



Republic of the Philippines
Supreme Court
 Manila

CERTIFIED TRUE COPY
Wilfredo V. Lapitan
 WILFREDO V. LAPITAN
 Division Clerk of Court
 Third Division
 MAR 02 2016

THIRD DIVISION

PRO BUILDERS, INC.,
 Petitioner,

G.R. No. 194960

Present:

-versus-

VELASCO, JR., J.
Chairperson,
 PERALTA,
 PEREZ,
 REYES, and
 JARDELEZA, JJ.

TG UNIVERSAL BUSINESS
VENTURES, INC.,
 Respondent.

Promulgated:

February 3, 2016

x-----*Wilfredo V. Lapitan*-----x

DECISION

PEREZ, J.:

This Petition for Review on *Certiorari* assails the Decision¹ dated 13 October 2010 and Resolution² dated 16 December 2010 issued by the Court of Appeals in CA-G.R. SP No. 106407 which modified the Decision of the Arbitral Tribunal of the Construction Industry Arbitration Commission. (CIAC)

Factual Antecedents

On 29 May 2007, TG Universal Business Ventures, Inc. (TG) entered into an Owner-Contractor Agreement (Agreement) with Pro Builders, Inc. (Pro Builders) for the construction of a 15-storey building at Asiatown I.T. Park in Lahug, Cebu City. In consideration of the sum of Seventy Million Pesos (₱70,000,000.00), Pro Builders undertook to provide the labor,

¹ *Rollo*, pp. 88-131; Penned by Associate Justice Amy C. Lazaro-Javier with Associate Justices Rebecca De Guia-Salvador and Sesinando E. Villon concurring.
² *Id.* at 132.

materials and equipment, and to perform all structural works for the project. On the other hand, TG undertook to pay Pro Builders a down payment of Twenty-One Million Pesos (₱21,000,000.00), or equivalent to 30% of the amount of contract. Pursuant to the Agreement, the completion of the project is slated on 31 May 2008 but is subject to extension upon request of Pro Builders to TG, through its Project Manager, Prime Edifice, Inc., on the grounds of force majeure or fortuitous event and/or additional work approved by TG, or any other special circumstances as may be determined by TG.³ Upon signing of the Agreement, Pro Builders posted a performance bond obtained from Prudential Guarantee and Assurance, Inc.

The Notice of Award was issued to Pro Builders on 15 May 2007. The project site was turned over to Pro Builders on 22 May 2007. The construction was set to officially begin on 1 June 2007.⁴

On 19 June 2007, Pro Builders received the 30% down payment equivalent to ₱21,000,000.00.

Extremely unsatisfied with the progress of the works, TG took over the project, hired another contractor to finish the work, and demanded the balance of its overpayment from Pro Builders. The parties failed to reach an amicable settlement, prompting TG to file a Request for Arbitration with the CIAC praying for the payment of cost to complete the project, amounting to ₱13,489,807.48.⁵

Request for Arbitration filed by TG

According to the Project Manager, Project Manager, Prime Edifice, Inc., Pro Builders missed its target milestone for July 2007. On 28 August 2007, Project Manager, Prime Edifice, Inc. wrote to Pro Builders raising serious concerns on the latter's ability to complete the project as scheduled. Project Manager, Prime Edifice, Inc. presented a Performance Evaluation for the period ending 28 August 2007 showing that Pro Builders only accomplished 13.37% out of the 19.09% target accomplishment or a variance of 5.72%. Project Manager, Prime Edifice, Inc. attributed Pro Builders' failure to meet the target to its inability to deploy the required manpower and equipment. On 31 August 2007, Project Manager, Prime Edifice, Inc. recommended to TG a full takeover by a more competent

³ Id. at 139; Article 10.02 of the Owner-Contractor Agreement.

⁴ Id. at 169; Admitted Facts as cited in the Arbitral Tribunal's Decision. These facts were indicated in the Minutes of the Construction Meeting No. 2 dated 22 May 2007.

⁵ Records, Folder No. 3; See Statement of Accounts.



contractor to take effect immediately. Pro Builders responded to Project Manager, Prime Edifice, Inc.'s letter and alleged that some of the delays were attributable to TG, such as the delayed release of down payment and delivery of owner-supplied materials, particularly the reinforcing bars (rebars). For September 2007, Project Manager, Prime Edifice, Inc. revealed that Pro Builders again failed to meet its September milestones, accomplishing only 18.11% out of the 33.42% target accomplishment or slippage of -15.32%.

Due to the dismal performance of Pro Builders, TG invoked Article 9 of the Agreement or the Option to Complete Work Takeover. Pro Builders refused to turn over the works and demanded the payment of its unpaid progress billings.

On 11 January 2008, TG sent a Statement of Account to Pro Builders demanding payment of the excess cost to complete the project amounting to ₱13,489,807.48, which is broken down as follows:

P5,582,921.10 – unconsumed down payment (21,000,000.00 – 15,417,078.90 assessed value of Pro Builders accomplishment as of 15 October 2007)

₱7,771,553.04 – additional expenses by engaging another contractor

P135,333.34 – miscellaneous expenses (violation of Asiatown's guidelines, damage to property, lot rental)⁶

On 26 February 2008, TG filed a claim against the surety bond and performance bond.

