

FILIPINAS (PRE-FAB BLDG.) SYSTEMS, INC., PETITIONER, VS. MRT DEVELOPMENT CORPORATION; COURT OF APPEALS; CONSTRUCTION INDUSTRY ARBITRATION COMMISSION; AND VICTOR P. LAZATIN, ELIS...

G.R. NOS. 167829-30. November 13, 2007

Ponente: VELASCO, JR., J.

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VELASCO, JR., J.:

The Case

This Petition for Review on Certiorari under Rule 45 seeks to reverse and set aside the January 6, 2004 Decision[1] and April 8, 2005 Resolution[2] of the Court of Appeals (CA), dismissing petitioner's appeal and denying petitioner's February 4, 2004 Motion for Reconsideration,[3] respectively.

The Facts

The Metro Rail Transit Development Corporation (MRTDC) is the owner of the MRT-3 North Triangle Development Project located at the corner of Epifanio Delos Santos Avenue (EDSA) and North Avenue in Quezon City. The North Triangle Project was part of the Manila North Triangle Project, which was conceived as a major hub of the light rail transit line system along EDSA starting from the North Triangle area near the corner of Quezon Avenue and EDSA, and connecting to the Light Rail Transit-1 starting in Pasay City at the intersection of Taft Avenue and EDSA. Part of the North Triangle Project is a podium structure which would serve as the depot and maintenance area for the trains and would serve as the base or foundation for any commercial development.

MRTDC engaged Parsons Interpro JV (PIJV) to act as the Project Management Team (PMT) to supervise and monitor the project. PIJV was a joint venture company composed of Parsons International, an international project management firm, and Interpro, a local construction management company. Each of these companies appointed a representative as project managers to supervise the project, namely: Engr. Augustus Salgado for Interpro and Arch. Melvin Satok for PIJV. As joint project managers, their duties were to monitor the progress of construction on behalf of the owner, to recommend the payment of regular progress billings, to ensure that work was being completed in accordance with the construction schedule, and other similar matters. Directly under them was David Sampson, who was designated as the Area Construction Manager, tasked to monitor the day-to-day activities on the site with the help of other PIJV area engineers.

There were six contractors who submitted their respective bids for the construction of the four-level podium facility (Project). The Project was initially awarded to the lowest bidder, Gammon Philippines, Inc. (GPI), while Filipinas Systems, Inc. (FSI) submitted the second lowest bid. Subsequently, MRTDC decided to construct levels one and two of the Project only with a third level to be constructed on the area above the workshop. Thus, GPI submitted another proposal on March 11, 1998 for the revised Project specifications. Later, GPI was issued a Notice of Award/Notice to Proceed (NOA/NTP) dated June 10, 1998 in its favor by MRTDC which required GPI

to accept the award and NTP within five (5) business days from receipt, failing which the award and the NTP would be automatically withdrawn.

While negotiations with GPI were ongoing, MRTDC was conducting negotiations with FSI as the second lowest bidder to ensure that another contractor would be in a position to immediately accept the Project and start construction.

Accordingly, FSI submitted a letter-proposal dated June 6, 1998[4] proposing to construct the two-level podium facility within 180 days for PHP 878,888,888.88. Paragraph 12, page 3 of the proposal stated that:

- In case of delayed payment by the Owner, after 30 days from receipt by the Construction Manager of approved progress billings, the Owner shall be charged at the rate of 2% per month of delay and charge for standby time of equipment and manpower (direct cost + VAT) and shall give the Contractor an automatic time extension on the completion of the work of the same number of delays provided the works are in compliance with the plans and specifications. After 60 days of delay, the Contractor shall have the right to stop work and bill the Owner for remobilization expenses in case of resumption of work.

GPI refused the terms of the NOA/NTP dated June 10, 1998 due to the strict timetable imposed by MRTDC.

Thus, MRTDC issued a NOA/NTP dated June 17, 1998[5] to FSI which contained, among others, the following provision:

The successful operation of the depot and the related rail system is of national importance. In the light of this fact and to conform with the schedule provided for in the BLT Agreement, FSI in accepting this NTP agrees to finish the Work within 6 months from acceptance of this NTP, inclusive of any rain delays but subject to force majeure as defined in the BLT Agreement a photocopy of which is attached herewith. In addition, FSI hereby agrees to a bonus/penalty scheme as follows:

Liquidated Damages: US\$100,000.00 per day of delay based on the Six-month period.

Bonus: US\$30,000.00 per day of early accomplishment

FSI, through its President, Felipe A. Cruz, Jr., as indicated by his conformity on the NOA/NTP, accepted the NOA/NTP.

In a letter dated October 5, 1998 issued by MRTDC to FSI, day one of the construction period was reckoned on July 14, 1998 to end 180 days after or on January 14, 1999.

In the course of the construction, there were several change orders issued by MRTDC to FSI which included the realignment or shifting of several columns and the construction of a sewerage treatment plant and septic tank, among others.

FSI finished 98.7% of the Project on April 30, 1999 or 106 days from the original January 14, 1999 deadline. Full completion was achieved on May 17, 1999.

On October 8, 1999 or almost six months after the completion of the Project, FSI issued a letter to David Sampson, the PIJV Construction Manager, requesting an extension of 228 days. Attached to the letter was a spreadsheet showing the time extensions that they were entitled to, which allegedly moved the Project deadline to August 30, 1999. At the bottom right hand corner of the spreadsheet was the signature of David Sampson, ostensibly approving the extension but only until August 2, 1999 for a period of 200 days.[6]

Thereafter, FSI issued several letters to MRTDC asking for payment of additional amounts for owner-caused delays. FSI claimed that by virtue of par. 12 of its letter-proposal dated June 6, 1998, for each day MRTDC was

delayed in paying FSI's progress billing, the latter was entitled to a corresponding additional day for the completion of the Project. FSI contended that payment of the progress billings had been delayed for 1,800 days. Adding that to the previous 200-day extension approved by David Sampson, the extension period would total 2,000 days.

