ALC INDUSTRIES, INC., PETITIONER, VS. DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS, RESPONDENT.

G.R. Nos. 173219-20. August 11, 2010

Ponente: ABAD, J.

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ABAD, J.:

On May 29, 1996 respondent Department of Public Works and Highways (DPWH) awarded to petitioner ALC Industries, Inc. (ALC) the construction of a 105-kilometer section of the Davao-Bukidnon Road from Calinan to Maramag. The parties signed the covering contract, Contract Package 09B, on January 28, 1997. ALC began work after receipt on March 3, 1997 of the notice to proceed. Subsequently, however, the parties discovered that the original design plans and drawings failed to reflect actual ground levels. Thus, they undertook a full-scale redesign of the project.

Because ALC had fallen behind schedule, it agreed with DPWH to reduce the scope of works by executing about a year later on July 17, 1998 a Reduction in Scope Agreement (RISA),[1] shrinking the project from 105 kilometers to 46.2 kilometers and from a contract price of P396,336,381.48 to P194,802,386.89. But, despite the reduction in scope of work, ALC continued to fall behind schedule. On August 7, 1998 the DPWH warned ALC about it, followed on August 13, 1998 by another warning from the project consultant, and a third warning from the DPWH on September 3, 1998.

But with the delay unabated, in March 1999 the DPWH proposed to ALC a Supplemental Agreement which required ALC, among other things, to pay the DPWH about P30 million to enable it to recoup its advances to ALC based on the original scope of the project. But ALC rejected the proposed supplemental agreement. This prompted the DPWH to send it another letter dated April 19, 1999, rescinding its the contract with ALC on the ground that it had incurred a negative slippage in excess of 15%, the threshold set under Presidential Decree (P.D.) 1870.

ALC sought reconsideration, claiming that what essentially delayed the project were actually the errors in the original design plans and drawings. It took the DPWH resident engineer eight months to approve the first sheet of the redesigned plans and drawings that covered a five-kilometer stretch of the project. Then it still had to be approved by the DPWH Bureau of Construction. ALC alleged that it in fact got no approved construction plan even after the rescission of the project. The delay of 14 months in the issuance of the notice to proceed and the inclement weather at the project site compounded the causes of the delay.

Since the DPWH did not act on its request for reconsideration, ALC submitted the matter for arbitration by the Construction Industry Arbitration Commission (CIAC).[2] Appallingly, the DPWH did not adequately respond to the action. It did not file an answer, seek modification of the Terms of Reference, file its memorandum, or submit the required draft decision, despite several extensions and postponements. It also neither presented a witness nor cross-examined ALC's witnesses.

At any rate, ALC claimed that the target accomplishment of the project for December 1998 was 39.52% and it

finished 30.80%. ALC pointed out that its negative slippage was, therefore, only 8.72%, which was still below the negative slippage threshold of 15%. But the CIAC had a different computation of the slippage. It reached 22.06% because ALC accomplished only 77.94% of the project as scheduled (30.80 divided by 39.52).

Surprisingly, despite this finding in the rate of ALC's negative slippage, the CIAC voided DPWH's order of rescission on the ground that, factoring in the delays attributable to bad weather, the slippage should be adjusted to 12.85% only. Further, the CIAC found that, while ALC was guilty of breach of contract, the DPWH was not without fault. It failed to give ALC the opportunity to refute its finding of negative slippage. It had moreover been shown that other contractors had incurred negative slippages of more than 15%, yet the DPWH did not resort to rescission. Thus, the CIAC modified the rescission to a mutual termination.

Out of the P655,647,869.82 that ALC originally claimed, the CIAC ruled that ALC was entitled only to P136,105,236.25. On ALC's urgent motion for partial correction, the CIAC modified its decision and increased the award to P190,355,820.84. From this amount, however, the CIAC offset P64,732,536.75 representing payments that the DPWH already made or advanced, resulting in a net award of P125,623,284.09 to ALC.

Both ALC and the DPWH appealed the decision of the CIAC to the Court of Appeals (CA).[3] In a decision, the CA agreed with the CIAC that ALC's negative slippage did not exceed the 15% threshold. The CA, however, upheld the DPWH rescission order based on the ALC's other contractual breaches.

Regarding the monetary awards, the CA affirmed nearly all that the CIAC provided but eliminated its award for stand by costs for equipment and manpower that ALC allegedly incurred on account of the DPWH's late issuance of the notice to proceed. The CA also denied ALC's additional claims for stand by costs due to the redesign works and bad weather conditions. Ultimately, the CA reduced the award to ALC from P190,355,820.84 to P45,687,595.25. But, offsetting prior payments that the DPWH already made, the CA ordered ALC to instead return P19,044,941.50 to the DPWH.[4] With the denial of its motion for reconsideration, ALC filed the present petition for review on certiorari.