The summary of TG's claim is as follows:

Unliquidated down payment	₱ 5,582,921.10
Cost to complete	7,771,553.04
Miscellaneous expenses	135,333.34
Litigation expenses	700,000.00
Attorney's fees	300,000.00
Total Claims	₱ 14,489,807.48⁷

⁶ *Rollo*, p. 349.

⁷ *Id.* at 441; See Term of Reference.

Pro Builder's Amended Answer with Counterclaims

In its Answer, Pro Builders claimed that TG incurred delay when it only delivered 16% of the total requirement of rebars, an owner-supplied material. Pro Builders insisted that the targeted milestones were duly accomplished. Pro Builders added that the reckoning date of the performance evaluation should be within seven days upon receipt of the 30% down payment. Pro Builders counterclaimed for the following amounts and damages:

Unpaid work accomplishment	₱ 2,104,642.11
Compensatory damages	5,000,000.00
Rental deposit of the forms & scaffoldings for the period of one year	1,500,000.00
Surety bond	157,000.00
Construction all risk bond	142,000.00
Performance bond	96,450.00
Litigation expenses	1,000,000.00
Exemplary damages	500,000.00
Attorney's fees	200,000.00
Total counterclaims	₱ 10,700,092.11⁸

An Arbitral Tribunal was created and composed of Jacinto M. Butalid, as Chairman, Guadalupe O. Mansueto and Kian Hun T. Tiu.

The Arbitral Tribunal limited the issues to the following:

1. Who between the parties failed to comply with the terms and conditions of the Contract Agreement?
 - 1.1. Was Respondent-CONTRACTOR in delay in the Performance of the Construction Agreement?
 - 1.2. Was CLAIMANT in delay in the release of down payment and delivery of the Owner-Supplied materials?
2. Is CLAIMANT entitled to its claim for unliquidated down payment in the amount of Php 5,582,921.10?
3. Is CLAIMANT entitled to the amount of Php 7,771,553.04 as cost to complete the Project?
 - 3.1. How much was CLAIMANT's cost to complete the works?

⁸

Id. at 164-165; See Amended Answer with Counterclaims.

3.2. How much was the Claimant's cost to complete the works IN EXCESS of the balance of the original contract price?

4. Is CLAIMANT entitled to its claim of Php 135,333.34 as miscellaneous expenses?
5. Is CLAIMANT entitled to its claim for litigation expenses in the amount of Php700,000.00? If so, how much?
6. Is CLAIMANT entitled to its claim for attorney's fees in the amount of Php300,000.00? If so, how much?
7. Is Respondent-CONTRACTOR entitled to its counterclaim of Php2,104,642.11 as unpaid work accomplishment?
8. Is Respondent-CONTRACTOR entitled to its counterclaim of Php5,000,000.00 as compensatory damages? If so, how much?
9. Is Respondent-CONTRACTOR entitled to its counterclaim of Php1,500,000.00 as rental deposit of the forms & scaffoldings for the period of one year?
10. Is Respondent-CONTRACTOR entitled to its counterclaim of Php157,000.00 as cost incurred for its surety bond?
11. Is Respondent-CONTRACTOR entitled to its counterclaim of Php142,000.00 as cost incurred for the construction all risk bond?
12. Is Respondent-CONTRACTOR entitled to its counterclaim of Php96,450.00 as cost incurred for the performance bond?
13. Is Respondent-CONTRACTOR entitled to its counterclaim of Php1,000,000.00 as litigation expenses? If so, how much?
14. Is Respondent-CONTRACTOR entitled to its counterclaim of Php500,000.00 as exemplary damages? If so, how much?
15. Is Respondent-CONTRACTOR entitled to its counterclaim of Php200,000.00 as attorney's fees? If so, how much?
16. Is Respondent-Surety solidarily liable on its performance and surety bonds up to the total amount thereof?
17. Whether or not the right of the CLAIMANT to claim against the subject surety and performance bonds of the respondent PRUDENTIAL had already expired and/or become time-barred or deemed waived?
18. Whether or not the CLAIMANT as well as the other third-party Respondents are legally obliged jointly and severally to indemnify, pay or reimburse PRUDENTIAL in the unlikely event that the latter is held liable to pay CLAIMANT by virtue of the subject surety and performance bonds.⁹

⁹ Id. at 173-174.



Arbitral Tribunal's Decision

On 1 October 2008, the Arbitral Tribunal rendered a Decision, the dispositive portion of which reads:

In view of the foregoing, it is hereby ordered that:

1. [TG] to pay [Pro Builders] for unpaid accomplishment in the amount of Php2,104,642.11.
2. [Pro Builders] to pay [TG] the amount of Php58,333.34 miscellaneous expenses as reimbursement of the said amount paid by [TG] for the rental of the staging area used by the [Pro Builders].