Reckoning the completion of the Project on May 30, 1999 and taking into account the 2,000-day extension FSI claimed it was entitled to, FSI alleged that it completed the Project 1,894 days ahead of schedule which would amount to an early accomplishment bonus of USD 56,820,000.

FSI also demanded from MRTDC the payment of actual extended cost in the amount of PhP 33,145,515.13 due to the extended Project time attributable to MRTDC's change orders. Additionally, FSI claimed that MRTDC's change orders which affected the design of the Project necessarily required it to change the construction methodology from the sliding hydraulic-lift table formwork system to the conventional formworks, resulting in extra costs amounting to PhP 99,515,759.

MRTDC refused to pay the claims. It alleged that FSI failed to finish the construction of the Project within the 180-day period agreed upon and that it had already paid FSI the amounts due for work accomplished as well as for interest on delayed payments.

Thus, on June 5, 2002, FSI filed with the Construction Industry Arbitration Commission (CIAC) a Request for Adjudication of its claims against MRTDC. In its June 3, 2002 Complaint, FSI reduced its claim for early completion bonus to USD 19,590,000 allegedly to lower the prohibitive filing fees of the CIAC.

After due hearing, the CIAC issued an Award dated May 6, 2003 in favor of FSI for USD 2,820,000 as early completion bonus, denying FSI's other claims, the dispositive portion of which states:

WHEREFORE, in view of all the foregoing, the Arbitral Tribunal hereby renders the following award:

- Filsystem's claim for early completion bonus in the amount of TWO MILLION EIGHT HUNDRED EIGHT HUNDRED TWENTY THOUSAND US DOLLARS (US\$2,820,000.00) is hereby granted.
- Filsystems' claim for extra costs due to change in methodology in the amount of P99,515,790.00 is hereby denied.
- Filsystems' claim for extra overhead costs in the amount of P33,140,515.13 is hereby denied.
- MRTDC's claim for liquidated damages is hereby denied.
- MRTDC's claim for reimbursement for interest is hereby denied.
- Filsystems and MRTDC are ordered to share the cost of arbitration equally.

The foregoing monetary award shall bear interest at the rate of six percent (6%) per annum on the total amount due from the date hereof until finality of this Award, after which interest at the rate of twelve percent (12%) per annum shall be paid on the said total amount until full payment.

SO ORDERED.

In the Award, as there was no actual contract for the Project, the CIAC made a finding that the following documents shall govern in the relationship of the parties:

- The NOA/NTP dated June 17, 1998;
- The June 6, 1998 Letter of FSI to MRTDC;

- The General Conditions and the Drawing and Specifications included with the Bid Documents except to the extent that the same is inconsistent with the two (2) previous documents.

The CIAC found that David Sampson was the Project Manager and thus could authorize change orders, contrary to MRTDC's allegation that he was not the Project Manager. It also found that no specific construction methodology was agreed upon.

With regard FSI's claim for early completion bonus, specifically as to the financial time extension, that is, time extension for delayed payment of progress billings, the CIAC found that MRTDC was already sufficiently penalized for any delay in payment by the two percent (2%) interest per month. Furthermore, the CIAC determined that additional time for delayed payment would amount to double payment and is unconscionable resulting in a 1,800-day time extension or 1000% increase from the original contract period of 180 days.

As to the technical time extension which arose from the change orders of MRTDC, the latter claimed that David Sampson was not the Project Manager and was not authorized to issue change orders in behalf of MRTDC. However, the CIAC found that MRTDC itself represented David Sampson as its Project Manager and that documentary exhibits prove that he was indeed the Project Manager. Thus, by virtue of Articles 20.07 and 21.04 of the General Conditions of Contract,[7] David Sampson could authorize change orders in behalf of MRTDC. This was further supported by the Construction Industry Authority of the Philippines (CIAP) Document No. 102, par. 21.04-A(a) which allows the adjustment of completion time due to delays caused by the owner.

The CIAC ruled that FSI is entitled to a technical time extension of 200 days or until August 2, 1999 as authorized by David Sampson. Therefore, FSI substantially finished construction of the Project on April 30, 1999 or 94 days before the deadline. This translates to an early accomplishment bonus of USD 2,820,000.

As to the extended overhead costs, the CIAC determined that such claim partakes of a claim for actual damages, and explained that jurisprudence dictates that such claim be established with actual pieces of evidence, which include receipts, invoices, and other similar documents. FSI failed to present any piece of evidence. Thus, this claim was denied by the CIAC.

With regard FSI's claim for extra cost due to construction methodology, the CIAC denied the claim holding that such claim was not supported by any contractual or legal basis as well as the fact that FSI could have used the sliding hydraulic-lift formworks in some areas, but chose not to.

From such Award, both parties filed their respective petition for review under Rule 43 of the Rules of Court with the CA.

On January 6, 2004, the CA issued the assailed Decision, the dispositive portion of which reads:

WHEREFORE, in consideration of the foregoing premises, judgment is hereby rendered partially reversing and setting aside the Award of the Construction Industry Arbitration Commission (CIAC) in these consolidated cases and MODIFYING the same by deleting the award of US\$2,820,000.00, representing early completion bonus in favor of Filsystems, while the rest of the Award is AFFIRMED.

In view of the modification of the CIAC Award as stated above, MRTDC's application for the issuance of a temporary restraining order/writ of preliminary injunction is hereby declared moot and academic considering that the modified Award no longer contains monetary award that may be enforced by the CIAC pursuant to the provisions of Sec. 4 of the CIAC Rules of Procedure Governing Construction Arbitration.

