parties to submit existing or future controversies between them to CIAC jurisdiction, without any qualification or condition precedent. To affirm a condition precedent in the construction contract, which would effectively suspend the jurisdiction of the CIAC until compliance therewith, would be in conflict with the recognized intention of the law and rules to automatically vest CIAC with jurisdiction over a dispute should the construction contract contain an arbitration clause.[48]

The CIAC is given the original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines.[49] This jurisdiction cannot be altered by stipulations restricting the nature of construction disputes, appointing another arbitral body, or making that body's decision final and binding.

The jurisdiction of the CIAC to resolve the dispute between LICOMCEN and FSI is, therefore, affirmed.

The validity of the indefinite
suspension of the works on the
Citimall project

Before the Court rules on each of FSI's contractual monetary claims, we deem it important to discuss the validity of LICOMCEN's indefinite suspension of the works on the Citimall project. We quote below two contractual stipulations relevant to this issue:

GC-38. SUSPENSION OF WORKS

The Engineer [ESCA] through the LICOMCEN, INCORPORATED shall have the authority to suspend the Works wholly or partly by written order for such period as may be deemed necessary, due to unfavorable weather or other conditions considered unfavorable for the prosecution of the Works, or for failure on the part of the Contractor to correct work conditions which are unsafe for workers or the general public, or failure or refusal to carry out valid orders, or due to change of plans to suit field conditions as found necessary during construction, or to other factors or causes which, in the opinion of the Engineer, is necessary in the interest of the Works and to the LICOMCEN, INCORPORATED. The Contractor [FSI] shall immediately comply with such order to suspend the work wholly or partly directed.

In case of total suspension or suspension of activities along the critical path of the approved PERT/CPM network and the cause of which is not due to any fault of the Contractor, the elapsed time between the effective order for suspending work and the order to resume work shall be allowed the Contractor by adjusting the time allowed for his execution of the Contract Works.

The Engineer through LICOMCEN, INCORPORATED shall issue the order lifting the suspension of work when conditions to resume work shall have become favorable or the reasons for the suspension have been duly corrected.[50]

GC-41 LICOMCEN, INCORPORATED's RIGHT TO SUSPEND WORK OR TERMINATE THE CONTRACT

x x x x

2. For Convenience of LICOMCEN, INCORPORATED

If any time before completion of work under the Contract it shall be found by the LICOMCEN, INCORPORATED that reasons beyond the control of the parties render it impossible or against the interest of the LICOMCEN, INCORPORATED to complete the work, the LICOMCEN, INCORPORATED at any time, by written notice to the Contractor, may discontinue the work and terminate the Contract in whole or in part. Upon the issuance of such notice of termination, the Contractor shall discontinue to work in such manner, sequence and at such time as the LICOMCEN, INCORPORATED/Engineer may direct, continuing and doing after said notice only such work and only until such time or times as the LICOMCEN, INCORPORATED/Engineer may direct.[51]

Under these stipulations, we consider LICOMCEN's initial suspension of the works valid. GC-38 authorizes the suspension of the works for factors or causes which ESCA deems necessary in the interests of the works and LICOMCEN. The factors or causes of suspension may pertain to a change or revision of works, as cited in the December 16, 1997 and January 6, 1998 letters of ESCA, or to the pendency of a case before the Ombudsman (OMB-ADM-1-97-0622), as cited in LICOMCEN's January 15, 1998 letter and ESCA's January 19, 1998 and February 17, 1998 letters. It was not necessary for ESCA/LICOMCEN to wait for a restraining or injunctive order to be issued in any of the cases filed against LICOMCEN before it can suspend the works. The language of GC-38 gives ESCA/LICOMCEN sufficient discretion to determine whether the existence of a particular situation or condition necessitates the suspension of the works and serves the interests of LICOMCEN.