OFFSETTING Number 1 and 2, [TG] shall pay CONTRACTOR PRO Builders, Inc. the amount of Php2,046,308.77.

[TG's] claim for Unliquidated Down Payment, Cost to Complete the works, miscellaneous expenses except rental of the staging area, exemplary damages, litigation expenses and attorney's fees are denied for lack of merits.

[Pro Builders'] claim for compensatory damages, exemplary damages, rental deposit of forms and scaffoldings, cost of Surety Bond, Performance Bond and All Risk Bond, litigation expenses and attorney's fees are denied for lack of merits.¹⁰

The Arbitral Tribunal found that both parties failed to comply with their respective obligations and responsibilities under the Agreement. The Arbitral Tribunal expounded that Pro Builders failed to meet its target due to inability to deploy the required resources, *i.e.* manpower and equipment. Pro Builders also committed violations of concrete protocol. On the other hand, TG made the down payment only on 19 June 2007 and not upon execution of the Agreement as provided therein. TG also did not pay Pro Builders' progress billings and change order and incurred delay in the delivery of the owner-supplied rebars.

The Arbitral Tribunal denied TG's claim of ₱5,582,921.10 representing the unliquidated portion of the down payment. The Arbitral Tribunal gave credence to Pro Builders' billed amount of ₱23,104,642.11 as the value of the accomplished works.

¹⁰

Id. at 188.

The Arbitral Tribunal did not agree with TG's claim of ₱7,771,553.04 as the cost to complete the project. The Arbitral Tribunal held that said value can only be determined after the project has been fully completed. The Arbitral Tribunal favored TG's claim of ₱58,333.34 for the advanced rental of the staging area after finding that TG paid in advance the rental for a property adjacent to the project site used by Pro Builders.

The Arbitral Tribunal did not find any justification to award cost of litigation and compensatory damages to both parties.

The Arbitral Tribunal ruled that Pro Builders is entitled to ₱2,104,642.11 as the amount of unpaid accomplishment by subtracting the ₱21,000,000.00 down payment from the total accomplishment of ₱23,104,642.11.

The Arbitral Tribunal found that Pro Builders is not entitled to its claim for rental deposit for the forms and scaffoldings.

With respect to the cost of the bonds, the Arbitral Tribunal held that there is no provision in the contract or in the policy issued by Prudential for the reimbursement of the costs of the bonds. But the Arbitral Tribunal held that Prudential and Pro Builders are solidarily liable on its performance and surety bonds upon the total amount thereof. In the event that Prudential would be made to pay any liability by virtue of the surety and performance bonds, the Arbitral Tribunal stressed that it is only the third-party respondents who will be legally obliged to pay or reimburse the bonding company.

Aggrieved, TG filed a petition for review with the Court of Appeals challenging in part the Decision of the Arbitral Tribunal, specifically on the following points:

1. TG was remiss in its obligation when it failed to give Pro Builders the down payment on time.
2. TG was not entitled to reimbursement of ₱5,582,921.10 which was the balance of the unspent 30% down payment.
3. TG was not allowed to charge ₱7,771,553.04 to Pro Builders representing the cost of what it had spent in completing the construction.



4. TG did not have any right to miscellaneous expenses of ₱77,200.00.
5. TG was not entitled to attorney's fees and expenses for litigation, cost of rectification and exemplary damages.¹¹

The Court of Appeals Decision

On 13 October 2010, the Court of Appeals rendered the assailed Decision favoring TG, the decretal portion reads:

ACCORDINGLY, the petition is **GRANTED IN PART**. The Decision dated October 1, 2008 of the Arbitral Tribunal of the Construction Industry Arbitration Commission in CIAC Case No. 04-2008 is **MODIFIED**:

- a) ordering Pro Builders, Inc. to pay petitioner TG Universal Business Ventures, Inc. P5,582,921.10 as balance of the unspent 30% down payment; P7,771,553.04 as petitioner's cost in completing the subject construction; P77,200.00 as additional miscellaneous expenses; and P500,000.00 as attorney's fees and expenses of litigation.
- b) declaring that petitioner is **NOT ENTITLED** to cost of rectification and exemplary damages.
- c) deleting the award of P2,104,642.11 to Pro Builders Inc.

The Decision is **AFFIRMED IN ALL OTHER RESPECTS**.¹²

The Court of Appeals found that all inadequate performance was attributable to Pro Builders alone.

The appellate court found no delay in the down payment of ₱21,000,000.00 as its release on 19 June 2007 coincided with Pro Builder's posting of the surety bond. The Court of Appeals found merit in the claim for ₱5,582,921.10 by subtracting the down payment of ₱21,000,000.00 by Pro Builder's accomplishments worth ₱15,417,078.90. The appellate court sustained TG's estimate of Pro Builder's accomplishment to ₱15,417,078.90 because it was supported by documentary evidence. The appellate court added that TG's receipt of Pro Builder's progress billings did not estop the former from disputing the real amount of the latter's undertakings in the project. As the cost to complete the balance of the construction, the Court of

¹¹ Id. at 119-120.

¹² Id. at 51-52.



