

SECOND DIVISION

[G.R. No. 187521, March 14, 2012]

F.F. CRUZ & CO., INC., PETITIONER, VS. HR CONSTRUCTION CORP., RESPONDENT.

DECISION

REYES, J.:

This is a petition for review on *certiorari* under Rule 45 of the Rules of Court filed by petitioner F.F. Cruz & Co., Inc. (FFCCI) assailing the Decision^[1] dated February 6, 2009 and Resolution^[2] dated April 13, 2009 issued by the Court of Appeals (CA) in CA-G.R. SP No. 91860.

The Antecedent Facts

Sometime in 2004, FFCCI entered into a contract with the Department of Public Works and Highways (DPWH) for the construction of the Magsaysay Viaduct, known as the Lower Agusan Development Project. On August 9, 2004, FFCCI, in turn, entered into a Subcontract Agreement^[3] with HR Construction Corporation (HRCC) for the supply of materials, labor, equipment, tools and supervision for the construction of a portion of the said project called the East Bank Levee and Cut-Off Channel in accordance with the specifications of the main contract.

The subcontract price agreed upon by the parties amounted to P31,293,532.72. Pursuant to the Subcontract Agreement, HRCC would submit to FFCCI a monthly progress billing which the latter would then pay, subject to stipulated deductions, within 30 days from receipt thereof.

The parties agreed that the requests of HRCC for payment should include progress accomplishment of its completed works as approved by FFCCI. Additionally, they agreed to conduct a joint measurement of the completed works of HRCC together with the representative of DPWH and consultants to arrive at a common quantity.

Thereafter, HRCC commenced the construction of the works pursuant to the Subcontract Agreement.

On September 17, 2004, HRCC submitted to FFCCI its first progress billing in the amount of P2,029,081.59 covering the construction works it completed from August 16 to September 15, 2004.^[4] However, FFCCI asserted that the DPWH was then able to evaluate the completed works of HRCC only until July 25, 2004. Thus, FFCCI only approved the gross amount of P423,502.88 for payment. Pursuant to the Subcontract Agreement, FFCCI deducted from the said gross amount P42,350.29 for retention and P7,700.05 for expanded withholding tax leaving a net payment in the amount of P373,452.54. This amount was paid by FFCCI to HRCC on December 3,

2004.^[5]

FFCCI and the DPWH then jointly evaluated the completed works of HRCC for the period of July 26 to September 25, 2004. FFCCI claimed that the gross amount due for the completed works during the said period was P2,008,837.52. From the said gross amount due, FFCCI deducted therefrom P200,883.75 for retention and P36,524.07 for expanded withholding tax leaving amount of P1,771,429.45 as the approved net payment for the said period. FFCCI paid this amount on December 21, 2004.^[6]

On October 29, 2004, HRCC submitted to FFCCI its second progress billing in the amount of P1,587,760.23 covering its completed works from September 18 to 25, 2004.^[7] FFCCI did not pay the amount stated in the second progress billing, claiming that it had already paid HRCC for the completed works for the period stated therein.

On even date, HRCC submitted its third progress billing in the amount of P2,569,543.57 for its completed works from September 26 to October 25, 2004.^[8] FFCCI did not immediately pay the amount stated in the third progress billing, claiming that it still had to evaluate the works accomplished by HRCC.

On November 25, 2004, HRCC submitted to FFCCI its fourth progress billing in the amount of P1,527,112.95 for the works it had completed from October 26 to November 25, 2004.

Subsequently, FFCCI, after it had evaluated the completed works of HRCC from September 26 to November 25, 2004, approved the payment of the gross amount of P1,505,570.99 to HRCC. FFCCI deducted therefrom P150,557.10 for retention and P27,374.02 for expanded withholding tax leaving a net payment of P1,327,639.87, which amount was paid to HRCC on March 11, 2005.^[9]

Meanwhile, HRCC sent FFCCI a letter^[10] dated December 13, 2004 demanding the payment of its progress billings in the total amount of P7,340,046.09, plus interests, within three days from receipt thereof. Subsequently, HRCC completely halted the construction of the subcontracted project after taking its Christmas break on December 18, 2004.