Although we consider the initial suspension of the works as valid, we find that LICOMCEN wrongfully prolonged the suspension of the works (or "indefinite suspension" as LICOMCEN calls it). GC-38 requires

ESCA/LICOMCEN to "issue an order lifting the suspension of work when conditions to resume work shall have become favorable or the reasons for the suspension have been duly corrected." The Ombudsman case (OMB-ADM-1-97-0622), which ESCA and LICOMCEN cited in their letters to FSI as a ground for the suspension, was dismissed as early as October 12, 1998, but neither ESCA nor LICOMCEN informed FSI of this development. The pendency of the other cases[52] may justify the continued suspension of the works, but LICOMCEN never bothered to inform FSI of the existence of these cases until the arbitration proceedings commenced. By May 28, 2002, the City Government of Legaspi sent LICOMCEN a notice instructing it to proceed with the Citimall project;[53] again, LICOMCEN failed to relay this information to FSI. Instead, LICOMCEN conducted a rebidding of the Citimall project based on the new design.[54] LICOMCEN's claim that the rebidding was conducted merely to get cost estimates for the new design goes against the established practice in the construction industry. We find the CIAC's discussion on this matter relevant:

But what is more appalling and disgusting is the allegation x x x that the x x x invitation to bid was issued x x x solely to gather cost estimates on the redesigned [Citimall project] x x x. This Arbitral Tribunal finds said act of asking for bids, without any intention of awarding the project to the lowest and qualified bidder, if true, to be extremely irresponsible and highly unprofessional. It might even be branded as fraudulent x x x [since] the invited bidders [were required] to pay P2,000.00 each for a set of the new plans, which amount was non-refundable. The presence of x x x deceit makes the whole story repugnant and unacceptable.[55]

LICOMCEN's omissions and the imprudent rebidding of the Citimall project are telling indications of LICOMCEN's intent to ease out FSI and terminate their contract. As with GC-31, GC-42(2) grants LICOMCEN ample discretion to determine what reasons render it against its interest to complete the work - in this case, the pendency of the other cases and the revised designs for the Citimall project. Given this authority, the Court fails to see the logic why LICOMCEN had to resort to an "indefinite suspension" of the works, instead of outrightly terminating the contract in exercise of its rights under GC-42(2).

We now proceed to discuss the effects of these findings with regard to FSI's monetary claims against LICOMCEN.

The claim for material costs at site

GC-42 of the GCC states:

GC-42 PAYMENT FOR TERMINATED CONTRACT

If the Contract is terminated as aforesaid, the Contractor will be paid for all items of work executed, satisfactorily completed and accepted by the LICOMCEN, INCORPORATED up to the date of termination, at the rates and prices provided for in the Contract and in addition:

- The cost of partially accomplished items of additional or extra work agreed upon by the LICOMCEN, INCORPORATED and the Contractor.
- The cost of materials or goods reasonably ordered for the Permanent or Temporary Works which have been delivered to the Contractor but not yet used and which delivery has been certified by the Engineer.
- The reasonable cost of demobilization

For any payment due the Contractor under the above conditions, the LICOMCEN, INCORPORATED, however, shall deduct any outstanding balance due from the Contractor for advances in respect to mobilization and materials, and any other sum the LICOMCEN, INCORPORATED is entitled to be credited.[56]

For LICOMCEN to be liable for the cost of materials or goods, item two of GC-42 requires that

- the materials or goods were reasonably ordered for the Permanent or Temporary Works;
- the materials or goods were delivered to the Contractor but not yet used; and
- the delivery was certified by the Engineer.

Both the CIAC and the CA agreed that these requisites were met by FSI to make LICOMCEN liable for the cost of the steel bars ordered for the Citimall project; the two tribunals differed only to the extent of LICOMCEN's liability because the CA opined that it should be limited only to 50% of the cost of the steel bars. A review of the records compels us to uphold the CA's finding.

Prior to the delivery of the steel bars, ESCA informed FSI of the suspension of the works; ESCA's January 6, 1998 letter reads:

As per our information to you on December 16, 1997, a major revision in the design of the Legaspi Citimall necessitated a change in the bored piles requirement of the project. The change involved a substantial reduction in the number and length of piles.

We expected that you would have suspended the deliveries of the steel bars until the new design has been approved.

According to you[,] the steel bars had already been paid and loaded and out of Manila on said date.