Appeals held that TG is entitled to payment of ₱7,771,553.04 when it took over the project. Said amount is supported by documents presented by TG but which were disregarded by the Arbitral Tribunal. The appellate court also awarded ₱77,200.00 to TG, which is the total cost of damages that Pro Builders caused upon the properties of Asiatown I.T. Park where the project was built. Attorney's fees and expenses of litigation were also awarded to TG by the appellate court because it found that TG was compelled to initiate the proceedings before the Arbitral Tribunal.

Pro Builders sought a reconsideration of the unfavorable Decision but it was denied by the Court of Appeals in its Resolution¹³ dated 16 December 2010.

Petition


At the outset, Pro Builders implores us to delve into the facts as an exception to the rule that this Court is not a trier of facts. Pro Builders cites as ground the conflicting findings of the Arbitral Tribunal and the Court of Appeals.

Pro Builders asserts that the Court of Appeals erred in declaring that its accomplishments is worth only ₱15,417,078.90. Pro Builders refuted the joint evaluation used as basis by the Court of Appeals in denying its valuation on the ground that said joint evaluation was done solely by Project Manager, Prime Edifice, Inc. while Pro Builders' engineers had no participation in the evaluation. Moreover, said evaluation was submitted only on 11 January 2008, long after the contract was terminated. Pro Builders also defend the finding of the Arbitral Tribunal that its progress billings are more accurate and reliable than TG's valuation. Consequently, Pro Builders asserts that it still has a collectible of ₱2,104,642.11 and from that amount, the sum of ₱58,333.34 representing the rental of the staging area, should be deducted. TG then is obliged to pay ₱2,046,308.77 to Pro Builders.

Pro Builders echoes the Arbitral Tribunal's ruling that the cost overrun cannot be computed because at the time the case was submitted to the Arbitral Tribunal, the project was still not finished.

Pro Builders questions the award of attorney's fees and expenses of litigation for lack of basis.

¹³ *Id.* at 132.



Finally, Pro Builders avers that TG availed of the wrong remedy when it filed a petition for partial review before the Court of Appeals. Pro Builders maintains that the arbitral award of the CIAC is appealable on questions of law to this Court.

OUR RULING

Procedural Issue

Executive Order (EO) No. 1008 vests upon the CIAC 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. Section 19 thereof declares the arbitral award of the CIAC as final and unappealable, except on questions of law, which are appealable to the Supreme Court. By virtue of the amendments introduced by R.A. No. 7902 and promulgation of the 1997 Rules of Civil Procedure, as amended, the CIAC was included in the enumeration of quasi-judicial agencies whose decisions or awards may be appealed to the Court of Appeals in a petition for review under Rule 43. Such review of the CIAC award may involve either questions of fact, of law, or of fact and law.

The CIAC Revised Rules of Procedure Governing Construction Arbitration provide for the manner and mode of appeal from CIAC decisions or awards in Section 18 thereof, which reads:

SECTION 18.2 Petition for review. – A petition for review from a final award may be taken by any of the parties within fifteen (15) days from receipt thereof in accordance with the provisions of Rule 43 of the Rules of Court.¹⁴

Applying the aforesaid rules, the Court of Appeals is correct in taking cognizance of TG's appeal filed via petition for review.

Substantive Issues

The issues raised by Pro Builders involve a question of fact. A question of fact exists when the issue raised on appeal pertains to the truth or

¹⁴ *J Plus Asia Development Corporation v. Utility Assurance Corporation*, G.R. No. 199650, 26 June 2013, 700 SCRA 134, 146-147.

falsity of the alleged facts. If the question posed requires a re-evaluation of the credibility of witnesses, or the existence or relevance of surrounding circumstances and their relationship to each other, the issue is factual.¹⁵

The general rule that findings of facts of the Courts of Appeals are deemed conclusive is subject to certain exceptions, such as:

- (1) when the factual findings of the [Court of Appeals] and the trial court are contradictory;
- (2) when the findings are grounded entirely on speculation, surmises, or conjectures;
- (3) when the inference made by the [Court of Appeals] from its findings of fact is manifestly mistaken, absurd, or impossible;
- (4) when there is grave abuse of discretion in the appreciation of facts;
- (5) when the [Court of Appeals], in making its findings, goes beyond the issues of the case, and such findings are contrary to the admissions of both appellant and appellee;
- (6) when the judgment of the [Court of Appeals] is premised on a misapprehension of facts;
- (7) when the [Court of Appeals] fails to notice certain relevant facts which, if properly considered, will justify a different conclusion;
- (8) when the findings of fact are themselves conflicting;
- (9) when the findings of fact are conclusions without citation of the specific evidence on which they are based; and
- (10) when the findings of fact of the [Court of Appeals] are premised on the absence of evidence but such findings are contradicted by the evidence on record.¹⁶

Indeed, the factual finding of the Court of Appeals is contrary to the Arbitral Tribunal. This necessitates a review of the evidence adduced in this case.

¹⁵ *Bases Conversion Development Authority v. Reyes*, G.R. No. 194247, 19 June 2013, 699 SCRA 217, 226.

