THIRD DIVISION

BF CORPORATION,
Petitioner,

- versus -

WERDENBERG INTERNATIONAL CORPORATION,
Respondent.

G.R. No. 174387

Present:

VELASCO, JR., *J.*, *Chairperson*
PERALTA,
VILLARAMA, JR.,
LEONEN,* and
JARDELEZA, *JJ.*

Promulgated:

December 9, 2015

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DECISION

JARDELEZA, *J.*:

THE CASE

This is a petition for review on *certiorari* under Rule 45 of the Revised Rules of Court seeking the reversal of the Resolution[1] of the Former Seventh Division of the Court of Appeals (CA) dated August 23, 2006, which held respondent entitled to liquidated damages equivalent to 70 days of delay, 10% retention fee, and payment for expenses for repainting job arising from a construction dispute.

FACTS

Petitioner[2] and respondent[3] entered into a Construction Agreement, under which petitioner would construct for respondent a three-story building housing a meat processing plant and a showroom office in Yakal Street,

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* Designated as additional Member per Raffle dated November 9, 2015 in lieu of Associate Justice Bienvenido L. Reyes who participated in the proceedings before the Court of Appeals.

1 Penned by former CA Associate Justice Bienvenido L. Reyes, who is now a member of this Court, and concurred in by Associate Justice Ruben T. Reyes and former CA Associate Justice Jose C. Mendoza, who is also now a member of this Court. *Rollo*, pp. 10-35.

2 Petitioner is a corporation organized and existing under Philippine laws. It is engaged in the business of erecting buildings and other structures, among others.

3 Respondent is a corporation organized and existing under Philippine laws. It is engaged in the manufacture, distribution and retail of gourmet products.

Makati City. The parties agreed on a contract price of Php 43,800,000.00 and a completion and delivery date of April 7, 1995.[4] Due to several delays, however, petitioner turned over the building only on August 15, 1995.[5] Respondent did not accept the building, asserting it had many deficiencies. Respondent paid petitioner only Php 38,088,445.00.[6] Thus, petitioner filed a complaint for sum of money against respondent before the Pasig Regional Trial Court (RTC) for the balance of Php 4,771,221.59.[7] In addition, petitioner prayed for the payment of Php 141,944.93 representing expenses incurred due to work on respondent's changes or additional orders, and for a judgment that the liquidated damages claimed by respondent in the amount of Php 3,066,000.00 was without basis.[8]

Petitioner enumerated in its complaint the following reasons why the project was delayed:

1. At the start of the excavation phase, petitioner had to remove two to three layers of concrete slabs over the construction site, instead of only 1 layer.[9] The soil was also found to be extra soft and had to be filled with boulders. Respondent granted petitioner an extension of only 7 days, but the remedial work required in the removal of the extra layers of concrete slabs, and in stabilizing the condition of the soil, took 30 – 40 days to finish.[10]

2. Respondent and another corporation, Sinclair Paints, engaged in a boundary dispute. Respondent ordered petitioner to suspend the excavation works until the dispute was resolved. The suspension took 6 days, yet petitioner was not credited with an extension.[11]

3. The building permit was not secured on time. The application for the building permit was not initially processed by the Building Official of Makati City because respondent failed to timely secure the required Environmental Clearance Certificate (ECC).[12]

4. Respondent informed petitioner that the building plan will be revised, such that the locations of the columns, beams and walls to be put up were to be determined only through the verbal instructions of respondent's construction manager.[13]

5. On February 20, 1995, the City Building Office served petitioner with an order to stop all construction works until a building permit

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4 CA Decision, *rollo*, p. 79.
5 RTC Decision, *id.* at 73-74.
6 *Id.* at 74.
7 RTC records, pp. 1-7.
8 *Id.* at 5-6.
9 *Id.* at 2.
10 CA Decision, *rollo*, p. 89.
11 RTC records, p. 2.
12 *Id.*
13 *Id.* at 2-3.

is secured. Despite this "stop work order," respondent ordered petitioner to continue with the construction discreetly.[14]

6. It was only on March 23, 1995 or after the lapse of 31 days from the "stop work order" when the building permit was secured.[15]

Thus, while the demolition, excavation, and initial construction works started on November 26, 1994, regular construction works began only 113 days after, or on March 24, 1995.[16]

Petitioner further alleged that even after the original completion date of April 7, 1995, construction works continued.[17]

Respondent even ordered substantial changes and additional works after April 7, 1995, which took 130 days to complete, or until August 14, 1995.[18] In total, petitioner claimed it was entitled to an extension of 243 days, yet asked for only 130 days.[19] Respondent, however, granted petitioner with a mere 60-day extension and held it in default for the remaining 70 days. Consequently, petitioner was charged with liquidated damages computed at Php 43,800.00 for every day of delay, or a total of Php 3,066,000.00.[20]

In its defense, respondent attributed the delays to the fault of petitioner. Respondent denied suppressing information about the existence of the extra layer of concrete slabs and the extra soft condition of the soil.[21] It alleged that petitioner was given this information during the pre-bidding conference, and that petitioner inspected the site and was present during soil testing.[22] Respondent averred that petitioner was responsible for securing the required permits.[23] As to the changes and additional works, respondent asserted it gave petitioner a 60-day extension, even if these works were merely linear, meaning they may be performed without interrupting the normal pace of the construction work.[24] In sum, respondent blamed petitioner's poor workmanship, persistent inaction in satisfying respondent's complaints, and lack of, or defective equipment, for the delays.[25] Respondent claimed that due to petitioner's poor workmanship, the turnover in August 1995 was merely partial because there were several works that needed to be adjusted and corrected, to which petitioner agreed.[26] This poor workmanship