The Issues Presented

The issues presented in this case are:

- Whether or not the CA erred in failing to dismiss the DPWH's appeal on the ground that it was filed beyond the reglementary period;

- Whether or not the CA erred in upholding the DPWH's rescission of its contract with ALC; and

- Whether or not the CA erred in not allowing ALC to recover stand by costs for equipment and manpower.

The Court's Rulings

One. ALC claims that the DPWH received, through the Office of the Solicitor General (OSG), copy of the CIAC decision on November 29, 2002, hence, it needed to perfect its appeal on or before December 13, 2002. But, as the CA found, the OSG received the CIAC decision only on December 2, 2002.[5] The DPWH filed a motion for extension of 15 days within which to file its petition for review on December 17, 2002 and a second motion for extension also of 15 days on December 27, 2002. The CA granted both motions and the DPWH filed its petition within the last extension asked for.

Two. ALC insists that the DPWH premised its rescission of the contract solely on the basis of ALC's negative slippage. Since both the CIAC and the CA found ALC's negative slippage to be below the 15% threshold

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provided by P.D. 1870, the CA had no basis for affirming the DPWH's rescission order. ALC points out that the CA erred when it considered other factors supposedly constituting breach of the agreement other than the negative slippage.

But the DPWH rescission order did not cite only the negative slippage as ground for its action. The pertinent portion of its order of April 19, 1999 reads:

> In view of your failure to comply with Clause 10 of the Reduction of Scope Agreement x x x and your continuing commission of acts amounting to breach of contract resulting to a negative slippage of twenty six point sixty nine (26.69%) percent to protect the interest of the Government we hereby forfeit/rescind your contract for the above-mentioned project pursuant to Clause 63.1 of the conditions of Contract (International) for Works of Civil Engineering Construction and Presidential Decree 1870.[6]

Clearly, the DPWH gave two reasons for the rescission: 1) ALC's failure to comply with Clause 10 of the RISA; and 2) its continuing commission of acts amounting to breaches of contract, resulting in negative slippage in its performance.

The negative slippage, an evidence of the breach, is not itself the cause of the delay in the project but an evidence of it. And what were the acts that amounted to breaches of the contract? The CA found, based on a DPWH memorandum dated February 15, 1999, that ALC failed to perform several obligations that the RISA required of it. Specifically, ALC failed to: 1) submit a program of work; 2) submit its month-by-month cash flow summary; 3) complete the verification survey; 4) complete and maintain facilities for the resident engineer; 5) provide data for the resident engineer to process orders for power generators; 6) provide a service vehicle; and 7) delegate the necessary technical, financial and administrative authority to the Project Manager.

ALC argues that, in considering these breaches, the CA violated its right to due process since the DPWH did not specify them in its rescission order and since the same were not raised as issues on appeal. But these breaches of the contract were mentioned as the cause of the negative slippage. Since the parties raised this negative slippage as an issue between them, the breaches that caused the slippage are necessarily a part of that issue.

In any case, aside from those breaches of the contract, the DPWH based its rescission of the same on ALC's failure to comply with Clause 10 of the RISA, which provides:

> 10. The Contractor agrees that should he fail to achieve 90% of the progress shown on the bar chart programme given on Attachment 4 for the period up to end December 1998, then the Employer has the right to enter upon the site and expel the Contractor therefrom in accordance with Conditions of Contract Clause 63.[7]

ALC undertook in the agreement to accomplish 43.91% of the reduced project by the end of December 1998.[8] The RISA's threshold was, therefore, 39.52%. But ALC was only able to accomplish 30.80% which was only 70.14% of the schedule, well below the 90% progress required by Clause 10. And even if delay due to bad weather could be factored in, ALC would still fall below the 90% target.[9]

On this score alone rescission was still justified. The 90% progress is a requirement imposed by the parties to the RISA. As a contractual obligation, this supersedes the threshold imposed by law. Since the parties entered into the RISA primarily due to initial delays in the project, the timetable instituted in it became an integral part of the agreement, an assurance that the project would be completed on time. ALC's failure to keep up with the rate of progress as contractually mandated is a substantial and fundamental breach which would defeat the very purpose of the RISA. Thus, the DPWH was entitled to terminate the project and expel ALC from it.

Three. ALC seeks to recover the stand by costs of its equipment and manpower as a result of 1) delays in the issuance of the notice to proceed; 2) the late submittal of the redesign works; and 3) the inclement weather that

impeded work.

