

## **THIRD DIVISION**

**[ G.R. NO. 167022, August 31, 2007 ]**

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

**FOUNDATION SPECIALISTS, INC., PETITIONER, VS. LICOMCEN INCORPORATED AND COURT OF APPEALS, RESPONDENTS.**

### **D E C I S I O N**

**NACHURA, J.:**

For review in these consolidated petitions is the November 23, 2004 Decision<sup>[1]</sup> of the Court of Appeals (CA) in CA-G.R. SP. No. 78218, as well as the Resolutions dated February 4, 2005<sup>[2]</sup> and September 13, 2005,<sup>[3]</sup> denying the motions for its reconsideration.

Liberty Commercial Center, Inc. (LICOMCEN) is a corporation engaged in the business of operating shopping malls. In March 1997, the City Government of Legaspi leased its lot in the Central District of Legaspi to LICOMCEN. The Lease Contract was based on the Build-Operate-Transfer Scheme under which LICOMCEN will finance, develop and construct the LCC City Mall (CITIMALL). LICOMCEN engaged E.S. De Castro and Associates (ESCA) as its engineering consultant for the project.

On September 1, 1997, LICOMCEN and Foundation Specialist, Inc. (FSI) signed a Construction Agreement for the bored pile foundation of CITIMALL.<sup>[4]</sup> Forming part of the agreement were the Bid Documents and the General Conditions of Contract (GCC)<sup>[5]</sup> prepared by ESCA. A salient provision of the GCC is the authority granted the engineering consultant to suspend the work, wholly or partly. LICOMCEN was also given the right to suspend the work or terminate the contract. Among other caveats, GC-05 provided that questions arising out or in connection with the contract or its breach should be litigated in the courts of Legaspi, except where otherwise stated, or when such question is submitted for settlement through arbitration. GC-61 also provided that disputes arising out of the execution of the work should first be submitted to LICOMCEN for resolution, whose decision shall be final and binding, if not contested within thirty (30) days from receipt. Otherwise, the dispute shall be submitted to the Construction Industry Arbitration Commission (CIAC) for arbitration.

Upon receipt of the notice to proceed, FSI commenced work and undertook to complete it within ninety (90) days, all in accordance with the approved drawing, plans, and specifications.

In the course of the construction, LICOMCEN revised the design for the CITIMALL involving changes in the bored piles and substantial reduction in number and length

of the piles. ESCA, thus, informed FSI of the major revision on December 16, 1997<sup>[6]</sup> and ordered the non-delivery of the steel bars, pending approval of the new design. FSI, however, responded that the steel bars had already been loaded and shipped out of Manila. ESCA then suggested the delivery of 50% of the steel bars to the jobsite and the return of the other 50% to Manila, where storage and security were better.<sup>[7]</sup>

On January 15, 1998, LICOMCEN sent another letter to FSI ordering all the construction activities suspended, because Albay Accredited Constructors Association (AACA) had contested the award of the Contract of Lease to LICOMCEN and filed criminal complaints with the Office of the Ombudsman for violation of the *Anti-Graft and Corrupt Practices Act* against LICOMCEN and the City Government of Legaspi. Thus, pending a clear resolution of the case, LICOMCEN decided to suspend all construction activities. It also requested FSI not to unload the steel bars.<sup>[8]</sup>

On January 17, 1998, the steel bars for the CITIMALL arrived at the Legaspi port, and despite LICOMCEN's previous request, these were unloaded and delivered to the jobsite and some to Tonzon compound,<sup>[9]</sup> FSI's batching site. Then, on January 19, 1998, LICOMCEN reiterated its decision to suspend construction, and ordered demobilization of the materials and equipment for the project.<sup>[10]</sup> Finally, on February 17, 1998, LICOMCEN indefinitely suspended the project, due to the pending cases in the Ombudsman.<sup>[11]</sup>

FSI demanded payment for its work accomplishments, material costs, and standby off equipment, as well as other expenses amounting to P22,667,026.97,<sup>[12]</sup> but LICOMCEN took no heed.

On October 12, 1998, the Ombudsman dismissed the cases filed against the City Government and LICOMCEN. The dismissal was affirmed by this Court<sup>[13]</sup> and attained finality on September 20, 2000.<sup>[14]</sup> This notwithstanding, LICOMCEN did not lift the suspension of the construction that it previously ordered. It then hired Designtech Consultants and Management System (Designtech) as its new project consultant, which, in turn, invited contractors, including FSI, to bid for the bored piling works for CITIMALL.<sup>[15]</sup>

FSI reiterated its demand for payment from LICOMCEN, but the latter failed and refused to pay, prompting FSI to file a petition for arbitration with the CIAC, docketed as CIAC Case No. 37-2002.

LICOMCEN denied the claim of FSI, arguing that it lacks factual and legal basis. It also assailed the jurisdiction of the CIAC to take cognizance of the suit, claiming that jurisdiction over the controversy was vested in the regular courts, and that arbitration under the GC-61 of the GCC may only be resorted to if the dispute concerns the execution of works, not if it concerns breach of contract.

During the preliminary conference, the parties agreed to submit the controversy to the Arbitral Tribunal and signed the Terms of Reference (TOR).<sup>[16]</sup> But on February 4, 2003, LICOMCEN, through a collaborating counsel, filed an *Ex Abundanti Ad Cautela Omnibus Motion*.<sup>[17]</sup> It reiterated the claim that the arbitration clause in the

contract does not cover claims for payment of unrealized profits and damages, and FSI did not comply with the condition precedent for the filing of the suit, thus, the CIAC cannot take cognizance of the suit. LICOMCEN further averred that FSI has no cause of action against it because the claim for material costs has no factual basis and because the contract is clear that FSI cannot claim damages beyond the actual work accomplishments, but only reasonable expenses for the suspension or termination of the contract. LICOMCEN also alleged that the expenses incurred by FSI, if there be any, cannot be considered reasonable, because there was no showing that the materials were ordered and actually delivered to the job site. Finally, it prayed for the suspension of the proceedings, pending the resolution of its omnibus motion.