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14 *Id.* at 3.
15 *Id.*
16 *Id.* at 4.
17 *Id.*
18 *Id.* at 3-4
19 *Id.* at 4.
20 *Id.*
21 *Id.* at 20.
22 *Rollo*, p. 74.
23 RTC records, pp. 22-23.
24 *Id.* at 24-27.
25 *Id.* at 27.
26 *Id.* at 23-24.

on the part of petitioner pushed the actual turnover to October 15, 1995.[27] Nevertheless, respondent maintained that out of benevolence, it computed delay only from June 6, 1995 to August 15, 1995 (70 days) instead of up to October 15, 1995.[28] Even then, after the turnover, respondent had to hire another contractor to do corrective and repainting works because of the same poor workmanship of petitioner. Respondent allegedly incurred additional expenses worth Php 1,202,888.50 for the repainting work of the other contractor.[29]

After trial, the RTC ruled in favor of petitioner.[30] It duly noted the causes of delay petitioner outlined and concluded that the 60-day credit respondent allowed for delay was not commensurate to the total allowable or justifiable delay. Instead, the RTC ruled that petitioner was entitled to a 130-day extension it requested. Thus, the liquidated damages respondent deducted from the agreed contract price was baseless and unjustified. The dispositive portion of the RTC's Decision reads:

> **WHEREFORE**, in view of the foregoing, the Court hereby renders judgment in favor of plaintiff **BF CORPORATION** and against defendant **WERDENBERG INTERNATIONAL CORPORATION** and hereby orders defendant to pay plaintiff the following amounts, to wit:
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> 1. Four Million Seven Hundred Seventy One Thousand Two Hundred Twenty One Pesos and 59/100 (P4,771,221.59) corresponding to the unpaid balance of the contract price, inclusive of the retention fee and net of electric/water billings. Rectification works and other charges at twelve (12%) percent interest per annum from the filing of this suit until fully paid;
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> 2. One Hundred Forty One Thousand Nine Hundred Forty Four and 93/100 (P141,944.93), corresponding to the unpaid balance of the change orders/extra works done, net of advances, taxes and other charges at twelve (12%) percent interest per annum from the filing of this suit until fully paid;
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> 2. Two Hundred Thousand Pesos (P200,000.00) for and as attorney's fees; and,
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> 4. [C]ost of suit.
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> **SO ORDERED.**[31]

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27 *Id.* at 24.
28 *Id.* at 27.
29 *Id.*
30 Through Judge Santiago G. Estrella. *Rollo*, pp. 73-77.
31 *Id.* at 76-77.

On appeal, the CA modified the Decision of the RTC and held respondent entitled to its claim of liquidated damages of Php 3,066,000.00 corresponding to petitioner's 70-day delay. The dispositive portion of the CA Decision[32] reads:

> WHEREFORE, the decision appealed from is hereby ***MODIFIED*** and We deem it reasonable to render a decision imposing, as We do hereby impose, upon the defendant-appellant Werdenberg to pay BF Corporation the amount of P1,847,167.52 to complete the payment of its professional fee under their Construction Agreement based on the following computation:
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> | | | | |
> |---|---|---|---|
> | | P4,771,222.59 | – | unpaid balance under the Agreement |
> | + | 141,944.93 | – | unpaid balance for change orders |
> | | P4,913,167.52 | – | total amount due to BFC |
> | Less: | P3,066,000.00 | – | liquidated damages by BFC |
> | | P1,847,167.52 | – | amount due to BFC |
>
> the total sum being payable upon the finality of this decision. Upon failure to pay on such finality, twelve (12%) per cent interest per annum shall be imposed upon afore-mentioned amount from finality until fully paid.
>
> SO ORDERED.[33]

On Motion for Reconsideration, the CA modified its Decision.[34] On re-evaluation of the evidence, the CA ruled that respondent was entitled to the expenses worth Php 1,050,000.00 it incurred for the repainting job done by another contractor. The CA also granted respondent's claim for a retention fee of 10%. The CA's new computation[35] reads:

	P4,771,222.59	–	unpaid balance under the Agreement
+	141,944.93	–	unpaid balance for change orders
	P4,913,167.52	–	total amount due to BFC
Less:	3,066,000.00	–	liquidated damages by BFC
	P1,847,167.52		
Less:	1,050,000.00	–	expenses for painting job due to Werdenberg
	P797,167.52	–	amount due to BFC
Less:	79,716.75	-	10% retention fee by Werdenberg
	P717,450.75	-	amount due to BFC

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32 Penned by former CA Associate Justice Bienvenido L. Reyes, who is now a member of this Court, and concurred in by Associate Justice Ruben T. Reyes and former CA Associate Justice Jose C. Mendoza, who is also now a member of this Court. *Id.* at 79-104.

33 *Id.* at 103-104.

34 Resolution dated August 23, 2006, *id.* at 10-35.

35 *Id.* at 35.

Hence, this petition, which argues in the main that the CA misappreciated relevant facts and prays that the decision of the RTC be reinstated.

OUR RULING

Petitioner raises questions of fact, which generally, we cannot entertain in a Rule 45 petition. We are not obliged to review all over again the evidence which the parties adduced in the courts below. Of course, the general rule admits of exceptions, such as where the factual findings of the CA and the trial court are conflicting or contradictory.[36] This exception is present here.