In order to avoid double handling, storage, security problems, we suggest that only 50% of the total requirement of steel bars be delivered at jobsite. The balance should be returned to Manila where storage and security is better.

In order for us to consider additional cost due to the shipping of the excess steel bars, we need to know the actual dates of purchase, payments and loading of the steel bars. Obviously, we cannot consider the additional cost if you have had the chance to delay the shipping of the steel bars.[57]

From the above, it appears that FSI was informed of the necessity of suspending the works as early as December 16, 1997. Pursuant to GC-38 of the GCC, FSI was expected to immediately comply with the order to suspend the work.[58] Though ESCA's December 16, 1997 notice may not have been categorical in ordering the suspension of the works, FSI's reply letter of December 18, 1997 indicated that it actually complied with the notice to suspend, as it said, "We hope for the early resolution of the new foundation plan and the resumption of work." [59] Despite the suspension, FSI claimed that it could not stop the delivery of the steel bars (nor found the need to do so) because (a) the steel bars were ordered as early as November 1997 and were already loaded in Manila and expected to arrive in Legaspi City by December 23, 1997, and (b) it expected immediate resumption of work to meet the 90-day deadline.[60]

Records, however, disclose that these claims are not entirely accurate. The memorandum of agreement and sale covering the steel bars specifically stated that these would be withdrawn from the Cagayan de Oro depot, not Manila[61]; indeed, the bill of lading stated that the steel bars were loaded in Cagayan de Oro on January 11, 1998, and arrived in Legaspi City within three days, on January 14, 1998.[62] The loading and delivery of the steel bar thus happened after FSI received ESCA's December 16, 1997 and January 6, 1998 letters - days after the instruction to suspend the works. Also, the same stipulation that authorizes LICOMCEN to suspend the works allows the extension of the period to complete the works. The relevant portion of GC-38 states:

In case of total suspension x x x and the cause of which is not due to any fault of the Contractor [FSI], the elapsed time between the effective order for suspending work and the order to resume work shall be allowed the Contractor by adjusting the time allowed for his execution of the Contract Works.[63]

The above stipulation, coupled with the short period it took to ship the steel bars from Cagayan de Oro to Legaspi City, thus negates both FSI's

argument and the CIAC's ruling[64] that there was no necessity to stop the shipment so as to meet the 90-day deadline. These circumstances prove that FSI acted imprudently in proceeding with the delivery, contrary to LICOMCEN's instructions. The CA was correct in holding LICOMCEN liable for only 50% of the costs of the steel bars delivered.

The claim for equipment and labor standby costs

The Court upholds the CA's ruling deleting the award for equipment and labor standby costs. We quote in agreement pertinent portions of the CA decision:

The CIAC relied solely on the list of 37 pieces of equipment respondent allegedly rented and maintained at the construction site during the suspension of the project with the prorated rentals incurred x x x. To the mind of this Court, these lists are not sufficient to establish the fact that indeed [FSI] incurred the said expenses. Reliance on said lists is purely speculative x x x the list of equipments is a mere index or catalog of the equipments, which may be utilized at the construction site. It is not the best evidence to prove that said equipment were in fact rented and maintained at the construction site during the suspension of the work. x x x [FSI] should have presented the lease contracts or any similar documents such as receipts of payments x x x. Likewise, the list of employees does not in anyway prove that those employees in the list were indeed at the construction site or were required to be on call should their services be needed and were being paid their salaries during the suspension of the project. Thus, in the absence of sufficient evidence, We deny the claim for equipment and labor standby costs.[65]

The claim for unrealized profit

FSI contends that it is not barred from recovering unrealized profit under GC-41(2), which states:

GC-41. LICOMCEN, INCORPORATED's RIGHT TO SUSPEND WORK OR TERMINATE THE CONTRACT

x x x x

2. For Convenience of the LICOMCEN, INCORPORATED

x x x. The Contractor [FSI] shall not claim damages for such discontinuance or termination of the Contract, but the Contractor shall receive compensation for reasonable expenses incurred in good faith for the performance of the Contract and for reasonable expenses associated with termination of the Contract. The LICOMCEN, INCORPORATED will determine the reasonableness of such expenses. The Contractor [FSI] shall have no claim for anticipated profits on the work thus terminated, nor any other claim, except for the work actually performed at the time of complete discontinuance, including any variations authorized by the LICOMCEN, INCORPORATED/Engineer to be done.