In deleting the award for financial time extension, the CA reasoned that the consent of the Project Manager was insufficient as change orders require a modification of the contract which must be consented to by MRTDC itself.

Hence, FSI filed this Petition for Review on Certiorari.

The Issues

FSI raised the following issues in its petition:

Grounds For The Allowance Of The Petition

The Court of Appeals committed grave abuse reversible error and decided questions of substance in a way not in accordance with law and applicable decisions of the Honorable Court, and has departed from the accepted and usual course of judicial proceedings, necessitating the Honorable Court's exercise of its power of supervision, considering that:

I.

The Court of Appeals inexplicably reversed and supplanted the CIAC Arbitral Tribunal's expert and technical determination in its Award dated 06 May 2003 which ruled that the original contract period of 180 days was extended by 200 days of technical time extension, a conclusion determined by the said tribunal after extensive technical evidentiary hearings.

- The minimum of 200 days of technical time extension as determined by the CIAC Arbitral Tribunal is generally conclusive as a specialized quasi-judicial body's factual and technical determination of equitable adjustment based on the evidence on record. This minimum equitable adjustment of 200 days is not only in accord with the governing contractual documents, but is demanded by applicable law, construction industry practice, and the approval by the Project Manager.

- As correctly found by the CIAC Arbitral Tribunal, the governing contractual documents do not require the consent or approval of respondent MRTDC as a precondition to petitioner Filsystems's entitlement to technical time extension:

- Under Article 20.07 of the General Conditions of the Bid Documents, if the owner orders changes in the work with cost and time impact, an equitable adjustment shall be made. In such cases, there is no requirement for petitioner Filsystems to submit a request for time extension and for the approval by the owner, PMT, or Project Manager.

- Contrary to the ruling of the Court of Appeals, under Article 21.04 of the General Conditions of the Bid Documents, the PMT, through the Project Manager as its authorized representative, has the authority to grant time extensions independent of the approval of respondent MRTDC. As admitted by respondent MRTDC itself and as provided under the governing contractual documents, there is no requirement for another approval by respondent MRTDC of any time extension as determined and granted by the Project Manager.

- The Court of Appeals arbitrarily disregarded the facts and conclusion correctly found by the CIAC Arbitral Tribunal and borne by the evidence on record, confirming that petitioner Filsystems complied with the contractual requirements for claiming time extension.

- The determination of an equitable adjustment of time extension cannot be left solely to the discretion of one of the parties. If there is a dispute between the parties as to what the equitable adjustment should be, then resort may be had to the arbitration machinery as contractually agreed upon by the parties. In this case, the grant by the CIAC Arbitral Tribunal of the 200-day technical time extension is a factual and technical determination of the minimum equitable adjustment of the completion period to which petitioner Filsystems is, at the very least, entitled. There is nothing to show that the CIAC Arbitral Tribunal acted with grave abuse of discretion, arbitrarily arrived at its findings of facts, or disregarded evidence on record, in granting 200-day technical time extension, either as approved by the Project Manager or as a determination of equitable adjustment.

- Finally, assuming that the owner's approval is necessary, the 200-day technical time extension was deemed

approved by respondent MRTDC considering that, as correctly found by the CIAC Arbitral Tribunal, the Project Manager in this case already approved/granted a technical time extension of 200 days which approval/grant, despite receipt by respondent MRTDC, has not been disapproved nor revoked by the latter.

II.

The Court of Appeals erroneously denied petitioner Filsystems's claim for financial time extension when it ruled that the provision on automatic financial time extension stated in the accepted letter proposal does not apply for purposes of determining entitlement to early accomplishment bonus.

- The governing contract documents, i.e., bid documents, letter proposal and Notice of Award/Notice to Proceed, do not provide for a distinction between financial time extension and technical time extension insofar as bonus compensation is concerned. Thus, petitioner Filsystems's earned financial time extension should necessarily be credited also in determining early accomplishment bonus.

- The application of financial time extension for purposes of determining entitlement to early accomplishment bonus is consistent with the basic principle of mutuality of the interests of the contracting parties, putting them in approximately equal footing, and with the principle of greater reciprocity of interests of the parties to an onerous contract, consistent with Article 1350 and 1378 of the Civil Code.

- Contrary to the ruling of the Court of Appeals, petitioner Filsystems's entitled to early accomplishment bonus based on financial time extension is not unconscionable for allegedly being a double financial penalty.

- The fact that the intention of the parties was to consider also financial time extension for determining early accomplishment bonus was even admitted by the PIJV personnel and engineers on site.

- The Court of Appeals conveniently ignored the Letter dated 14 October 1998 of PIJV Vice-President Melvin Satok addressed to respondent MRTDC, which letter is respondent MRTDC's own evidence, and in fact corroborated by its witness, where the bonus clause was extensively discussed and petitioner Filsystems's anticipated claim for significant bonuses was acknowledged. That conclusively confirms that the parties were of the understanding that petitioner Filsystems would be entitled to early accomplishment bonus on account of financial time extensions beyond the original 180-day construction period.

- Equitable considerations demand that financial time extension be applied in determining bonus compensation.

- The foregoing ruling of the Court of Appeals overlooks the total train system project as a whole, of which the podium depot structure project is only a part.

- Although contractually, as with liquidated damages, it is not necessary for petitioner Filsystems to prove actual damages, or to even have suffered damages at all; petitioner Filsystems did in fact suffer damages in the amount of around US Dollars Twenty Seven Million Four Hundred Eight Thousand Seven Hundred Fifty (US\$27,408,750) for which the early accomplishment bonus can equitably compensate.