On March 7, 2005, HRCC, pursuant to the arbitration clause in the Subcontract Agreement, filed with the Construction Industry Arbitration Commission (CIAC) a Complaint^[11] against FFCCI praying for the payment of the following: (1) overdue obligation in the reduced amount of P4,096,656.53 as of December 15, 2004 plus legal interest; (2) P1,500,000.00 as attorney's fees; (3) P80,000.00 as acceptance fee and representation expenses; and (4) costs of litigation.

In its Answer,^[12] FFCCI claimed that it no longer has any liability on the Subcontract Agreement as the three payments it made to HRCC, which amounted to P3,472,521.86, already represented the amount due to the latter in view of the works actually completed by HRCC as shown by the survey it conducted jointly with the DPWH. FFCCI further asserted that the delay in the payment processing was primarily attributable to HRCC inasmuch as it presented unverified work

accomplishments contrary to the stipulation in the Subcontract Agreement regarding requests for payment.

Likewise, FFCCI maintained that HRCC failed to comply with the condition stated under the Subcontract Agreement for the payment of the latter's progress billings, i.e. joint measurement of the completed works, and, hence, it was justified in not paying the amount stated in HRCC's progress billings.

On June 16, 2005, an Arbitral Tribunal was created composed of Engineer Ricardo B. San Juan, Joven B. Joaquin and Attorney Alfredo F. Tadiar, with the latter being appointed as the Chairman.

In a Preliminary Conference held on July 5, 2005, the parties defined the issues to be resolved in the proceedings before the CIAC as follows:

1. What is the correct amount of [HRCC's] unpaid progress billing?
2. Did [HRCC] comply with the conditions set forth in subparagraph 4.3 of the Subcontract Agreement for the submission, evaluation/processing and release of payment of its progress billings?
3. Did [HRCC] stop work on the project?
 - 3.1 If so, is the work stoppage justified?
 - 3.2 If so, what was the percentage and value of [HRCC's] work accomplishment at the time it stopped work on the project?
4. Who between the parties should bear the cost of arbitration or in what proportion should it be shared by the parties?^[13]

Likewise, during the said Preliminary Conference, HRCC further reduced the amount of overdue obligation it claimed from FFCCI to P2,768,916.66. During the course of the proceedings before the CIAC, HRCC further reduced the said amount to P2,635,397.77 – the exact difference between the total amount of HRCC's progress billings (P6,107,919.63) and FFCCI's total payments in favor of the latter (P3,472,521.86).

The CIAC Decision

On September 6, 2005, after due proceedings, the CIAC rendered a Decision^[14] in favor of HRCC, the decretal portion of which reads:

WHEREFORE, judgment is hereby rendered in favor of the Claimant **HR CONSTRUCTION CORPORATION** and **AWARD** made on its monetary claim against Respondent **F.F. CRUZ & CO., INC.**, as follows:

[P]2,239,452.63	as the balance of its unpaid billings and
<u>101,161.57</u>	as reimbursement of the

[P]2,340,614.20

arbitration costs.

Total due the Claimant

Interest on the foregoing amount **[P]2,239,452.63** shall be paid at the rate of 6% per annum from the date of this Decision. After finality of this Decision, interest at the rate of 12% per annum shall be paid thereon until full payment of the awarded amount shall have been made x x x.