The prohibition, FSI posits, applies only where the contract was properly and lawfully terminated, which was not the case at bar. FSI also took pains in differentiating its claim for "unrealized profit" from the prohibited claim for "anticipated profits"; supposedly, unrealized profit is "one that is built-in in the contract price, while anticipated profit is not." We fail to see the distinction, considering that the contract itself neither defined nor differentiated the two terms. [A] contract must be interpreted from the language of the contract itself, according to its plain and ordinary meaning."[66] If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of the stipulations shall control.[67]

Nonetheless, on account of our earlier discussion of LICOMCEN's failure to observe the proper procedure in terminating the contract by declaring that it was merely indefinitely suspended, we deem that FSI is entitled to the payment of nominal damages. Nominal damages may be awarded to a plaintiff whose right has been violated or invaded by the defendant, for the purpose of vindicating or recognizing that right, and not for indemnifying the plaintiff for any loss suffered by him.[68] Its award is, thus, not for the purpose of indemnification for a loss but for the recognition and vindication of a right. A violation of the plaintiff's right, even if only technical, is sufficient to support an award of nominal damages.[69] FSI is entitled to recover the amount of P100,000.00 as nominal damages.

The liability for costs of arbitration

Under the parties' Terms of Reference, executed before the CIAC, the costs of arbitration shall be equally divided between them, subject to the CIAC's determination of which of the parties shall eventually shoulder the amount.[70] The CIAC eventually ruled that since LICOMCEN was the party at fault, it should bear the costs. As the CA did, we agree with this finding. Ultimately, it was LICOMCEN's imprudent declaration of indefinitely suspending the works that caused the dispute between it and FSI. LICOMCEN should bear the costs of arbitration.

WHEREFORE, premises considered, the petition for review on certiorari of LICOMCEN INCORPORATED, docketed as G.R. No. 167022, and the petition for review on certiorari of FOUNDATION SPECIALISTS, INC., docketed as G.R. No. 169678, are DENIED. The November 23, 2004 Decision of the Court of Appeals in CA-G.R. SP No. 78218 is MODIFIED to include the award of nominal damages in favor of FOUNDATION SPECIALISTS, INC. Thus, LICOMCEN INCORPORATED is ordered to pay FOUNDATION SPECIALISTS, INC. the following amounts:

- P1,264,404.12 for unpaid balance on FOUNDATION SPECIALISTS, INC. billings;
- P5,694,939.87 for material costs at site; and
- P100,000.00 for nominal damages.

LICOMCEN INCORPORATED is also ordered to pay the costs of arbitration. No costs.

SO ORDERED.

Carpio Morales, (Chairperson), Bersamin, Villarama, Jr., and Sereno, JJ., concur.

[1] Rollo (G.R. No. 167022, Vol. I), p. 63.

[2] Ibid.

[3] Id. at 96-105.

[4] Id. at 106-119.

[5] Id. at 120-156.

[6] Id. at 903.

[7] Id. at 202-203.

[8] Id. at 260.

[9] Bill of Lading; *id.* at 261.

[10] *Id.* at 64.

[11] *Id.* at 184.

[12] *Id.* at 185.

[13] *Id.* at 195.

[14] *Id.* at 200.

[15] *Id.* at 212.

[16] *Id.* at 214.

[17] *Id.* at 215-217.

[18] In reply to FSI's March 24, 2001 demand letter, LICOMCEN simply stated that the matter would be referred to its finance and legal department, in its March 24, 2001 letter, *id.* at 430.

[19] *Id.* at 90-95.

[20] *Id.* at 224-229.

[21] *Id.* at 1863-1869.

[22] Rollo (G.R. No. 167022, Vol. I), pp. 889-890.

[23] *Id.* at 894-908.

[24] *Id.* at 62-85.