ALC claims that it placed its equipment and personnel on stand by at the project site for 10 months while awaiting the issuance of the notice to proceed, thus it incurred expenses for them and lost earning that it would have made had it devoted those resources to some other project. Indeed, the CIAC held that ALC was entitled to recover P144,668,225.59 for these expenses and loses. On appeal, however, the CA held that ALC already waived whatever right it had to recover these costs.

The Court agrees with the CA's ruling that ALC should be deemed to have already waived whatever rights or interests it may have been entitled to as a result of DPWH's shortcomings by virtue of entering into the RISA. The parties executed the RISA so the work on the project could continue despite the initial setbacks. Admittedly, both sides incurred some delays. Instead of seeking redress for such delays, each side waived whatever claims it had against the other arising from such delays as a major consideration for their agreeing to enter into the RISA. For, if this was not the case, the parties "should have included the payment [of stand by costs in the RISA] as what they did with the other monetary claims of ALC."[10]

Besides, ALC created its own problem when it decided to mobilize in July 1996. As ALC pointed out in its letter to the DPWH dated October 28, 1996,[11] the contract had not yet been signed by then and this was essential to the issuance of the Notice to Proceed. ALC unnecessarily put itself in a position where it would incur stand by costs. While the DPWH gave ALC the authority to mobilize, this came about because ALC asked for it.

As for the delay caused by the redesign works, the CIAC awarded costs equivalent to 50 days totaling P15,000,722.93.[12] ALC mistakenly claims that the CA deleted this award based a waiver contained in the RISA. The truth, however, is that the CA affirmed the CIAC award for these costs. What the CA denied was ALC's prayer to increase the amount of damages. While ALC asks this Court to increase this award to P146,106,944.00, it gave no justification for the same.

Finally, due to incessant rains at the project site, the parties considered a number of non-workable days. ALC claims that it should be able to recover the expenses it incurred as a result of these non-workable days. Both the CIAC and the CA held that ALC was not entitled to recover such supposed expenses. Clause 12.2 of the Conditions of Contract provides for conditions under which ALC may be entitled to an extension of time or to recover costs. The provision refers to physical obstructions or conditions at the site "other than climatic conditions." While this seems to exclude delays due to weather conditions, ALC claims otherwise, if read in relation to Clause 44:

> 44.1 In the event of:
>
> x x x x
>
> (c) exceptionally adverse climatic conditions, or
>
> x x x x
>
> being such as fairly to entitle the Contractor to an extension of the Time for Completion of the Works, or any Section or part thereof, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer.[13]

While Clause 44, unlike Clause 12.2, allows for time extensions due to weather delays, the same is silent on the recovery of costs. Indeed, ALC could not point to any provision in the contract specifically allowing it to recover stand by costs incurred due to inclement weather. Besides, such costs were incurred without any fault or

negligence on the part of the DPWH. Certainly, such weather conditions are to be considered fortuitous events. And in such cases, the general rule is that each party shall bear his own loss.[14]

WHEREFORE, the Decision of the Court of Appeals in CA-G.R. SP 74463 and 74839 is hereby AFFIRMED in toto.

SO ORDERED.

Carpio, (Chairperson), Nachura, Bersamin,[*] and Mendoza, JJ., concur.

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[*] Designated as additional member in lieu of Associate Justice Diosdado M. Peralta, per raffle dated July 28, 2010.

[1] CA rollo (CA-G.R. SP 74839), Vol. I, pp. 337-339.

[2] Docketed as CIAC Case 27-2000.

[3] Docketed as CA-G.R. SP 74463 and 74839.

[4] In its decision dated December 16, 2005, penned by Associate Justice Josefina Guevara-Salonga and concurred in by Associate Justices Eliezer R. de los Santos and Fernanda Lampas Peralta, rollo, pp. 55-69.

[5] CA rollo (CA-G.R. SP 74463), pp. 163, 164 and 194.

[6] CA rollo (CA-G.R. SP 74839), Vol. I, p. 352.

[7] Id. at 338.

[8] Rollo, pp. 22 and 77.

[9] ALC claims that there were 37 non-workable days from July to December 1998 due to bad weather. ALC's average accomplishment per month is only 3.34%. Following the computation of the CIAC (rollo, p. 149), a time extension for 37 days would reduce the December target by 4.18%. Thus the scheduled accomplishment for December could be reduced to 39.73%. Unfortunately for ALC, 30.80% out of 39.73% is only 77.52%.

[10] CA rollo (CA-G.R. SP 74463), p. 655.

[11] CA rollo (CA-G.R. SP 74839), Vol. I, p. 496.

[12] Rollo, p. 160.

[13] CA rollo (CA-G.R. SP 74463), p. 571.

[14] New Civil Code, Article 1174.

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