The RTC ruled in favor of petitioner, finding that the delay in the construction was not its fault. The RTC found the extension of the delivery date of 60 days granted by respondent incommensurate to the total number of days of justifiable delay. The CA, on the other hand, did not find all the grounds raised by petitioner as causes for justifiable delay to be meritorious. The CA held petitioner at fault when it did not adopt measures to arrest soil deterioration.[37] The CA also held that petitioner should have notified respondent that it (petitioner) would stop work until the required building permit was secured.[38] Neither did petitioner inform respondent that the revision of the building plan will cause delay. Thus, such revision merely required a reorientation of the project.[39] This was also true with the change orders and additional works. The CA gave more credence to the testimony of respondent's witness, Engr. Antonio Aliño, an engineer of 37 years' experience. Engr. Aliño testified that the change orders and additional works merely required linear activities that did not affect the construction time.[40] The CA then deferred to the approximation of respondent that petitioner is, under the facts, entitled to only 60 days of extension of the contracted completion date of April 7, 1995. This meant that the new completion date can be moved to June 6, 1995.[41] Since, however, the turnover was made only on August 15, 1995, petitioner incurred delay for 70 days. For this, the CA found petitioner liable for liquidated damages for 70 days of delay.[42]

On reconsideration, the CA also noted that the defects on the painting job, which petitioner acknowledged and tried to rectify, were not solved at all. In a letter dated May 31, 1996, respondent informed petitioner that it (respondent) would hire another contractor to do the repainting job. Thus, the CA found respondent entitled to liquidated damages, retention fee, and reimbursement for the expenses in the repainting job.[43]

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36 *Miro v. Mendoza Vda. De Erederos*, G.R. Nos. 172532 & 172544-45, November 20, 2013, 710 SCRA 371, 386-387.
37 *Rollo*, p. 93.
38 *Id.* at 95.
39 *Id.* at 96.
40 *Id.* at 99-101.
41 *Id.* at 102.
42 *Id.*
43 *Id.* at 29-32.

The petition is partly meritorious.

To recall, petitioner originally claimed it was entitled to a 113 day extension of the contracted delivery date because of various delays that moved the regular construction date from November 26, 1004 to March 24, 1995. These various delays were broken down as follows:

- Removal of layers of unforeseen concrete slabs, which took 30 – 40 days;
- Rectification of the extra soft condition of the soil, which took 14 days;
- Revision of the building plan, which affected the petitioner's conduct of work for a month, or 30 days;
- One month "stop work order" from the City Hall of Makati due to lack of construction permit, or 30 days.

Petitioner argues that respondent concealed the existence of the concrete slabs and the condition of the soil, which necessitated additional work, expense, and use of sophisticated equipment.[44] The building plan also had to be revised in an attempt to avoid the necessity of submitting an ECC as a measure to facilitate the approval of the application for a building permit. At the same time, however, the revised building plan was needed as supporting document to the application for a building permit, such that without it, the application was put on hold.[45] The revision also called for a 180-degree reorientation of the building floor plan, which stalled the progress of construction for a month because petitioner had to rely on and await mere verbal instructions from respondent's representatives.[46] When the revised building plan was finally submitted to petitioner in January 1995,[47] the building permit application was further delayed because the city hall officials questioned the provisions on the parking area.[48] Thus, due to the lack of building permit, the city hall issued and served a "stop work order" in the construction premises on February 20, 1995. This caused work to stop for a month, or until March 23, 1995, when the building permit was finally secured.

Petitioner also claimed it was entitled to a 130-day extension corresponding to various additional works and change orders from April 7, 1995 to August 14, 1995. The total number of days for extension, therefore, was 243 days. Petitioner settled for 130 days instead.

In reply to petitioner's request for extension, respondent initially granted 34 days, which were broken down as follows:

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44 Petition for Review, *id.* at 58-59.
45 *Id.* at 53.
46 *Id.* at 61.
47 *Id.* at 60.
48 TSN, May 17, 1999, p. 16.

- 7 days for the removal of concrete slabs
- 7 days for the delay in the construction permit
- 14 days for the construction of shear walls
- 6 days for holidays

According to respondent, it granted only 7 days for the removal of concrete slabs because the delay was caused by the frequent breakdown of petitioner's equipment. Respondent also granted only 7 days for the delay in the construction permit because it did not prevent petitioner from continuing with the construction. As for the construction of shear walls, a part of the additional works which petitioner claimed took 30 – 40 days to finish, respondent granted only 14 days because the work was gradual. The rest of the additional works and change orders were categorized by respondent as either linear activities that can be executed simultaneously with the main work or repeat jobs due to petitioner's poor workmanship and thus, did not merit any extension. On re-evaluation, respondent granted an additional 26 day extension, for a total extension of 60 days.

We stress at the outset that in its decision, the CA found petitioner entitled to extensions of 35 days for the removal of concrete slabs, and 7 days for the work stoppage brought by a boundary dispute with Sinclair Paints. The CA then upheld respondent's total grant of a 60 day extension. The computation, however does not add up. Petitioner would be entitled to a 42 day extension for the concrete slabs and the boundary dispute alone, leaving an additional extension of 18 days for other causes of delay. While the CA found petitioner not entitled to any extension for the supposed delay in the building permit, it ignored the extensions of 14 days for the construction of the shear walls, and 6 days for the holidays which respondent already granted in favor of petitioner. These would have totalled to an additional extension of 20 days. In effect, the CA's computation would not jibe with that of the respondent's.

