

THIRD DIVISION

[G.R. No. 191591, June 17, 2015]

**DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS, PETITIONER,
VS. FOUNDATION SPECIALISTS, INC., RESPONDENT.**

DECISION

REYES, J.:

This Petition for Review on *Certiorari*^[1] under Rule 45 of the Rules of Court assails the Decision^[2] dated October 30, 2009 of the Court of Appeals (CA) in CA-G.R. SP Nos. 91329 and 91349 affirming with modification the Decision^[3] dated September 1, 2005 of the Construction Industry Arbitration Commission (CIAC) which awarded the monetary claims of Foundation Specialists, Inc. (FSI) against the Department of Public Works and Highways (DPWH).

The Antecedents

FSI, a private corporation organized and existing under Philippine laws, was the winning bidder for the construction of the DPWH's EDSA/BONI PIONEER INTERCHANGE PROJECT (hereinafter referred to as the Project). On December 22, 1992, the parties signed the corresponding contract^[4] reflecting the total project cost of P100,779,998.60 for a 60-meter long tunnel connecting Pioneer Street and Boni Avenue in Mandaluyong City, to be completed in 120 calendar days or four (4) months. To provide, among others, necessary engineering supervision, DPWH engaged the services of Renardet-Pacific Philippines Interstructure Consulting Engineers represented by Engineer Ennio Bossi as Consultant and Project Manager.^[5]

On March 4, 1993, the contract was renegotiated in order to accommodate a major redesign that increased the scope of work to a 282 m "cut and cover tunnel" for the amended contract price of P146,344,932.91 with a completion date of nine (9) months or until December 2, 1993.^[6]

FSI failed to complete the Project on December 2, 1993. It requested the DPWH for extension on five (5) separate instances which were all approved. The new completion date was thus moved to November 19, 1995 but the Project was already substantially completed as of November 1, 1995.^[7] The DPWH also approved three (3) variation orders increasing the contract price to P153,447,899.82, which was fully paid to FSI.^[8]

The DPWH issued a Certificate of Acceptance in favor of FSI on November 9, 2001.^[9]

The present controversy arose when FSI filed on July 27, 2004 a Request for

Arbitration^[10] before the CIAC for the recovery of its additional expenses and damages incurred for the rental of equipment made available for the Project but were rendered idle during the periods of delay, viz:

1. Standby Rental Cost for the Rotary Equipment P883,221.29
2. Overhead Costs during the periods of delay P15,379,790.11
3. Extended Rental Costs of Various Equipment P27,570,622.82

FSI also demanded for the payment of P23,670,162.48 as interest charges, P500,000.00 as attorney's fees, as well as the reimbursement costs of Arbitration. According to FSI, the delays were caused by construction problems that were beyond its control, such as right of way problems, underground obstructions not shown in the plan and utilities and other obstructions which the contract prohibited them to touch. These problems were detailed in the Judicial Affidavit of Dr. Armando Cazzola, FSI's witness, thus:

The construction of the tunnel across EDSA was originally divided into two (2) stages involving a shallow excavation and an open cut portion. When the plans were redesigned by [DPWH] and the [Contract] was renegotiated, the plans and specifications for the Tunnel was increased to [a] depth of nine (9) meters from the original depth of about 5 meters and from the original length of 60 meters to 282 meters with cut and cover to allow unobstructed passage along EDSA.

Under the construction Agreement, the Claimant cannot remove or relocate privately-owned structures such as walls, septic vaults, etc. and public utilities, such as Meralco posts, MWSS sewer lines, PLDT lines, etc.

In view of the increase in the size of the project and the numerous obstructions encountered, an additional ten (10) sections in the Cut and Cover Tunnel along Pioneer Street was added. As a result in the change of construction methodology from two (2) to fourteen (14) stages, the contract time was amended and approved from one hundred twenty (120) calendar days to two hundred seventy (270) calendar days.

The construction of the Project, which was supposed to start at the Boni Avenue side on 22 January 1993, also included the construction of ramps or access roads on either side of the Interchange (Boni, Pioneer). These further delayed the works due to additional obstructions.

As a necessary consequence of these obstructions which the DPWH had to relocate and the adjustment in the traffic re-routing at EDSA, which all contributed to right of way problems of DPWH, the start up of the Project was reset to 08 March 1993.

The construction of Stage 2 of the Cut and Cover Tunnel was likewise delayed and started only on 14 October 1993 due to the restrictions imposed by the MMA-TEC.

The construction of Stage 3 of the Cut and Cover Tunnel started only on

13 January 1994 after the Christmas holidays due to the restrictions imposed by MMA-TEC prohibiting work at the Project during the holiday season. The said construction was further delayed because of an existing 250 mm diameter MWSS pipe and PLDT underground lines at the work site.

Stage 4 construction of the Cut and Cover Tunnel was delayed to 16 March 1994 due to restrictions imposed by the MMA-TEC Transec and the obstructions caused by two (2) PLDT lines and three (3) MWSS pipelines.

Due to the existence of obstructions such as telephone and electric lines and septic vaults found at the areas where the bored piles were supposed to be drilled for the protective wall covering the Triumph Building, the Claimant was constrained to start excavation works for the Cut and Cover Tunnel (Stages 5-7) on Pioneer Street on 01 May 1994. The work was further made more difficult because the Claimant had to avoid the Triumph Building.

Construction work along the Pioneer right side approach to the EDSA Tunnel was supposed to have been made available [as] of 15 May [1993] but was made available only on 28 March 1994 after the DPWH had caused the complete relocation and/or demolition of the MWSS pipes, Phelps Dodge's sewer line, electrical service post, concrete fence, guard house and locker building.