- MRTDC does not find inequitable its US Dollars One Hundred Thousand (US\$100,000) per day liquidated damages, thus neither should the early accomplishment bonus of only US Dollars Thirty Thousand (US\$30,000) a day be deemed inequitable.

- It is inequitable not to apply extensions earned due to the owner's delays in payment (financial time extension) for the purpose of determining early accomplishment bonus, since construction cannot proceed without funds and the owner can simply intentionally delay or refuse payment for several months or years just to defeat the contractor's claim for early accomplishment bonus.

- The very purpose for early accomplishment bonus, which was to ensure that the project will be completed in time for the operation of the metro rail project, was actually served.

- As borne by the Letter dated 14 October 1998, respondent MRTDC and PIJV already knew at the time that the project period would extend beyond 180 days and the petitioner Filsystems would be claiming early accomplishment bonus.
- Even before the issuance of the Notice of Award/Notice to Proceed to petitioner Filsystems, respondent MRTDC knew that the 180-day period would be inevitably extended.
- The total amount of early accomplishment bonus that petitioner Filsystems is entitled to has already been equitably reduced.
- At the very least, considering that respondent MRTDC itself admitted that it incurred 211 days of delay in its payment of petitioner Filsystems's progress billings, which fact of delay is even recognized by the CIAC Arbitral Tribunal, the equivalent amount of at least US Dollars Six Million Three Hundred Thirty Thousand (US\$6,330,000.00) should have been additionally granted as early accomplishment bonus based on financial time extension.

III.

The Court of Appeals arbitrarily ignored petitioner Filsystems's claim for extended overhead cost despite the evidence on record and respondent MRTDC's own admission that extended overhead cost is claimed separately of and independently from the cost impact of the various change orders.

- The Court of Appeals arbitrarily and completely ignored the evidence on record showing petitioner Filsystems's compliance with the contractual requirements for claiming extended overhead cost.
- Since the business documents, i.e., vouchers, receipts, billings, payments, petty cash replenishments, and similar documents, supporting petitioner Filsystems's claim for extended overhead cost are indisputably numerous and voluminous, and the fact sought to be established from them is only the general result of the whole, the originals thereof need not be presented pursuant to Section 3(c), Rule 130 of the Rules of Court. As proven during the trial, the originals thereof were actually available and manifested to be accessible for scrutiny but respondent MRTDC waived and squandered the same. Moreover, this issue was not even raised by respondent MRTDC in the course of the submission of its countervailing affidavits and evidence.

IV.

The Court of Appeals erred in denying petitioner Filsystems's claim for extra cost due to change in construction methodology considering that as found by the CIAC Arbitral Tribunal, petitioner Filsystems was indeed constrained to incur increased cost, i.e., a "radical increase in manpower as well as formworks", to meet the construction deadline brought about by the several change orders issued by respondent MRTDC. Thus, petitioner Filsystems should be compensated for extra cost due to change in construction methodology pursuant to article 20.08 of the General Conditions of the Bid Documents, and based on the principle against unjust enrichment and on quantum meruit.

V.

Respondent MRTDC should bear the arbitration cost alone, considering the undisputed fact that petitioner Filsystems was constrained and forced to litigate and institute the arbitration proceedings below to protect its interest due to respondent MRTDC's bad faith and unjustified, malicious, unreasonable and fraudulent conduct.[8]

Summarized, the issues are:

- Whether FSI is entitled to be paid early completion bonus based on technical time extension;
- Whether FSI is entitled to be paid early compensation bonus based on financial time extension;

- Whether FSI is entitled to be paid for extended overhead cost;
- Whether FSI is entitled to be paid for costs due to change in construction methodology; and
- Whether MRTDC should bear the arbitration costs alone.

The Court's Ruling

First Issue: FSI is entitled to be paid early completion bonus based on technical time extension

The CIAC granted FSI's claim for early completion bonus to the extent of 94 days, awarding FSI the amount of USD 2,820,000, based on a 200-day technical time extension.[9] There was no evidence presented before the CIAC to prove that MRTDC authorized any technical time extension. However, FSI presented a timetable[10] showing technical time extension up to August 2, 1999 which was approved by the Project Manager, David Sampson. FSI is not claiming payment for the change orders directed by MRTDC through David Sampson, such change orders having already been paid. What FSI is claiming is that it is entitled to an extension to the agreed completion date and consequently to early completion bonus.

This award was deleted by the CA in its assailed Decision on the ground that in order to bind MRTDC to the change orders issued by the Project Manager, the consent of MRTDC to modify its contract with FSI is required. Since MRTDC did not order nor authorize the modification of the contract, it is not bound to honor or pay for the change orders. The CA reasoned, as follows:

Thus, if the change orders caused an increase or decrease in the amount due, i.e., contract cost, and in the time required for its performance, i.e., completion period of the project, an equitable adjustment shall be made but it is a requirement that the "Contract shall be modified in writing accordingly".