SO ORDERED.^[15]

The CIAC held that the payment method adopted by FFCCI is actually what is known as the “back-to-back payment scheme” which was not agreed upon under the Subcontract Agreement. As such, the CIAC ruled that FFCCI could not impose upon HRCC its valuation of the works completed by the latter. The CIAC gave credence to HRCC’s valuation of its completed works as stated in its progress billings. Thus:

During the trial, [FFCCI’s] Aganon admitted that [HRCC’s] accomplishments are included in its own billings to the DPWH together with a substantial mark-up to cover overhead costs and profit. He further admitted that it is only when DPWH approves its (Respondent’s) billings covering [HRCC’s] scope of work and pays for them, that [FFCCI] will in turn pay [HRCC] for its billings on the sub-contracted works.

On clarificatory questioning by the Tribunal, [FFCCI] admitted that there is no “**back-to-back**” provision in the sub-contract as basis for this **sequential payment arrangement** and, therefore, [FFCCI’s] imposition thereof by withholding payment to [HRCC] until it is first paid by the project owner on the Main Contract, clearly violates said sub-contract. It [is] this unauthorized implementation of a back-to-back payment scheme that is seen to be the reason for [FFCCI’s] non-payment of the third progress billings.

It is accordingly the **holding** of this Arbitral Tribunal that [FFCCI] is not justified in withholding payment of [HRCC’s] third progress billing for this scheme that [HRCC] has not agreed to in the sub-contract agreement x x x.

x x x

The total retention money deducted by [FFCCI] from [HRCC’s] three progress billings, amounts to **[P]395,945.14** x x x. The retention money is part of [HRCC’s] progress billings and must, therefore, be credited to this account. The two amounts (deductions and net payments) total [P]3,868,467.00 x x x. This represents the total gross payments that should be credited and deducted from the total gross billings to arrive at what has not been paid to the [HRCC]. This results in the amount of **[P]2,239,452.63** ([P]6,107,919.63 - [P]3,868,467.00) as the correct balance of [HRCC’s] unpaid billings.^[16]

Further, the CIAC ruled that FFCCI had already waived its right under the Subcontract Agreement to require a joint measurement of HRCC's completed works as a condition precedent to the payment of the latter's progress billings. Hence:

[FFCCI] admits that in all three instances where it paid [HRCC] for its progress billings, it never required compliance with the aforementioned contractual provision of a prior joint quantification. Such **repeated omission** may reasonably be construed as a **waiver** by [FFCCI] of its contractual right to require compliance of said condition and it is now too late in the day to so impose it. Article 6 of the Civil Code expressly provides that "rights may be waived unless the waiver is contrary to law, public order, public policy, morals or good customs". The tribunal cannot see any such violation in this case.

x x x

[FFCCI's] omission to enforce the contractually required condition of payment, has led [HRCC] to believe it to be true that indeed [FFCCI] has waived the condition of joint quantification and, therefore, [FFCCI] may not be permitted to falsify such resulting position.^[17]

Likewise, the CIAC held that FFCCI's non-payment of the progress billings submitted by HRCC gave the latter the right to rescind the Subcontract Agreement and, accordingly, HRCC's work stoppage was justified. It further opined that, in effect, FFCCI had ratified the right of HRCC to stop the construction works as it did not file any counterclaim against HRCC for liquidated damages arising therefrom.

FFCCI then filed a petition for review with CA assailing the foregoing disposition by the CIAC.

The CA Decision

On February 6, 2009, the CA rendered the herein assailed Decision^[18] denying the petition for review filed by FFCCI. The CA agreed with the CIAC that FFCCI had waived its right under the Subcontract Agreement to require a joint quantification of HRCC's completed works.

The CA further held that the amount due to HRCC as claimed by FFCCI could not be given credence since the same was based on a survey of the completed works conducted without the participation of HRCC. Likewise, being the main contractor, it ruled that it was the responsibility of FFCCI to include HRCC in the joint measurement of the completed works. Furthermore, the CA held that HRCC was justified in stopping its construction works on the project as the failure of FFCCI to pay its progress billings gave the former the right to rescind the Subcontract Agreement.

FFCCI sought a reconsideration^[19] of the said February 6, 2009 Decision but it was denied by the CA in its Resolution^[20] dated April 13, 2009.