Originally, Pioneer Street was to be excavated in bulk but was stopped on 10 June 1993 because of right of way problems or obstructions at the work site. Excavation work resumed only on 19 September 1993 and was limited to the Pioneer left side approach after the DPWH had finally caused the complete relocation of existing utility obstructions.

Other portions of the Pioneer side tunnel (Stages 8-14) were supposed to be made available by the DPWH [for FSI] on 15 May 1993 but was made available only on 17 July 1994 after the DPWH had caused the relocation of Triumph's service entrance post, underground PLDT line drainage manhole and septic vault.

x x x x

Moreover, the business establishments around the construction site required an access road for their businesses even before excavation could start. The re-routing scheme imposed by the MMA and TEC, plus the additional scope of work not shown on the plans, also contributed to further delaying the construction of the Project.^[11]

To bolster its claim, FSI submitted as Exhibit C-58 a copy of the Conditions of Contract for Works of Civil Engineering Construction portion of the Contract Documents which in turn was taken from the "*Federation Internationale Des Ingenieurs — Conseils*", Sub-Clause 42.2 of which reads as follows:

"Failure to give possession

42.2 *If the Contractor suffers delay and/or incurs costs from failures on the part of the employer to give possession in accordance with the terms of Sub-Clause 42.1. The Engineer shall, after due consultation with the Employer and the Contractor determine:*

- a) *Any extension of time to which the Contractor is entitled under Clause 44, and [;]*
- b) *The amount of such costs, which shall be added to the Contract Price, and shall notify the Contractor accordingly with a copy to the Employer.*"^[12]

The DPWH denied any liability for FSI's claims and asserted that under Sub-Clause 42.2, Part II of the Conditions of Particular Application, FSI bound itself not to claim for damages as a result of any delay when it requested for five (5) extensions. According to the DPWH, the provision reads:

Failure to Give Possession

"If the contractor suffers delay and/or incurs costs from failure on the part of the Employer to give possession in accordance with the terms of Sub-Clause 42.2, the Engineer, shall, after due consultation with the Employer and the Contractor, determine any extension of time to which the Contractor is entitled under Clause 44, and shall notify the Contractor accordingly, with a copy to the Employer. **No amount of such costs shall be added to the contract price.**" (Emphasis Supplied)^[13]

These averments of DPWH, however, were not substantiated by any documentary evidence showing that such provision indeed exists in the Contract.^[14]

The DP WIT also argued that the delays were due to FSI's fault. Based on the final report of the Project Manager, the following were the reasons for the Project's delayed completion: 1) FSI's equipment breakdown for ten (10) months; 2) FSI's insufficient manpower and/or labor problems for thirteen (13) months; 3) insufficient financial support from FSI for seven (7) months; 4) insufficient materials from FSI for eight (8) months; and 5) insufficient fuel for FSI's equipment for two (2) months. Also out of the 39 monthly evaluations made on FSI from January 1993 to March 1996, it registered unsatisfactory performance for 28 months.^[15]

Ruling of the CIAC

In a Decision^[16] dated September 1, 2005, the CIAC ruled in favor of FSI. It held that the modified Sub-Clause 42.2 alleged by DPWH was not substantiated with any documentary proof. Hence, DPWH cannot use it to avoid liability for the costs and damages incurred by FSI as a result of the delay in the construction of the Project. Consequently, FSI's money claims were granted except for the Extended Rental Costs for Various Equipment for failure of FSI to present credible and correct computations.

The computation submitted by FSI was found grossly erroneous owing to the large discrepancies between it and the data shown in the "Contractor's Field Equipment Report on Site."

The CIAC decision disposed, thus:

WHEREFORE, judgment is hereby rendered and AWARD made on the monetary claims of [FSI] as follows:

1. Standby Rental Cost for the Rotary Equipment	-	P 355,582.60
2. Overhead Costs during the periods of delay	-	15,379,790.11
3. Extended Rental Costs of various equipment	-	
4. Interest	-	8,876,310.93
5. Attorney's Fees	-	300,000.00

Total		P 24,911,683.64

[DPWH] is hereby directed to pay [FSI] the sum of **PESOS TWENTY-FOUR MILLION' NINE HUNDRED ELEVEN THOUSAND SIX HUNDRED EIGHTY-THREE and 64/100 (P24,911,683.64)** plus the reimbursement of the cost of Arbitration, advanced by [FSI] to the [CIAC] the amount of **PESOS THREE HUNDRED EIGHTY-EIGHT THOUSAND NINE HUNDRED NINE and 87/100 (P388,909.87)**.

The above awarded amount due [FSI] shall bear an interest at the legal rate of six percent (6%) per annum from the date of filing of the Request for Adjudication on 27 July 2004 to the date of receipt of this DECISION by [both] Parties and/or their respective counselors. After the date received, the interest rate of twelve percent (12%) per annum shall be made on the outstanding amount until full payment thereof shall have been made, "this interim period being deemed to be at that time already a forbearance of credit." x x x.

The CIAC Secretariat is directed to make the necessary computations in order to quantify the interests to be paid by [DPWH] on the net amount hereby found to be due [FSI].

SO ORDERED.^[17]

Ruling of the CA

Both parties appealed to the CA. FSI questioned the CIAC's refusal to award its claim for Extended Rental Costs of Various Equipment.^[18] DPWH, on the other hand, faulted the CIAC for ignoring its evidence and arguments against FSF's money claims. DPWH insisted that the delay in the completion of the Project was primarily