Inasmuch as an equitable adjustment required the modification of the contract in writing, We find and so rule that it should be MRTDC as a contracting party who should give its consent to such contractual modification. This was necessitated by the fact that in case of directed changes, the scope or nature of works to be performed were to be altered and there would be additional price or costs to be paid by the owner of the project. Necessarily, there was direct impact on performance period of the obligation. Besides, this power was NOT delegated by MRTDC in the above-quoted Clause 20.07 because only the authority to make the change orders was given to the PMT but it did not extend such authority to bind MRTDC in modifying the contract in writing. NO such provision could be read or even implied from the above-quoted contractual provision.[11]

The CA cited Article 20.07, pars. (a) and (c), and Article 21.04, par. (a) of the General Conditions of Contract, which provide:

Art. 20 : WORK

x x x x

20.07 CHANGES IN THE WORK:

a. CHANGES ORDERED BY THE OWNER: The Owner may at any time, without invalidating the Contract and without notice to the sureties, order extra work or make changes by altering, adding to or deducting from the work, as covered by the Drawings and Specifications of this Contract and within the general scope thereof. Such changes shall be ordered by the Project Management Team in writing, and no change or omission from the Drawings and Specifications shall be considered to have been authorized without written instructions signed by the Project Manager.

x x x x

c. ADJUSTMENT OF CONTRACT: All such work shall be executed under the conditions of the original

contract. If such changes cause an increase or decrease in the amount due under this Contract, or in the time required for its performance, an equitable adjustment shall be made and the Contract shall be modified in writing accordingly. The express consent of the sureties shall be obtained in writing. In the event that the work involved is increased by such changes, the Contractor shall furnish proportionate additional performance bond.

x x x x

Art. 21 : TIME OF COMPLETION OF WORK

x x x x

21.04 EXTENSION OF TIME: The Contractor will be allowed an extension of time based on the following conditions:

- Should the Contractor be obstructed or delayed in the prosecution or completion of the work by the act, neglect, delay, or default of the Owner or any other contractor employed by the Owner on the work: by strikes, lockouts; by an Act of God or Force Majeure as defined in Article 1.26; by delay authorized by the PMT pending arbitration; then the Contractor shall within fifteen (15) days from the occurrence of such delay file the necessary request for extension, the PMT may grant the request for extension for such period of time as he considers reasonable.[12]

We do not agree with the CA. A plain reading of par. (c) of Art. 20.07 would show that change orders can be executed immediately and that contract modification is not a pre-condition for it. Nowhere in the above provisions is it stated that the modification of the contract is a requisite for the execution of the change orders. It only states that in the event that such changes cause an increase or decrease in the amount due under the contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. This means that the contract could be made to conform to the agreement that has already been agreed upon.

Besides, MRTDC's proposition is absurd.

MRTDC admits that the Project Manager could order changes in the Contract Work but cannot bind the owner to it. Having to await for the consent of the owner to change orders would defeat the purpose of authorizing the Project Manager to order such changes.

While the general rule is one cannot be bound to a contract entered into by another person, there are exceptions, such as when the contracting person was authorized to enter a contract on behalf of another, or when such contract was ratified, as enunciated in the Civil Code:

Article 1317. No one may contract in the name of another without being authorized by the latter, or unless he has by law a right to represent him.

A contract entered into in the name of another by one who has no authority or legal representation, or who has acted beyond his powers shall be unenforceable, unless it is ratified, expressly or impliedly, by the person on whose behalf it has been executed, before it is revoked by the other contracting party.

Here, David Sampson was clearly authorized to issue change orders. The relationship between MRTDC as the owner, PIJV as the PMT, and David Sampson as the Project Manager is embodied in Sections 1.02, 1.03 and 1.05 of the General Conditions of the Bid Documents. Said provisions state:

1.02

OWNER: shall mean METRO RAIL TRANSIT DEVELOPMENT CORPORATION (abbreviated as "MRTDC" or "MRTDevCo"), the person or entity ordering the project for execution, including duly

appointed successors, or authorized representatives.

1.03

PROJECT MANAGEMENT TEAM (PMT): shall mean PARSONS-INTERPRO JV, the authorized representative of the Owner to oversee the execution of the Contract Work, either directly or through the properly authorized agents. Such agents shall be acting within the scope of the particular duties to them. They are responsible to the Owner through the PARSONS-INTERPRO JV Program Director or Project Manager.

x x x x

1.05

PROJECT MANAGER (PROJECT MANAGER): shall mean the personally authorized representative of the PMT.

Evidently, David Sampson was the representative or agent of PIJV who was engaged as the Project Manager by MRTDC. However, the relationship between MRTDC and PIJV cannot be strictly characterized as a contract of agency. The practice in the construction industry is that the Project Manager exercises discretion on technical matters involving the construction work, such as change orders. This is because owners of the Project are oftentimes not technically suited to oversee the construction work and hire professional project managers precisely to oversee the day-to-day operations on the construction site and to exercise professional judgment when expedient. Thus, the CIAC ruled:

In practice, in case of a dispute between the owner and the contractor, the independent third party project manager will exercise his own independent professional judgment and render his independent decision on technical matters such as adjustments in cost and time occasioned by a change order which he issued.

This is the reason why the PMT and the Project Manager were authorized under Art. 20.07, par. (a) of the General Conditions of the Bid Documents to modify the Contract Work. It may thus be concluded that the PMT and consequently the Project Manager were authorized by the owner to modify the Contract or the Project Specifications.

Relative to the contract, the CIAC correctly held that:

The authority to issue the field instructions cannot be divorced from the corresponding authority to cause the appropriate adjustment in price and time resulting from these instructions; otherwise, the filed instructions will never be followed by the contractor without the corresponding authority to adjust the price and time. While theoretically it is possible to divorce the two, it is not the norm specially in a project where the time for completion is tight as the separation would invariably lead to delay.[13]

Relying on Art. 1724 and *Powton Conglomerate, Inc. v. Agocolicol*,^[14] it is argued that a written consent of the owner of a project in order that increased costs shall be binding is required and the Project Manager in this case had no such written consent.

Art. 1724 provides:

Article 1724. The contractor who undertakes to build a structure or any other work for a stipulated price, in conformity with plans and specifications agreed upon with the land-owner, can neither withdraw from the contract nor demand an increase in the price on account of the higher cost of labor or materials, save when there has been a change in the plans and specification, provided:

- (1) Such change has been authorized by the proprietor in writing; and
- (2) The additional price to be paid to the contractor has been determined in writing by both parties.