At any rate, in determining whether respondent is entitled to liquidated damages and how much it is entitled to, we reach a different conclusion than those of the lower courts.

Petitioner is entitled to an extension of 21 days for the delay during the excavation stage

The daily reports[49] of respondent's project manager, Engr. Arnulfo Delima, show that petitioner performed earth and demolition works involving excavation, boulders and gravel filling, and soil poisoning from December 9, 1994 to February 14, 1995. But in the construction schedule[50]

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49 Exhibit "18," RTC records, pp. 347-348; Exhibits "18-B," "18-C," "18-D," "18-E," "18-F," "18-G," *id.* at 347-354; Exhibits "18- O" and "18-P," RTC records, pp. 362-363.

50 *Id.* at 371.

petitioner submitted to respondent, the duration of the earth and demolition works should have only been from and until mid-December 1994.[51] Petitioner accuses respondent of suppressing information about the existence of the concrete slabs and the extra soft condition of the soil, which were material in petitioner's determination of the time and cost required by the works. Thus, petitioner asks for a total extension of approximately 1 and 1/2 months equivalent to the actual period it took petitioner to perform these earthworks.

We disagree that petitioner is entitled to a full extension of its request (30 – 40 days for the removal of the concrete slabs and 14 days for arresting the soil condition). We hold that for these excavation works, it is fair to grant petitioner with a total extension of only 21 days or three weeks.

The existence of the layers of concrete slabs and the extra soft condition of the soil was not easily determinable upon site inspection. In fact, these were not included in the Construction Agreement or in the Minutes of the Pre-Bid Conferences.[52] Petitioner would have considered in its bid plan and proposal the attendant time and costs the measures required to address these conditions had it known about them from the beginning.[53] In *Advanced Foundation Construction Systems Corporation v. New World Properties and Ventures, Inc.*,[54] we deferred to the expert opinion of the Construction Industry Arbitration Commission that in practice, removal of underground obstructions is a "major item of work" that needs to be included in the contractor's scope of work. It cannot be understood as being merely subsumed under the general heading "miscellaneous."[55]

Here, the CA agreed with petitioner that the concrete slabs were unforeseen and their removal caused delay in the construction phase. The CA also acknowledged that the extra soft condition of the soil cannot be easily seen with the naked eye. The CA thus held "it is understandable that BFC could not be expected, upon ocular inspection, to immediately determine the soil condition."[56]

We rule, however, that the removal of the concrete slabs and the filling of boulders may have taken two or three more times in effort to accomplish than usual.[57] The removal also took time because of the frequent breakdown of the heavy equipment petitioner used in the process, and petitioner's failure to provide enough manpower. The daily reports[58] support this and Engr. Delima also convincingly testified:

Q: Can you describe to us the progress of the work by BF?

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51 *Id.*
52 TSN, March 13, 2000, p. 5.
53 TSN, September 27, 1999, p. 7.
54 G.R. No. 143154, June 21, 2006, 491 SCRA 557.
55 *Id.* at 576.
56 CA Decision, *rollo*, p. 92.
57 TSN, March 13, 2000, p. 6.
58 Exhibits "18-B," "18-C," "18-E," RTC records, pp. 349-350, 352.

> A: When I supervised the work, our schedules have not been met, we have some delays in the excavations, madam.
>
> Q: In the excavation stage, what delays were incurred if any?
>
> A: Their equipments [sic] were always not functioning. Although, we asked them for another equipment, they added one (1) equipment, but still that equipment was not functioning, madam.
>
> Q: How about the work schedules, the shifting of men during the construction?
>
> A: We also requested the B.F. to add some men for us to be able to work for 24-hour [sic], but still, it took time for them to add men, madam.[59]

Petitioner was obliged to provide "all materials, labor, tools, and equipments [sic], and other incidentals required for the complete and satisfactory completion of the project"[60] for the project. Under Section 5 of the Construction Agreement, "[a]ll materials and labor of every grade and equipment necessary for the prosecution and termination of the work shall be of the best grade of their respective kind and the quality of workmanship shall be in accordance with the requirements of the contract and its Annexes."[61] Petitioner was, therefore, obliged to provide the appropriate equipment in good running condition. Failing on this, petitioner is not entitled to the full extension of 30 – 40 days it requested.

We also disagree that petitioner is entitled to a full extension of 14 days it requested for the delay caused by the extra soft condition of the soil.

Firstly, we defer to the testimony of Arch. Orencio Sare, Jr., the designer of the building, that the soil investigation report[62] dated September 1994 was not crucial for the contractor's work. Arch. Sare testified that the report was only instrumental for the designer's work and not for the contractor's because it was intended to determine the soil bearing capacity.[63] Hence, we agree that there was no malicious intention to suppress the soil investigation report from petitioner, even if it was only furnished to petitioner after the contract was awarded in November 1994.[64] This is not to say, however, that the contractor should not be apprised of the actual condition of the soil before bidding. The soil report could have assisted petitioner in estimating the extent of its excavation works. As Mr. Gerardo

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59 TSN, January 17, 2000, p.p. 12-13.
60 Exhibit 19, RTC records, p. 366.
61 Exhibit "A," *id.* at 152.
62 Exhibit "20," *id.* at 372-375.
63 TSN, September 27, 1999, p. 9.
64 TSN, May 17, 1999, p. 6.