On February 20, 2003, the CIAC issued an Order<sup>[18]</sup> denying LICOMCEN's omnibus motion on the ground that it runs counter to the stipulations in the TOR. Trial, thereafter, ensued. FSI and LICOMCEN presented witnesses in support of their respective claims.

After due proceedings, the CIAC rendered a Decision<sup>[19]</sup> in favor of FSI, the dispositive portion of which reads:

**WHEREFORE**, premises considered, judgment is hereby rendered in favor of Claimant **FOUNDATION SPECIALIST, INC.** and against Respondent **LICOMCEN, INCORPORATED**, ordering the latter to pay to the former the following amounts:

1. P14,643,638. 51 representing material costs at site;
2. P2,957,989.94 representing payment for equipment and labor standby costs;
3. P5,120,000.00 representing unrealized profit; and
4. P1,264,404.12 representing the unpaid balance of FSI's billing.

**FURTHER**, the said Respondent is ordered to solely and exclusively bear the entire cost of arbitration proceedings in the total amount of P474,407.95 as indicated in the TOR, and to reimburse the herein Claimant of any amount thereof which it had advanced and paid pursuant to TOR.

All the above-awarded amounts shall bear interest of 6% per annum from the date of the formal demand on February 3, 1998 (Par. 10, Admitted Facts, TOR) until the date this Decision/Award becomes final and executory and 12% per annum from the date this Decision/Award becomes final and executory until fully paid.

**SO ORDERED.**<sup>[20]</sup>

LICOMCEN elevated the CIAC Decision to the CA. It faulted the CIAC for taking cognizance of the case, arguing that it has no jurisdiction over the suit. It also assailed the award and the ruling that the contract had been terminated, allegedly for lack of factual and legal basis.

On November 23, 2004, the CA rendered the assailed Decision, modifying the CIAC Decision, viz.:

**WHEREFORE**, the foregoing considered, the assailed Decision is hereby **MODIFIED** to the extent that paragraph 1 of the dispositive portion is amended and accordingly, petitioner is ordered to pay only the amount of P5,694,939.865 representing the material costs at site; and paragraphs 2 and 3 on equipment and labor standby costs and unrealized profit of the same dispositive portion are deleted. The rest is **AFFIRMED** in all respects. No costs.

**SO ORDERED.**<sup>[21]</sup>

Both LICOMCEN and FSI filed motions for partial reconsideration, but these were denied by the CA in its Resolutions dated February 4, 2005<sup>[22]</sup> and September 13, 2005.<sup>[23]</sup>

LICOMCEN and FSI reacted with the instant petitions. Considering that the cases involve the same parties, issues and assailed decision, this Court ordered the consolidation of G.R. No. 167022 and G.R. No. 169678 in its Resolution dated November 20, 2006.

LICOMCEN raised the following issues:

1.

WHETHER OR NOT THE PROJECT WAS MERELY SUSPENDED AND NOT TERMINATED.

2.

WHETHER OR NOT THE TRIBUNAL HAD JURISDICTION OVER THE DISPUTE.

3.

WHETHER OR NOT FSI IS ENTITLED TO CLAIM ANY AMOUNT OF DAMAGES.

4.

WHETHER OR NOT LICOMCEN IS THE PARTY AT FAULT.<sup>[24]</sup>

FSI, on the other hand, interposes the following:

1. THE COURT OF APPEALS ERRED IN NOT AWARDING TO PETITIONER THE FULL AMOUNT OF MATERIAL COSTS AT THE SITE.
2. THE COURT OF APPEALS ERRED IN DENYING PETITIONER'S CLAIM FOR EQUIPMENT AND LABOR STANDBY COSTS.

3. THE COURT OF APPEALS ERRED IN DENYING PETITIONER'S CLAIM FOR UNREALIZED PROFIT.

4. THE COURT OF APPEALS ERRED IN RENDERING A MERE MINUTE RESOLUTION IN RESOLVING PETITIONER'S MOTION FOR PARTIAL RECONSIDERATION.<sup>[25]</sup>

First, we resolve the issue of the CIAC's jurisdiction.

LICOMCEN insists that the CIAC had no jurisdiction over the suit. Citing GC-05 and GC-61 of the GCC, it posits that jurisdiction over the dispute rests with the regular courts of Legaspi City.

The argument is misplaced.

The power and authority of a court to hear, try, and decide a case is defined as jurisdiction. Elementary is the distinction between jurisdiction over the subject matter and jurisdiction over the person. The former is conferred by the Constitution or by law, while the latter is acquired by virtue of the party's voluntary submission to the authority of the court through the exercise of its coercive process.<sup>[26]</sup>

Section 4 of Executive Order (E.O.) No. 1008, or the *Construction Industry Arbitration Law*, provides:

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

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

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

Corollarily, Section 1, Article III of the *Rules of Procedure Governing Construction Arbitration* provides that recourse to the CIAC may be availed of whenever a contract contains a clause for the submission of a future controversy to arbitration, thus:

SECTION 1. *Submission to CIAC Jurisdiction.* - An arbitration clause in a construction contract or a submission to arbitration of a construction dispute shall be deemed an agreement to submit an existing or future controversy to CIAC jurisdiction, notwithstanding the reference to a different arbitration institution or arbitral body in such contract or