In Powton Conglomerate, Inc., we enunciated:

The present Civil Code added substantive requisites before recovery of the contractor may be validly had. It will be noted that while under the precursor provision, recovery for additional costs may be allowed if consent to make such additions can be proved, the present provision clearly requires that changes should be authorized, such authorization by the proprietor in writing. The evident purpose of the amendment is to prevent litigation for additional costs incurred by reason of additions or changes in the original plan. Undoubtedly, it was adopted to serve as a safeguard or a substantive condition precedent to recovery.[15]

We agree that indeed a written consent is needed. In the instant case, the written consent is embodied in the General Conditions of the Bid Documents issued by MRTDC and found by the CIAC as one of the documents comprising the contract between MRTDC and FSI.[16] Arts. 20.07 and 21.04 authorized the Project Manager to issue change orders and time extensions, respectively. And as discussed above, such authority extends to the modification of the contract between the parties.

Moreover, an examination of the records will show that PIJV issued several Certificates of Payment for progress billings covering Change Order Nos. 1 through 15.[17] One of these is Certificate of Payment No. JV4390[18] which was approved by David Sampson, endorsed for payment by Melvin Satok and Augustus Salgado and approved for payment by an Owner's Representative. Clearly, MRTDC cannot now question the authority of the Project Manager to bind MRTDC, as it is now estopped from so doing[19] having paid the change orders ordered by David Sampson thereby ratifying the same.

Verily, David Sampson was authorized to order changes in the Contract Work as well as binding MRTDC to it.

Additionally, the appellate court declared that the CIAC mistakenly quoted Article 21.04 as the basis in recognizing that David Sampson has the power or authority to bind MRTDC to a contract modification and that the situation was more properly covered by par. (c) of Article 20.07 of the General Conditions of the Bid Documents, to wit:

Furthermore, CIAC was guilty of misapprehension or misinterpretation of the contractual provisions by ruling that Clause 21.04 in relation to Construction Industry Authority of the Philippines (CIAP) Document No. 102, paragraph 21.04-A(a) should be applied to the instant case. The misinterpretation is confirmed by the fact that CIACs' premise had always been that the equitable adjustment of the contract cost and performance period was based on change orders or what is called "directed changes." On the other hand, Clause 21.04 covered extension of time due to obstruction or delay in the prosecution of the project, thus-

x x x x

It is very clear from the above quoted contractual provisions that equitable adjustment of the cost and time were due to change orders or directed changes and they are different from the causes provided in Clause 21.04 which had reference to obstruction or delay in the prosecution or completion of the project by act, neglect, delay or default of the owner. Despite the glaring differences in the meaning and coverage of the foregoing contractual provisions, CIAC mistakenly quoted Clause 21.04 as the basis in recognizing that Mr. David Sampson had the power or authority to bind MRTDC to a contract modification, a situation clearly governed by paragraph c of Clause 20.07 of the General Conditions of the Bid Documents.[20]

This is wrong.

Actually, the CIAC stated in its Award that:

Also from the above discussion, it is the PMT or the PROJECT MANAGER as representative of the Owner MRTDC which has the authority to grant the technical time extensions based on change orders/deviation/act/neglect/delay or default of the Owner, in accordance with Articles 21.04 and 20.07.

However, the formal approval of MRTDC of the time extensions as approved and recommended by the PMT/PROJECT MANAGER is of ministerial [sic] in nature, except for grave error or collusion which is not the case here. MRTDC should have acted upon recommendations by its technical personnel, the Project Manager, who had the direct knowledge and with accurate assessments of the construction activities in the project. It is not accurate to state that the whole PIJV is the Project Manager because it is composed of the President, the Vice-President, the Construction Manager and the Area Engineers. Looking at the technical functions and responsibilities, the Arbitral Tribunal holds that Dave Sampson is the Project Manager who had the authority to grant time extension being the highest technical personnel in the field for submittal to the Owner's formal approval.

While MRTDC did not formally grant or approve any technical time extension, nevertheless Filsystems is entitled to time extension based on the contract, the law and industry practice. This is clear from Articles 21.04 and 20.07 of the General Conditions of the Bid Documents which are part of the contract between the parties. This conclusion is likewise justified by the construction industry practice and that of Construction Industry Authority of the Philippines (CIAP) Document No. 102, paragraph 21.04-A(a), which states that "The Contractor shall be entitled to an equitable adjustment of Completion Time where the Contractor is obstructed or delayed in the prosecution of the Work by the act, neglect, delay or default of the Owner, or any other contractor employed by the Owner of the work." [21]

The appellate court erred in ruling that Arts. 20.07 and 21.04 of the General Conditions of the Bid Documents cannot be harmonized and applied simultaneously. To clarify, Art. 20.07 deals with changes in the Work, such as change orders and who may issue them. Art. 21.04, on the other hand, deals with the circumstances that could allow for extension of time for completion of the work. An order by the owner certainly is encompassed as an "act, neglect, delay, or default of the Owner."

In our view, the CIAC correctly cited Article 21.04 of the General Conditions of the Bid Documents and CIAP Document No. 102, par. 21.04-A(a) as giving authority to the Project Manager to modify the contract with regard the extension of the contract's completion date.

As to the observation that the performance period was extended after the completion of the Project, we note that the technical time extension on the change orders was the subject of evaluation from both FSI and Project Technical Group of PIJV. Thus, the CIAC noted, thus:

Both Filsystems and PTG's graphical representation had credited an average of 20-day technical time extensions for each change/extra/variation orders affecting the critical path per project area. This average of 20-day technical time extension of all the change/extra/variation orders was derived from the joint evaluations per project area and agreed by both the engineers and technical personnel of Filsystems and the PTG who were directly involved in the field, and adopted by the Area Construction Manager, as duly authorized representatives of the Owner.