Apoderado[65] testified, the extra soft condition of the soil spelled problems because the area cannot be excavated to the required elevation.[66] In its letter dated December 9, 1994,[67] petitioner proposed to respondent that since the actual soil condition is very soft, thicker boulders and a thicker gravel base should be used. Petitioner then informed respondent that these changes, on top of the demolition of unforeseen concrete slabs and arresting the soil condition, would result in additional working time and cost. Respondent did not object to or refute this letter.[68]

Respondent claims, however, that petitioner was responsible for the delay caused by the soil condition because it failed to immediately provide remedies when water from a broken drainage nearby seeped in.[69] Thus, in a letter dated January 16, 1995, respondent reminded petitioner of the required bottom elevation and noted that petitioner's latest excavation was undercut. Respondent also brought to petitioner's attention the muddy condition of the excavated area.[70]

We agree with the CA that petitioner should have taken measures to address the problem with the broken drainage. We note that as of January 16, 1995, petitioner had failed to properly stabilize the soil and obtain the required elevation of the area.[71] This is a lapse which merits a reduction on petitioner’s estimate for extension. We merely reduce the extension on the finding that at most, the broken drainage only aggravated the soil condition, but doesn't change the fact that it had been extra soft from the start. It was not even shown when the drainage broke and leaked and whether its effects were visible or known to petitioner from the beginning. Furthermore, in the same manner that petitioner should answer for the faulty equipment used in the removal of the concrete slabs, petitioner should also answer for the delay in the deliveries of the boulders used for filling in the excavated area.[72]

All told, both parties were responsible for the delay caused by the excavation and earthworks. Thus, even if petitioner may be held liable for negligence in the performance of its obligation, Article 1172 of the Civil Code[73] provides that such liability may be regulated by the courts according to the circumstances of the case. Here, the existence of concrete slabs and the extra soft soil remained a condition beyond the control of petitioner. Since these caused an unforeseen delay in the excavation stage, petitioner should be credited accordingly. We find that a reduced extension of 21 days for the earth and demolition works is commensurate and fair.

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65 Petitioner’s project manager.
66 TSN, February 8, 1999, pp. 7-8.
67 Exhibit “B,” RTC records, p. 156.
68 TSN, March 13, 2000, p.5.
69 TSN, April 2, 2001, p. 4.
70 Exhibit “18-H,” RTC records, p. 355.
71 *Id.*
72 Exhibit “18,” *id.* at 347-348.
73 Art. 1172. Responsibility arising from negligence in the performance of every kind of obligation is also demandable, but such liability may be regulated by the courts, according to the circumstances.

Petitioner is entitled to an extension of 38 days for the delay in securing the building permit and for the stop work order issued by the Makati City Hall.

The Construction Agreement provides that the agreed period of completion shall be automatically and correspondingly extended if the works are suspended to comply with any rule or order of public or government authorities[74]. We agree with the CA's explanation that before this provision can be considered in favor of petitioner, the latter should not be at fault.[75] We rule that petitioner was not at fault.

Under the Construction Agreement, terms and conditions reflected in the minutes of the pre-bid conferences shall be effective and binding upon the parties as terms and conditions of the Construction Agreement, except when modified or altered by the latter.[76] The minutes of the second pre-bid conference on November 9, 1994 provided that respondent, through its designer, A.L. Aliño Engineers and Architects, will initiate securing the building permit, and which activity will be continued by the winning bidder.[77] In other words, although the obligation to obtain the permit will ultimately devolve to petitioner, respondent had to act first by securing the ECC from the DENR, a prerequisite to the building permit application. Arch. Sare confirmed this understanding between the parties:

> Q: Mr. Sare, in the minutes of the pre-bidding conference held on November 9, 1994, at the Gold Ranch Restaurant in Makati wherein you claimed you were present, it was agreed among others by and between the plaintiff and defendant that A.L. Aliño Engineers will initiate the securing of building permit and will be continued by the winning bidder and at that time you were still connected with A.L. Aliño Engineers, am I correct?
>
> A: Yes, sir.
>
> Q: When you said initiate in securing the building permit it means [A.L.] Aliño Engineers shall file the corresponding application, is that correct?
>
> A: Yes, sir.
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> x x x

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74 Construction Agreement, Section 3(1) Time of Performance, Exhibit "A," RTC records, p. 151.
75 Resolution dated August 23, 2006, *rollo,* pp. 22-23.
76 Construction Agreement, Section 1 Scope of Work, Exhibit "A," RTC records, p. 150.
77 Exhibit "L-1," *id.* at 60.

> Q: Is it not a fact considering that the nature of the business to be conducted in the proposed construction project a DENR, ECC clearance is required to accompany the application for issuance of building permit?
>
> COURT: In other words, the building official will not authorize the issuance of building permit without the DENR, ECC clearance?
>
> Atty. Morga: Yes, your honor.
>
> Witness: We know that, sir.
>
> COURT: (To the witness) So you were made aware of that requirement that the building official cannot process any application for issuance of building permit without the presentation of the DENR, ECC clearance previously secured by the applicant before the building permit, is that correct?
>
> Witness: Yes, your honor.
>
> x x x
>
> Q: Pursuant to the highlights of the meeting which by the way was previously marked as Exhs. "L," "L-1" and Exh. "10" for the defendant, did the defendant apply for the necessary ECC clearance with the DENR?
>
> A: Yes, sir.
>
> Q: The defendant did that precisely because of what appeared in the highlights of the meeting on November 9, 1994, am I correct?
>
> A: Yes, sir.
>
> Q: When was that the defendant filed for the issuance of ECC clearance from the DENR? Was it during the progress of the construction?
>
> A: Yes, sir. [78]

Respondent is bound by the foregoing terms in the Construction Agreement and as refelcted in the minutes. Contracts constitute the law between the parties, and they are bound by its stipulations. For as long as they are not contrary to law, morals, good customs, public order, or public policy, the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient.[79]

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[78] TSN, October 18, 1999, pp. 2-5.