[25] LICOMCEN's petition for review on certiorari is docketed as G.R. No. 167022, while FSI's petition for review on certiorari is docketed as G.R. No. 169678.

[26] Rollo (G.R. No. 167022, Vol. I), p. 156.

[27] LICOMCEN cites GC-1.14, GC-1.09 and GC-1.13 which defined the terms "works," "permanent works," and "temporary works," respectively; *id.* at 38, and rollo (G.R. No. 167022, Vol. II), pp. 1926-1928.

[28] Rollo (G.R. No. 167022, Vol. I), p. 128.

[29] *Id.* at 65.

[30] Rollo (G.R. No. 167022, Vol. I), p. 76.

[31] *Id.* at 147.

[32] Rollo (G.R. No. 167022, Vol. II), pp. 1938-1943.

[33] *Id.* at 1944-1946.

[34] Rollo (G.R. No. 167022, Vol. I), page 80.

[35] Rollo (G.R. No. 167022, Vol. II), pp. 1948-1949.

[36] *Id.* at 1981-1986.

[37] *Ibid.*

- [38] Id. at 1987.
- [39] Id. at 2141-2145.
- [40] Id. at 2015-2016.
- [41] Id. at 1996.
- [42] Id. (G.R. No. 167022, Vol. I), p. 146.
- [43] E.O. 1008 (1985), Whereas clauses.
- [44] BF Homes, Inc., et al. v. Manila Electric Company, G.R. No. 171624, December 6, 2010, citing Civil Service Commission v. Albao, G.R. No. 155784, October 13, 2005, 472 SCRA 548, 555.
- [45] Municipality of Sogod v. Rosal, G.R. Nos. 38204 and 38205, September 24, 1991, 201 SCRA 632.
- [46] "E.O. No. 1008 does not distinguish between claims involving payment of money or not," Excellent Quality Apparel, Inc. v. Win Multi-Rich Builders, Inc., G.R. No. 175048, February 10, 2009, 578 SCRA 272, 280, citing C. Parlade, *The Law and Practice of Conciliation and Arbitration of Construction Disputes* (2001 ed.), p. 89.
- [47] G.R. No. 180640, April 24, 2009, 586 SCRA 746, 760-761.
- [48] Id. at 763.
- [49] E.O. 1008, Section 4.
- [50] Rollo (G.R. No. 167022, Vol. I), p. 144.
- [51] Id. at 146.
- [52] LICOMCEN cites OMB-ADM-1-98-2015, and Civil Case Nos. 10109 and 10093; id. at 20-22.
- [53] Id. at 745.
- [54] The Invitation to Bid was dated October 1, 2002; id. at 221.
- [55] Id. at 902.
- [56] Id. at 146-147.
- [57] Id. at 260.
- [58] Id. at 144.
- [59] Id. at 203.
- [60] Rollo (G.R. No. 167022, Vol. II), pp. 2137-2138.
- [61] Rollo (G.R. No. 167022, Vol. I), p. 732.
- [62] Id. at 261.
- [63] Supra note 58.
- [64] Rollo (G.R. No. 167022, Vol. I), p. 903, the CIAC's decision states:

According to [Licomcen], FSI acted unreasonably by allowing the rebars to be shipped to Legaspi City notwithstanding the suspension of the project. This argument holds no water. First of all, since the project was supposedly simply suspended, FSI had every reason to expect work thereon to be resumed after a short time.

There was, therefore, no necessity then for it to stop the shipment of the rebars. Furthermore, the stipulated period of construction is only ninety (90) days. Because said period is quite short, FSI cannot be faulted in ordering the remaining rebars needed for the project ahead of their scheduled use, since these had to be shipped from Cagayan de Oro.

[65] *Id.* at 77-78.

[66] *Adriatico Consortium, Inc. v. Land Bank of the Philippines*, G.R. No. 187838, December 23, 2009, 609 SCRA 403, 418.

[67] CIVIL CODE, Article 1370.

[68] *Id.*, Article 2221.

[69] *Almeda v. Cariño*, G.R. No. 152143, January 13, 2003, 395 SCRA 144.

[70] *Rollo* (G.R. No. 167022, Vol. II), p. 1366.

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