¹⁶ *National Transmission Commission v. Alphaomega Integrated Corporation*, G.R. No. 184295, 30 July 2014, 731 SCRA 299, 309-310.



Valuation of Pro Builders' Accomplished Works

The focal point of this controversy is the monetary equivalent of the accomplished works of Pro Builders.

Based on Pro Builders' computation, which were wholly based on its progress billings, the monetary value of its accomplishments is ₱22,482,934.34, broken down as follows:

Billing Period	Billed Amount
June 1- July 31, 2007	7,187,694.16
August 1-31, 2007	6,142,108.17
Sept. 1-30, 2007	6,844,363.73
Oct. 1-15, 2007	2,308,777.28
SUBTOTAL	22,482,943.34
Change Order	621,698.77
TOTAL	23,104,642.11¹⁷

By deducting the downpayment of ₱21,000,000.00 from the estimate of ₱22,482,943.34 and adding the amount of the change order of ₱621,698.77, Pro Builders claims that it is entitled to additional payment of ₱2,104,642.11.

Per TG's computation, the amount of Pro Builder's accomplishments is only ₱15,417,078.90, as supported by documentary evidence such as the Joint Evaluation allegedly made by both parties' representatives; photographs showing suspended slabs at the second floor; letter taking note of a joint inspection of the construction; summary of additive and deductive works; and written computation made by Pro Builders of the value of its Work Accomplishment. Thus, TG contends that Pro Builders must return the amount of ₱5,582,921.10 in excess of the ₱21,000,000.00 down payment.

We are called to determine which of the parties' valuation of accomplished works should be credited.

The Arbitral Tribunal gave more credence to the valuation of Pro Builders on the ground that TG's valuation lacked details. On the contrary, the Court of Appeals favored TG's valuation,

¹⁷ Rollo, p. 180.

We find Pro Builders' valuation of the accomplished works to be more accurate.

A joint evaluation was agreed upon by the parties. Pro Builders initially demanded for a joint assessment of its accomplishment. TG responded that it is amenable for a joint assessment and added that such assessment had already been completed.

As found by the Arbitral Tribunal however, the alleged joint evaluation conducted by TG is in fact one-sided. It need not be emphasized that the Arbitral Tribunal's expertise is well recognized in the field of construction arbitration, as CIAC is indeed the body upon which the law vested with exclusive jurisdiction over any dispute arising from, or connected with construction contracts.¹⁸ In a letter dated 28 November 2007, Engineer Glenn Realiza, TGU Project Inspector sent his evaluation to Pro Builders' Project-in-Charge, Engineer Jeffrey Blanco (Engr. Blanco), months after the takeover and asked for the latter's feedback. The letter reads:

November 28, 2007

Engr. Jeffrey Blanco
BPI Project in Charge
TGU Project

Dear Jeff:

I am sending you my evaluation of your accomplishment (structural works only) from foundation to second floor. The additive portion is your accomplishment for the third floor while the deductive covers for your unaccomplished works from foundation to second floor.

Please give me your feedback regarding this matter within 3 days so I can finalize the evaluation and forward it to our project manager.

Truly yours,

Red Glenn H. Realiza
TGU Project Inspector¹⁹

Project Manager, Prime Edifice, Inc. was appointed as Project Manager by TG Universal and has "authority at the job site throughout the

¹⁸ Executive Order No. 1008, Section 4.

¹⁹ *Rollo*, p. 266.

duration of the PROJECT and x x x to **certify to the satisfactory completion and implementation of this Agreement.**²⁰

Still on 11 January 2008, Project Manager, Prime Edifice, Inc. President Engineer Ed Hitosis wrote to Pro Builders' President Architect Paul G. Morgia demanding the settlement of ₱13,489,807.48 and inadvertently admitted that assessment of Pro Builders' accomplishment was done only by Project Manager, Prime Edifice, Inc., thus:

We have completed the assessment of your accomplishment for the above project as of October 15, 2007 as well as updated the cost of the project given your original scope of work as quoted by the new contractor, ALCCON pursuant to Article 9, "OPTION TO COMPLETE WORK TAKEOVER" of your contract with TG Universal Business Ventures which states:

x x x x

We have attached our computation for your review. We appreciate your prompt action regarding the settlement of the total amount of **PESOS: Thirteen Million Four Hundred Eighty-Nine Thousand Eight Hundred Seven and 48/100 (P13,489,807.48) Only.**²¹

Documents attached to the Joint Evaluation, such as numerous photographs showing the suspended slabs at the second floor and a detailed computation of the works accomplished from mobilization, excavation, concreting works and formworks are self-serving because there was no showing that Pro Builders participated in the computation of their accomplished works.