[79] *Atlantic Erectors, Inc. v. Court of Appeals*, G.R. No. 170732, October 11, 2012, 684 SCRA 55, 65-66.

In a letter dated December 13, 1994, petitioner informed respondent that it has applied for the building permit, but that respondent, in turn, has to secure the ECC, which is "vital in the application for [the] building permit."[80] Petitioner reminded respondent that as the owner, it (respondent) was in a better position to know the process flow of the meat processing plant.[81] Thus, it was only logical that respondent should be the one to file and secure the ECC. The CA has also acknowledged this much, saying that it was appropriate and understandable that the duty to secure the ECC should devolve upon respondent because the nature of the business is highly technical.[82] However, the CA held that petitioner should have notified respondent that it (petitioner) would stop construction work until the required building permit was in order.[83]

We disagree with the CA that petitioner was not vigilant enough. The December 13, 1994 letter was, effectively, a reminder from which respondent should have taken its cue. Petitioner stated in the letter that it has already done its part in the filing of the building permit as required in the contract. But due to the unavailability of an ECC and other permits, petitioner informed respondent it is losing precious time. Without a building permit, petitioner cautioned respondent that its works will be limited to those covered by its existing excavation permit, which were excavation and fencing.[84] Despite this reminder, respondent secured an ECC only on February 22, 1995.[85] Respondent should, therefore, bear the effect of the delay caused by the stop work order from the city hall. This is but fair because it failed in its obligation to initiate the building permit application.

Respondent should further bear the effect of the delay because its revision of the building plan contributed to delaying the building permit application.

The building plan, for reasons unclear, had to be revised during the excavation stage.[86] Respondent insists petitioner suggested the idea so the building would be converted from a meat processing plant to a regular office, thus dispensing with the requirement for an ECC.[87] The ECC, however, continued to be required and was eventually secured and submitted for the building permit application. Petitioner claims the revision delayed its work for a month because petitioner had to rely mainly on the verbal instructions of respondent's representatives. Respondent, on the other hand, maintains there was no complete work stoppage. The lack of building plan did not materially hamper the construction because the revision only called

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80 Exhibit "C," RTC records, p. 159.
81 *Id.*
82 CA Decision, *rollo*, p. 94.
83 *Id.* at 95.
84 Exhibit "C," RTC records, p. 159.
85 CA Decision, *rollo*, p. 95.
86 TSN, February 8, 1999, p. 11.
87 TSN, September 27, 1999, pp. 3-5; Exhibit "14-B," RTC records, p. 343.

for a reorientation of the floor plan. Thus, respondent only gave petitioner an extension of 7 days.

We agree with the CA that the revisions merely involved a reorientation of the project, such that petitioner only had to implement a mirror image of the original plan.[88] Engr. Aliño persuasively testified that there was not much effect in the construction schedule because it was still during the excavation for the foundation. As such, work can be done through the guidance of the project engineer. Respondent also gave petitioner a preliminary sketch to guide it on how to continue.[89]

Arch. Sare corroborated Engr. Aliño's testimony. According to Arch. Sare, the revised building plan is only a mirror image of the original one.[90] Mr. Apoderado, on the other hand, failed to specify how drastically different the revised plan is from the original. During his cross-examination, Mr. Apoderado admitted that "not much" had been changed with the plan.[91] We, therefore, uphold the original grant of an extension of 7 days.

However, the revision of the building plan also affected the building permit application because the building plan was one of its supporting documents.[92] The lack of a building permit affected the work of petitioner in such a way that even though there was no complete work stoppage, the work was done surreptitiously and intermittently. Petitioner was wary of getting caught for working without a permit and be penalized accordingly. We find these concerns of petitioner genuine. As early as December 3, 1994, petitioner reminded respondent about the revised plan.[93] In its subsequent letter dated December 13, 1994, petitioner stressed that "at present, [its] work permit covers only the excavation and fencing of the work area as authorized by the Municipality of Makati." [94] Petitioner further informed respondent that without the plan and the building permit, its work would be limited to excavation and gravel fill. Respondent gave petitioner the revised building plan only on January 3, 1995.[95] When it was submitted with the building permit application, the city hall officials questioned petitioner anew on the provisions for the parking area. It was finally re-submitted on February 27, 1995,[96] when the stop work order was already in force. Thus, it may be true that even without a building permit, petitioner kept working, albeit discreetly, under respondent's instructions. But it cannot be denied as well that the lack of building permit prevented petitioner from carrying out its work freely and efficiently. The admission of Engr. Delima is telling:

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88 CA Decision, *rollo*, p. 96.
89 TSN, July 31, 2000, p.5.
90 TSN, September 27, 1999, p. 6.
91 TSN, June 14, 1999, p. 6.
92 TSN, February 8, 1999, p. 12.
93 Exhibit "C," RTC records, p. 159.
94 *Id.*
95 Exhibit "15," *id.* at 345.
96 Exhibit "14-A," *id.* at 344.