Clearly, it could be gleaned from the aforecited finding that the technical time extension could not have been submitted to MRTDC for approval prior to the completion of the Project.

As to David Sampson's authority to approve such time extension at a time when the Project was already completed and his term as Project Manager already terminated, note that he was the one who directed the change orders in the first place, and, thus, he was uniquely situated to approve the time extension relative to such change orders. He was the most competent person to do it. In addition, to delegate such function to another person not privy to the change orders would render their results questionable at best.

Furthermore, although the construction of the Project was already completed, the winding up of the contractual obligations relative to the Project was not yet finished. The bonus scheme employed by MRTDC could only be

implemented upon the completion of the Project after computing for time extensions. Although David Sampson may have been already employed as a consultant by MRTDC at the time that he approved the 200-day technical time extension, it must be stressed that his engagement as the Project Manager did not end with the completion of the construction works. David Sampson signed Certificate of Payment No. MRT-1299 dated July 22, 1999[22] as the Area Construction Manager or Project Manager along with the signatures of: Gaudioso Del Rosario, AVP Operations; Augustus V. Salgado, President; and an Owner's Representative. Patently, David Sampson was still engaged as the Project Manager at the time that he approved the 200-day technical time extension.

Hence, FSI is entitled to the 200-day Technical Time Extension and, consequently, to the 94-day early accomplishment bonus awarded by the CIAC.

Second Issue: FSI is not entitled to financial time extension

In FSI's letter-proposal dated June 6, 1998 found by the CIAC as one of the binding documents governing the relationship between the parties, par. 12 reads;

- In case of delayed payment by the Owner, after 30 days from receipt by the Construction Manager of approved progress billings, the Owners shall be charged at the rate of 2% per month of delay and charge for standby time of equipment and manpower (direct cost + VAT) and shall give the Contractor an automatic time extension on the completion of the work of the same number of delays provided the works are in compliance with the plans and specifications. After 60 days of delay, the Contractor shall have the right to stop work and bill the Owner for remobilization expenses in case of resumption of work.

FSI argues that delays in the payment of progress billings should also be counted in the computation for the early completion bonus in the NOA/NTP dated June 17, 1998 issued by MRTDC, classified as financial time extensions. An examination of the relevant contractual provisions would reveal that financial time extension should not be considered in the computation of early accomplishment bonus.

MRTDC's consistent position has been that time extensions, to be considered for the early completion bonus, must actually delay the construction project or cause the stoppage of construction work. Thus, in Art. 21.04 of the General Conditions of the Bid Documents which enumerated the instances when time extensions may be allowed, it is only when "the Contractor be obstructed or delayed in the prosecution or completion of the work" that the contractor will be allowed an extension of time. While in the NOA/NTP, the complete provision for early accomplishment bonus is as follows:

The successful operation of the depot and the related rail system is of national importance. In the light of this fact and to conform with the schedule provided in the BLT Agreement, FSI in accepting this NTP agrees to finish the Work within 6 months from acceptance of this NTP, inclusive of any rain delays but subject to force majeure as defined in the BLT Agreement a photocopy of which is attached herewith. In addition, FSI hereby agrees to a bonus/penalty scheme as follows:

Liquidated Damages: US\$100,000.00 per day of delay based on the Six-month period

Bonus: US\$30,000.00 per day of early accomplishment

(Emphasis supplied.)

Furthermore, the contemporaneous conduct of MRTDC in allowing long delays in the payment of the FSI's progress billings would indicate their belief that such automatic time extension shall not be included in the computation of early accomplishment bonus. Certainly, MRTDC never intended that it should be liable to FSI for 1,800 days[23] of delay amounting to USD 54,000,000 of early completion bonus.

Such financial time extension must be distinguished from the earlier discussed technical time extension. The technical time extension resulted from change orders issued by the Project Manager on the so-called “critical path” of the Project, whereby the construction could not proceed until such change orders were completed. Clearly, in the computation for early accomplishment bonus, MRTDC only contemplated time extensions when the actual work had to cease.

It thus becomes clear that MRTDC never consented to nor ratified the inclusion of financial time extensions in the computation of early accomplishment bonus.

It must also be pointed out that FSI was sufficiently indemnified for the delay in the payment of its progress billings with the payment of interest at the rate of 2% per month, or 24% per annum, on the amount due.

Thus, FSI is not entitled to financial time extension.

Third Issue: FSI is not entitled to be paid for extended overhead cost

During the hearing before the CIAC, it was found that FSI failed to adduce admissible evidence in support of its claim for extended overhead cost. The pieces of evidence that it presented in support of its claim for extended overhead costs were summaries and not actual receipts, invoices, contracts and similar documents. Such finding is a factual question that cannot be raised before this Court. It is a well-settled principle that the Supreme Court is not a trier of facts, and findings of fact made by the trial court, especially when the same are reiterated by the CA, must be given great respect if not considered as final. Thus, we ruled in *Security Bank and Trust Company v. Gan*, that:

It is well established that under Rule 45 of the Rules of Court, only questions of law, not of fact, may be raised before the Supreme Court. It must be stressed that this Court is not a trier of facts and it is not its function to re-examine and weigh anew the respective evidence of the parties. Factual findings of the trial court, especially those affirmed by the CA, are conclusive on this Court when supported by the evidence on record.[24]

To such general rule there are exceptions; however, the instant case does not fall under any of them.

The reason propounded by FSI why it presented mere summaries and not the actual documents to prove the extended overhead cost is anchored on Rule 130, Section 3, par. (c) of the Rules of Court:

Section 3. Original document must be produced; exceptions.— When the subject of the inquiry is the contents of a document, no evidence shall be admissible other than the original document itself, except in the following cases:

x x x x

(c) When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the fact sought to be established from them is only the general result of the whole.