Pro Builders' contention that Engineer Blanco and Engineer Bucol had participated in the project survey but the computation and evaluation were done solely by Project Manager, Prime Edifice, Inc. was sustained by the Arbitral Tribunal. We agree that:

The documents on cost overrun (official receipts, check disbursement vouchers, billings, etc) mentioned by the CLAIMANT in its Memorandum/Draft Decision were not participated in by the CONTRACTOR, nor had been confronted by the CLAIMANT during the hearing for the CONTRACTOR to deny, comment or admit.²²

²⁰ Id. at 133; See Owner-Contractor Agreement. (Emphasis ours)

²¹ Id. at 348.

²² Id. at 182.



On the other hand, the progress billings prepared by Pro Builders provide an accurate summary of Pro Builders' accomplishments. Article 5.03 of the Agreement states:

5.03 The CONTRACTOR shall submit to the OWNER through the PROJECT MANAGER progress billing based on actual accomplishment of the various phases of the PROJECT. The PROJECT MANAGER shall process, certify to the correctness of, and make appropriate recommendations, and based on the recommendations, the OWNER shall make the actual payments. The appropriate recommendation shall be completed within fifteen (15) calendar days from receipt of complete billing documents. Final Payment shall be made in accordance with Article 17 of this Agreement.²³

Clearly, it is the Project Manager's responsibility to evaluate, certify and recommend the payment of the progress billings. Pursuant to the Agreement, the appropriate recommendation should be completed within fifteen (15) calendar days from receipt of complete billing documents. Pro Builders sent four (4) progress billings to TG from August to October 2007. None of these progress billings were acted upon, paid or contested by TG in violation of the Agreement. On account of TG's failure to act upon the progress billings, it had effectively waived its right to question the accuracy and veracity of Pro Builders' computation, thus the amounts stated in the progress billings are deemed valid and binding on TG, thus:

Progress Billing Date	% of Accomplishment	Amount
1 August 2007	10.27%	P4,312,616.49 ²⁴
13 September 2007	19.04%	P7,997,881.41 ²⁵
1 October 2007	29.21%	P12,104,449.63 ²⁶

²³ Id. at 137.

²⁴ Records, Folder No. 5, Exhibit "R-25." The amount is based on the following computation:

A. Total Contract Amount	P 70,000,000.00
B. 10.27% Accomplishment to date	7,187,694.00
Less:	
Downpayment (30.00%)	2,156,308.25
Retention 10%	718,769.42
C. Total Amount Due	P 4, 312,616.49

²⁵ Id.; Exhibit "R-26." The amount is based on the following computation:

A. Total Contract Amount	P 70,000,000.00
B. 19.04% Accomplishment to date	13,329, 802.00
Less:	
Downpayment (30.00%)	3,998,940.69
Retention 10%	1,332,980.23
C. Total Amount Due	
(plus billing # 1-not yet paid)	P7,997.881.41

²⁶ Id.; Exhibit "R-28." The amount is based on the following computation:

30 October 2007	32.65%	₱2,104,642.11 ²⁷
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In *F.F. Cruz & Co., Inc. v. HR Construction Corp.*,²⁸ the Court held that the owner is barred from contesting the contractor's valuation of the completed works when it waived its right to demand the joint measurement requirement. In the same vein, truly with more reason should it be concluded that TG had effectively waived its right to contest the computations in the progress billings since it failed to even act, one way or the other, on the progress billings within the time allowed under the Agreement.

As shown by the numbers, Pro Builders is entitled to payment of ₱2,104,642.11 for unpaid accomplishment of works, which amount is arrived at by subtracting the 30% down payment from the total unpaid billings and adding the change order.

Necessarily, TG's claim for cost to complete project is denied in view of its own failure to comply with its obligations under the Agreement.

Both Parties were in Breach of the Agreement

We likewise affirm the Arbitral Tribunal's finding that both parties failed to comply with their obligations under the Agreement. Records reveal that in the Notice of Award, Pro Builders was instructed "to mobilize within 7 days upon receipt of the 30% down payment."²⁹ TG Universal however failed to pay the down payment during the signing, as provided for in the Agreement. Pro Builders received the down payment only on 19 June

A. Total Contract Amount	P70,000,000.00
B. 29.21% Accomplishment to date	20,174,166.06
Less:	
Downpayment (30.00%)	6,052,249.82
Retention	2,107,416.61
C. Total Amount Due	
(plus billing # 1 & 2- not yet paid)	P12,104,499.63
²⁷ Id., Exhibit "R-29." The amount is based on the following computation:	
A. 32.65% Accomplishment to date	22,482,943.34
B. Additional & Change order work	621,698.77
Less:	
Downpayment (30.00%)	21,000,000.00
C. Total Amount Due	
(billing # 1 st up to 4 th & RFI 11, 20, 25, 39 & 40)	P2,104,642.11

²⁸ 684 Phil. 330, 353 (2012).

²⁹ *Rollo*, p. 357.