> Q: Do you know for a fact also that the plaintiff in this case as early as December 13, 1994 wrote the defendant a letter, through you, informing the defendant that because of the lack of building permit the [timetable] or construction time will be considerably affected?
>
> A: Yes, sir.
>
> Q: In fact, the construction time was really affected, right?
>
> A: Yes, sir.[97]

As such, it is only fair that respondent bear the consequences of the 31-day stop work order of the city hall because it failed in its duty of securing the building permit. Thus, for the delay in securing the building permit, we find that petitioner is entitled to a total extension of 38 days.

Petitioner is entitled to an extension of 40 days for the change orders and extra works.

The CA gave more credence to the testimony of Engr. Aliño that the change orders and extra works petitioner requested extensions for were mere linear activities that did not affect the construction time. The CA also held that contrary to Section 16 of the Construction Agreement,[98] these change orders and extra works were done without the written mutual agreement of the parties.[99]

However, out of the 34-day extension respondent initially granted petitioner, 14 days were allocated for the construction of shear walls, which was one of the change orders and additional works respondent allegedly requested from petitioner.[100] When petitioner requested for re-evaluation, respondent granted an additional extension of 26 days, which appear to cover for the alleged change orders and extra works.[101] In its Answer with Counterclaim[102] dated October 10, 1997, respondent countered that "[petitioner] should be grateful for the grant of a [60-day] extension credit because most of [these] change orders/[revisions] consist of linear activities,

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97 TSN, March 13, 2000, p. 10.

98 Section 16 of the Construction Agreement reads:

> EXTRA WORK OR ALTERATION – Any modification of the scope of work shall be an alteration. Any addition to the scope of work shall be extra work. xxx Alteration or extra work shall be subject to the mutual written agreement between the OWNER and CONTRACTOR. No alteration or extra work shall be binding upon either party in the absence of such written agreement.
>
> The parties shall fix in the said written agreement the alteration or extra work to be performed, the consideration [therefor], and its period of completion. The period or completion under this agreement shall be deemed automatically and correspondingly extended pursuant to the provision of paragraph 3 hereof.

Exhibit "1-B," RTC records, p. 154.

99 CA Decision, *rollo*, pp. 97-98.

100 *Id.* at 81; TSN, July 31, 2000, pp. 15-16.

101 CA Decision, *rollo*, p. 99.

102 RTC records, pp. 20-33.

i.e., they can be performed simultaneously or without interrupting the normal pace of the construction work. In fact, [petitioner] was generously given time extension where credit is not due."[103]

Furthermore, during cross-examination, Engr. Aliño admitted that "[the] extra work, change orders would cover canvassing, procurement, installation and fabrication of materials which would necessitate substantial additional time and money on the part of [petitioner]."[104]

We hold respondent for the above admissions. Notwithstanding the nonconformity with the literal terms of Section 16 of the Construction Agreement, respondent liberally granted extensions for the change orders and extra works. As correctly pointed out by petitioner, "[t]he construction agreement does not nullify the change orders/extra works that were already completed without any written agreement. In fact, Werdenberg had partially paid [therefor] leaving an unpaid balance of only P141,944.93."[105] In its Answer with Counterclaim, respondent indeed stated that petitioner is entitled to Php 141,944.93 for the change orders and additional works.[106]

Thus, we hold that petitioner is entitled to a total extension of 40 days for the change orders and extra works.

Finally, we agree with the CA when it held that petitioner is entitled to an extension of 7 days for the work stoppage ordered by respondent to resolve the boundary dispute with another company, Sinclair Paints.[107] The CA cited the testimony of respondent's witness, Ms. Josephine del Val, confirming that the work stoppage took 7 days.[108] Petitioner should also be entitled to another extension of 6 days, which respondent granted, to cover the holiday breaks.[109]

All told, the extensions in favor of petitioner can be summed up as follows:

21	days for the excavation works
38	days for the building permit application
40	days for the change orders and extra works
7	days for the boundary dispute
6	days for the holidays
112	days in total

103 *Id.* at 26-27.
104 TSN, July 31, 2000, p. 15.
105 Motion for Reconsideration of Petitioner dated June 18, 2004, CA *rollo*, p. 203.
106 RTC records, p. 27.
107 CA Decision, *rollo*, p. 93.
108 *Id.*
109 Exhibit "6-B," RTC records, p. 323.

Respondent is entitled to liquidated damages equivalent to 18 days of delay

The liability for liquidated damages is governed by Articles 2226 to 2228 of the Civil Code,[110] where the parties to a contract are allowed to stipulate on liquidated damages to be paid in case of breach. It is attached to an obligation in order to ensure performance and has a double function: (1) to provide for liquidated damages, and (2) to strengthen the coercive force of the obligation by the threat of greater responsibility in the event of breach. The amount agreed upon answers for damages suffered by the owner due to delays in the completion of the project.[111]

The Construction Agreement provides that upon failure to complete the work agreed upon within the stipulated time, the contractor agrees to pay the owner Php 43,800.00 for every day of delay.[112] As a pre-condition to such award, however, there must be proof of the fact of delay in the performance of the obligation.[113]

We have already ruled that the parties were mutually at fault. Petitioner is entitled to an extension of only 112 days counted from April 7, 1995 or until July 28, 1995. Thus, from July 28, 1995 to August 15, 1995, or a period of 18 days, petitioner had already been in default. Consequently, respondent is entitled to Php 788,400.00 as liquidated damages.

Respondent is entitled to the expenses for the repainting job.