FSI claims that what is sought to be established with the evidence in question is merely the general result of the evidence or the amount of extended overhead cost that it suffered.

FSI’s claim for extended overhead cost may be classified as a claim for actual damages.[25] Actual damages is defined as:

Actual damages are such compensation or damages for an injury and will put the injured party in the position in which he was before he was injured. They are those damages which the injured party is entitled to recover, for the wrong done and injuries received when none was intended. They indicate such losses as are actually sustained and susceptible of measurement, and as used in this sense, the phrase, “determinate pecuniary loss”

has been suggested as a more appropriate designation. They include all kinds of damages except exemplary or primitive damages. Compensatory damages are awarded as an equivalent for the injury done. It is synonymous with actual damages.

Thus, as correctly argued by the CIAC, actual damages must be duly proven and so proved with a reasonable degree of certainty.[26]

Contrary to FSI's contention, it is not merely the general result of the evidence that is sought in the instant case. The very fact of such overhead cost is also in question and evidence must be adduced to support any claim such as receipts. FSI did not. It is therefore not entitled to be paid extended overhead cost.

Fourth Issue: FSI is not entitled to be paid for costs due to change in construction methodology

The factual findings of the CIAC on this matter, which were reiterated by the CA, are:

There were no prior notice by Filsystems to MRTDC regarding the changed of methodology, and its financial consequences to MRTDC. Filsystems should have included this as extra cost or additional costs during the billings of the respective change orders. The absence of any contractual commitment on the part of MRTDC, there can be no legal basis to hold MRTDC liable for the extra cost in the alleged changed of methodology. If at all, Filsystems should have asserted this claim as a consequence of the change in methodology but it did not. There was likewise no reservation when Filsystems accepted payment for the several Change Orders. (Emphasis supplied.)

As discussed above, findings of fact of the CA are binding upon this Court. Thus, increases in the cost of the Project unless authorized by the owner will not make the latter liable for its cost. Here, no evidence supports the proposition that the owner authorized the change in construction methodology. FSI must bear the costs of such change in construction methodology having executed the same unilaterally.

Fifth Issue: The parties must equally share the arbitration costs

Philippine National Construction Corporation v. Court of Appeals provides the general rule in the determination of who should bear the costs of arbitration, to wit:

In respect of the costs of arbitration, Sec. 5, Article XV of the Rules of Procedure Governing Construction Arbitration states:

Decision as to Cost of Arbitration. – In the case of non-monetary claims or where the parties agreed that the sharing of fees shall be determined by the Arbitrator(s), the award shall, in addition to dealing with the merits of the case, fix the cost of arbitration, and/or decide which of the parties shall bear the cost(s) or in what proportion the cost(s) shall be borne by each.

Rule 142 of the Revised Rules of Court of the Philippines governing the imposition of costs likewise provides the following:

Section 1. Costs Ordinarily follow the result of suit. Unless otherwise provided in these rules, costs shall be allowed to the prevailing party as a matter of course, but the court shall have power for special reasons, to adjudge that either party shall pay the cost of an action, or that the same shall be divided, as may be equitable.[27]

In the instant case, there is no basis for assessing the arbitration costs against one party or the other, as the parties' prayers were only partially granted. We find it is just and equitable that both parties equally share the costs of arbitration.

WHEREFORE, the petition is hereby **PARTIALLY GRANTED**. The January 6, 2004 CA Decision is hereby

MODIFIED with the reinstatement of the CIAC's award to FSI of early accomplishment bonus in the amount of TWO MILLION EIGHT HUNDRED TWENTY THOUSAND US DOLLARS (USD 2,820,000). The May 6, 2003 Award of the CIAC is AFFIRMED IN TOTO. No pronouncement as to costs.

SO ORDERED.

Quisumbing, (Chairperson), Carpio-Morales, Tinga, and Austria-Martinez, JJ., concur.

[1] Rollo, pp. 127-201. The Decision was penned by Associate Justice Bienvenido L. Reyes and concurred in by Associate Justices Conrado M. Vasquez, Jr. (Chairperson) and Arsenio J. Magpale.

[2] Id. at 202-220. The Resolution was penned by Associate Justice Bienvenido L. Reyes and concurred in by Associate Justices Conrado M. Vasquez, Jr. (Chairperson) and Renato C. Dacudao.

[3] Id. at 221-320.

[4] Id. at 538-543.

[5] Id. at 544-547.

[6] Id. at 1095.

[7] Id. at 567 & 570.

[8] Id. at 34-40.

[9] The reckoning date is April 30, 1999 or 106 days from the original January 14, 1999 deadline. Thus, 200 days less 106 days is equal to 94 days.

[10] Rollo, p. 1095.

[11] Id. at 181.

[12] Supra note 7.

[13] Rollo, p. 495.

[14] G.R. No. 150978, April 3, 2003, 400 SCRA 523.

[15] Id. at 528-529.

[16] Rollo, p. 482.

[17] Id. at 1265-1350.

[18] Id. at 1265.

[19] Article 1431 of the Civil Code states:

Article 1431. Through estoppel an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereon.

[20] Rollo, pp. 181-182.

[21] Id. at 520-521.

[22] Id. at 1350.

[23] Id. at 507.

[24] G.R. No. 150464, June 27, 2006, 493 SCRA 239, 242-243.

[25] Rollo, pp. 528-529.

[26] Development Bank of the Philippines v. Court of Appeals, G.R. No. 110053, October 16, 1995, 249 SCRA 331.

[27] G.R. No. 165433, February 6, 2007, 514 SCRA 569, 574-575.

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