2007.³⁰ Thereafter, Pro Builders sought a clarification from TG as to the exact date of Day 1 of the construction citing as grounds the delay in the receipt of down payment, delay in the delivery of rebars and cement, rebar testing and heavy rainfall causing soil erosion.³¹ Pro Builders was asked to support its claims with documents. Upon submission by Pro Builders, TG found these submitted documents lacking in particulars. It was also proven during the proceedings before the Arbitral Tribunal that Pro Builders had failed to provide sufficient manpower and equipment which caused further delay to the project. As culled from the circumstances cited above, it is clear that both parties had been remiss in their respective obligations. The respective violations of the parties were encapsulated in the Decision of the Arbitral Tribunal, to wit:

[Pro Builders'] failure to comply with its Obligations/Responsibilities

Violations of concrete protocol as shown in the Concrete Pouring permits and Pouring Logs (Exhibit "C-26).

The [Pro Builders'] Technical and Financial Annexes (TFIA) showing the equipment it will provide, but was not able to do so for the project (Exhibit "C-5").

As testified by Engr. Hitois and Engr. Realiza of the project Management Team, (Exhibit "R-31") the table below shows the type and the number of equipment required in the project, as well as, the actual number furnished by the [Pro Builders].

Equipment	June 1-30, 2007		July 1-31, 2007		August 1-31, 2007	
	TFIA	Actual	TFIA	Actual	TFIA	Actual
4 Tower Crane	0	0	0	0	2	1
1POa4y2loader	1	0	1	0	0	0
Back Hoe hb 405	2	1	2	1	2	1
Mini Roller 1 ton	2	2	2	1	2	1
1 bagger mixer	1	0	1	0	1	0
Vibrator	0	2	5	4	5	1
Electric bar cutter	0	2	2	2	2	1
Mdale Crane 25TONE	0	1	0	1	0	1

The [Pro Builders'] Technical and Financial Annexes (TFIA) to the Contract show the number of men to carry out the various phases of work. The table below shows these and the actual number of workmen in the job site. (Joint Affidavit of [TG's] Engineers).

³⁰ Records, Folder No. 3; Annex "D" of Supplemental Complaint.
³¹ Id., Folder No. 5; Exhibit "R-8."

Period Covered	No. of Manpower in TFIA	No. of Manpower at Jobsite
June 1-30, 2007	55	45
July 1-31, 2007	83	81
August 1-31, 2007	158	110

x x x x

[TG's] failure to comply with the Obligations/Responsibilities

The 30% down payment was made on 19 June 2008, not upon execution of the Agreement on 29 May 2007 as provided therein.

Not one of the [Pro Builders'] progress billings (No. 1 to No. 4) and the Change Order was ever paid by the [TG].

[Pro Builders] claims delay in the delivery of the owner-supplied rebars, as follows:

- a. On 26 June 2007, [TG's] structural engineers, Aromin & Sy, computed bar requirements to be 1,091,964.53 kilograms (Exhibit "R-10-A"). As of 13 July 2007, only 437,990.08 kilograms of rebars were delivered (Exhibits "R-10-B").
- b. As of 13 August 2007, a total of 967,954.38 kilograms of rebars were delivered far short of the 1,431,637.36 kilograms Per cutting list of rebar requirements from the foundation to the third floor approved by the [TG's] structural engineers (Exhibit "R-12-A").
- c. The delivery of the balance of rebars required were done only on 09 October 2007 (Exhibit "C-17").
- d. The excavation works for the footings and the foundations of the building was completed by the [TG] only on 24 August 2007, not on 31 July 2007 as required (Affidavit of Arch. Paul G. Morgia, PBI President, and Engr. Jeffrey Blanco, Project Engineer of the [Pro Builders]).

Arbitral Tribunal's Findings

On the delay by the [Pro Builders] in the performance of the construction agreement, the [Pro Builders] contends that had [TG] approved their request for the adjustment of Day 1 of the contract in accordance with the Notice of Award, the slippage would have been insignificant, if any,

The Notice of Award (Exhibit "R-2") dated 15 May 2007 states, among others, that "you are hereby instructed to mobilize within 7 days upon receipt of the 30% down payment x x x. Project duration shall be 360 calendar days.

One of the Admitted Facts (Item 5.1) states that during the Pre-Construction Meeting No. 2 held on 22 May 2007, "Day 1 of the

Construction officially slated on June 1, 2007". (Annex B, Supplemental Complaint).

On 09 July 2007, [Pro Builders] asked for time extension without specifying the number of days, but was required by the project Manager to submit additional documents (Exhibit "R-8").

On 16 July 2007, [Pro Builders] complied with the submittal of the required documents and asked for the start of Day 1 of the construction to be 15 July 2007 (instead of June 26 as provided for in the Notice of Award). [Pro Builders] contends that this was never acted by the Project Manager of the [TG] (Exhibit "R-9").

What the [Pro Builders] submitted was a Revised Work Schedule, but did not take into account a lot of factors, most especially, the time allocation for each activity. (Annex K, Complaint).

There was no S-Curve or PERT/CPM Network diagram submitted by the [Pro Builders] from where the corresponding monthly accomplishment can be assessed.

On 02 August 2007, the [Pro Builders] submitted Progress Billing No. 1 covering the period from June 1 to July 31, 2007. (Exhibit "R-25B" & "R-29").

On 28 August 2007, the project Manager wrote the [Pro Builders] raising serious concerns on the latter's ability to complete the project as scheduled (No. 14, Complaint).