Petitioner wrote respondent a letter of turnover dated August 16, 1995.[114] On August 18, 1995, respondent replied, detailing its comments on the turnover list. [115] A recurring comment was the need to either re-paint or to complete the painting job. Respondent rejected the turnover until such time that petitioner would have "favorably remedied [respondent's] complaints on the defects xxx and generally on workmanship of the building."[116] Petitioner acknowledged these defects in a letter dated October 11, 1995 and informed respondent that it will proceed with repainting.[117] Clearly, the defects in the painting job were covered by the guarantee of petitioner.

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110 Article 2226. Liquidated damages are those agreed upon by the parties to a contract, to be paid in case of breach thereof.

Article 2227. Liquidated damages, whether intended as an indemnity or a penalty, shall be equitably reduced if they are iniquitous or unconscionable.

Article 2228. When the breach of the contract committed by the defendant is not the one contemplated by the parties in agreeing upon the liquidated damages, the law shall determine the measure of damages, and not the stipulation.

111 *Atlantic Erectors, Inc. v. Court of Appeals, supra* note 79 at 64-65.

112 Construction Agreement, Section 3, RTC records, p. 151.

113 *Id.*

114 Exhibit "2," *id.* at 312.

115 *Id.* at 312-314.

116 *Id.* at 314.

117 Exhibit "5," *id.* at 320-321.

The bid proposal[118] of petitioner stipulates the following:

> All works shall be under our guarantee for a period of one (1) year. Any defects that may arise due to poor workmanship and inferior quality of material supplied from the date of acceptance and guarantee period shall be repaired and replaced by us without any cost to the Owner.[119]

Section 15 of the Construction Agreement provides in part:

> 15. GUARANTEE – It is expressly agreed and understood that the CONTRACTOR guarantees the work against all defects of materials and workmanship for a period of (1) one year from the date of issuances [sic] of the letter of acceptance. Any defects discovered during said period shall be made good by the CONTRACTOR at its own expense upon notification in writing by the OWNER. x x x[120]

However, the repainting job still proved deficient. In a letter dated May 31, 1996,[121] respondent informed petitioner that it has taken the initiative to get an outside contractor for the subsisting deficiencies. Respondent subsequently contracted Silver Line Builders for the repainting job in the contract price of Php1, 050,000.00.[122] Petitioner should answer for these expenses, pursuant to Article 1167 of the Civil Code:

> Art. 1167. If a person obliged to do something fails to do it, the same shall be executed at his cost.
>
> This same rule shall be observed if he does it in contravention of the tenor of the obligation. Furthermore, it may be decreed that what has been poorly done be undone.

Section 6 of the Construction Agreement also provides, in part, that if the work is found defective in any material respect due to the fault of the contractor, the defects should be removed and replaced and all expenses of satisfactory reconstruction of the replaced materials shall be for its sole account.[123]

Respondent is entitled to a 10% retention fee.

In *H.L. Carlos Construction, Inc. v. Marina Properties Corporation,*[124] we held that in the construction industry, the 10 % retention money is a portion of the contract price automatically deducted from the contractor's billings, as security for the execution of corrective work—if

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118 Exhibit "19," *id*. at 366-367.
119 *Id.* at 367.
120 Exhibit "A," *id.* at 154.
121 Exhibit "3," *id.* at 315-317.
122 Exhibit "32," *id.* at 389.
123 Exhibit "A," *id.* at 152.
124 G.R. No. 147614, January 29, 2004, 421 SCRA 428.

any—becomes necessary.[125] Section 14 of the Construction Agreement provides the conditions for the release of the 10% retention fee to wit:

> 14. FINAL PAYMENT – Final payment of (10%) Ten percent of the contract price retained shall be made within thirty (30) days from the date of issuance by the OWNER of the letter of acceptance **provided that the CONTRACTOR shall submit to the OWNER a sworn statement showing that all the taxes due from it as a result of the contract and all obligation for materials used and labor employed, have been paid for and that no more outstanding claims for any obligations incurred by the CONTRACTOR as a result of the contract exist**; provided, further, that nothing herein contained shall be construed to waive the rights of the OWNER, which it hereby [reserves], to reject the whole or any portion of the aforesaid works should the same be found to have been constructed in violation of the plans and specifications or any of the conditions or documents of this contract.[126] (Emphasis supplied)

Petitioner has complied with the conditions, which are pre-requisites for the release of the retention fee. Hence, the CA was correct in granting the same to respondent.

WHEREFORE, the petition is **PARTLY GRANTED** and the assailed Resolution MODIFIED. Petitioner is entitled to an award of Php 2,767,290.768 computed as follows:

P 4, 771,222.59	– unpaid balance under the Agreement
+ 141,944.93	– unpaid balance for change orders
Php 4,913,167.52	– Total amount due to BFC
Less: 788,400.00	– liquidated damages by BFC
Php 4,124,767.52	
Less: 1,050,000.00	– expenses for repainting job due to Werdenberg
Php 3,074,767.52	– amount due to BFC
Less: 307,476.752	– 10% retention fee by Werdenberg
Php 2,767,290.768	– amount due to BFC

The amount due BFC shall be with interest of 6% interest per annum from the filing of the complaint until full payment.[127]

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125 *Id.* at 440.
126 Exhibit "A," RTC records, pp. 153-154.
127 *Nacar v. Gallery Frames*, G.R. No. 189871, August 13, 2013, 703 SCRA 439, 456.

SO ORDERED.

FRANCIS H. JARDELEZA
Associate Justice

WE CONCUR:

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

DIOSDADO M. PERALTA
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

MARVIC M. V. F. LEONEN
Associate Justice

ATTESTATION

I attest 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.

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
FEB 03 2016