[Pro Builders'] failure to meet its target could be accounted by its inability to deploy the required resources, i.e. manpower and equipment both of which are major factors in the concrete production output of the [Pro Builders] (Exhibits "C-6" to "C-10").

[TG] assessed the [Pro Builders'], monthly accomplishment to be behind schedule. The slippage as of 28 August 2007 was (-) 5.72% (Annex "G", Complaint) and (-) 15.32% on 30 September 2007 (Annex "M", Complaint).

On the delivery of owner-supplied reinforcing bars, the fact that as of 13 August 2007, 967, 954.38 kilograms or approximately 968 tons had been delivered is undisputed. However, the parties' disagreement is with respect to the quantity of rebars required for the project.

The [Pro Builders] presented the transmittal letter dated 25 September 2007 with the attached Rebar Requirement, to wit:

- a. From foundation to 3rd floor - 1, 431, 637.76 kilograms
(Exhibit "C-125-c")
- b. From 4th floor to 9th floor - 1, 225, 020.06 kilograms
(Exhibit "C-125-b")
- c. From 10th floor to Helipad level - 1, 263, 647.61 kilograms

(Exhibit "C-125-a")

TOTAL

- 3, 920,505.33 kilograms

The rebar requirements from foundation to the 3rd floor as alleged by [Pro Builders] is 1,431,637.76 kilograms as against [TG's] 967,954,38 kilograms. On cross-examination by the Counsel of the [TG's]. Arch. Morgia confirmed that based on their Bill of Quantities the rebar requirement from foundation to the 3rd floor is more of less 900,000 kilograms (TSN, page 266.)

In the [Pro Builders'] Bid Form (Exhibit "C-117") and the Bill of Quantities (Exhibit "C-117-a") attached to the Contract, the total rebar requirement of the project from basement to roof deck is 2,705,850.33 kilograms only. During the hearing, Arch. Morgia alleged that the rebar requirements in the letter of PRO Builders dated 25 September 2007 was due to changes in design. However, there was no evidence presented to establish the [Pro Builders'] contention that there were indeed design changes approved by the [TG].

As to the alleged delay in the delivery of concrete, [TG's] Summary of concrete Pouring Activities (Exhibit "C-25") indicates the dates of delivery, volume of concrete delivered and location in the project of the concrete pouring activities. These data were based on the Concrete Pouring permits of the [Pro Builders], which bear the date of approval and signatures of [TG's] project inspectors.

Referring to the circumstances enumerated in the preceding paragraphs, the Arbitral Tribunal finds both parties had failures to comply with their respective obligations and responsibilities as provided for in the Owner-Contractor Agreement.³² (Emphasis supplied)

With respect to Pro Builders' counterclaims, the same are correctly denied for lack of factual and legal bases.

In sum, we resolve to reinstate in its entirety the 1 October 2008 Decision of the CIAC.

WHEREFORE, based on the foregoing, we **GRANT** the petition. The 13 October 2010 Decision of the Court of Appeals in CA-G.R. SP No. 106407 is **REVERSED AND SET ASIDE**. The Decision of the Construction Industry Arbitration Commission dated 1 October 2008 in CIAC Case No. 04-2008 is **REINSTATED**.

³²

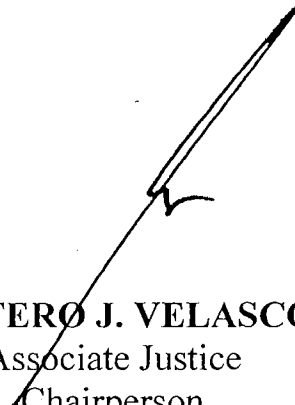
Rollo, pp. 177-179.

SO ORDERED.

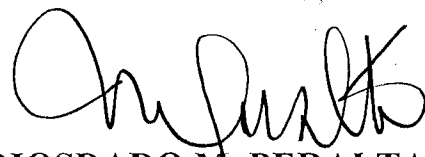


JOSE PORTUGAL PEREZ
Associate Justice

WE CONCUR:



PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson



DIOSDADO M. PERALTA
Associate Justice



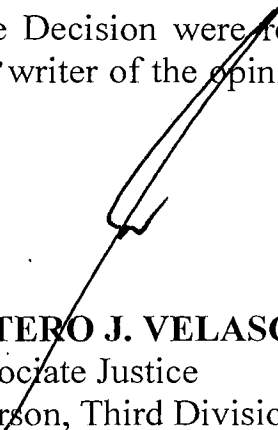
BIENVENIDO L. REYES
Associate Justice



FRANCIS H. JARDELEZA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson, Third Division

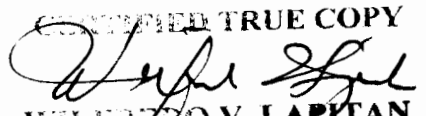
CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



MARIA LOURDES P. A. SERENO

Chief Justice

CERTIFIED TRUE COPY

WILFREDO V. LAPITAN
Division Clerk of Court
Third Division

MAR 02 2016