



Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

**ENGR. EMELYNE P. CAYETANO-
ABAÑO, OPERATING UNDER
THE NAME AND STYLE JACOB
JOSEPH BUILDERS & PLANNERS,
AND ENGR. DARIO C. ABAÑO,**
Petitioners,

G.R. No. 179545

Present:

CARPIO,
Chairperson,
BRION,
PEREZ,
SERENO, and
REYES, *JJ.*

-versus-

**COLEGIO DE SAN JUAN DE
LETRAN-CALAMBA,**
Respondent.

Promulgated:

JUL 11 2012

X-----X

DECISION

PEREZ, J.:

The Case

Before this Court is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court assailing the Decision¹ dated 31 August 2007 of the Court of Appeals (CA) in CA-G.R. SP No. 99315 which set aside the Final

¹ CA Rollo, pp. 513-528. Penned by Associate Justice Vicente S.E. Veloso with Associate Justices Juan Q. Enriquez, Jr. and Marlene Gonzales-Sison, concurring.

Award² dated 7 June 2007 of the Construction Industry Arbitration Commission (CIAC) in CIAC Case No. 20-2006 ordering Colegio De San Juan De Letran-Calamba (respondent) to pay herein Engr. Emelyne P. Cayetano-Abaño, operating under the name and style Jacob Joseph Builders & Planners, and Engr. Dario C. Abaño (petitioners) the total sum of ₱13,903,722.94.

The Antecedent Facts

In early 2003, respondent, an educational institution created and existing under Philippine laws, decided to build a central library building on its campus which would likewise house the classrooms and laboratory facilities of its Nursing program.³ Petitioners were commissioned to undertake the project.⁴ The corresponding Contract⁵ (the Contract) was executed on 17 November 2003 for a total project cost of ₱52,319,927.20.⁶ In connection with this, petitioners gave respondent a Technical Specifications Book⁷ which formed part of the Contract and which detailed how petitioners would implement the construction project. The parties agreed on a project duration of fourteen (14) months effective upon the signing of the Contract and the issuance of the necessary building permit. The requisite building permit was issued on 27 January 2004;⁸ hence, petitioners had until 27 March 2005 to complete the project.

On 16 February 2004, petitioners reminded respondent of the down payment consisting of 25% of the contract price, or a sum equivalent to

² Id. at 57-86.

³ *Rollo*, p. 527, Comment of respondent on the Petition for Review.

⁴ CIAC Records, Envelope No. 6, Terms of Reference, pp. 2-3.

⁵ *CA rollo*, pp. 320-321.

⁶ At the parties' first meeting, petitioners' proposal consisted of a total contract price of ₱64.2M, which was later reduced to ₱55M. Further negotiations resulted in the final contract price of ₱52.319M, *Rollo*, p. 542, Comment of respondent on the Petition for Review.

⁷ CIAC Records, Envelope No. 1, Annex "E" of Complaint with Request for Arbitration.

⁸ *CA rollo*, p. 322.

₱13,079,981.80. By this date, respondent had already paid a total of ₱6,000,000.00 starting 5 December 2003. The full amount of the down payment was settled on 27 February 2004.⁹

On 16 April 2004, upon petitioners' request and representation that they needed urgent substantial funding, respondent paid ₱10 million although no progress report had been submitted.¹⁰

Petitioners again requested payment on 12 July 2004 in the amount of ₱14,325,196.07 for work accomplishment equivalent to 27.38%. This time respondent required a progress report to substantiate the request for payment.¹¹ Accordingly, on 2 August 2004, petitioners submitted their First Progress Billing Report covering the period 1 December 2003 to 30 June 2004. Respondent paid the billed amount in installments beginning 28 July 2004 until 26 October 2004.¹²

In their First Progress Billing Report, petitioners indicated "28 February 2005" as the completion date of the project.¹³ As a result, respondent sent a Memorandum¹⁴ to petitioners, dated 21 January 2005, requesting documents necessary for the procurement of a Certificate of Occupancy. Instead of delivering the requested documents, petitioners submitted its Second Progress Billing Report on 8 February 2005, demanding payment of ₱9,586,057.06 and indicating a new move-out date:

⁹ Id. at 323, Progress Billing Chart.

¹⁰ *Rollo*, p. 529, Comment of respondent on the Petition for Review; *CA rollo*, p. 60, Final Award of the CIAC.

¹¹ *CA rollo*, p. 60.

¹² Id. at 323, Progress Billing Chart.

¹³ Id. at 90, Condensed Physical Report.

¹⁴ CIAC Records, Envelope No. 1, Annex "H."

April 2005 – a date fixed without prior consultation with and approval from respondent.¹⁵

Subsequently, in a meeting held on 28 February 2005, petitioners undertook to turn over on 15 March 2005 the first two floors of the building and to make a partial turn over on 15 April 2005 of the third floor. For its part, respondent committed to pay ₱4,994,927.20 out of the ₱14,994,927.20 balance from the contract price. While respondent complied with its undertaking, petitioners failed to make even one partial turn over. Thus, 14 months after the construction permits were secured, or by 27 March 2005, the building had not been completed.¹⁶

On 30 April 2005, petitioners submitted to respondent its Final Billing: (1) indicating a 100% completion of the project; (2) informing respondent that its unpaid balance was ₱10 million; and (3) requesting a final inspection of the building.¹⁷ The joint inspection was carried out on 16 and 17 May 2005. During the two-day inspection, serious problems regarding workmanship and the materials used were discovered and documented by respondents. The parties agreed that all the necessary corrective and completion works on the project would be done in accordance with the inspection results.¹⁸

Petitioners resumed repair, rehabilitation and cleaning works on the building on 13 June 2005 only. At the same time, petitioners wrote respondent two letters: first, expressing readiness to comply with their undertaking to accomplish the incomplete works, but denying that they

¹⁵ *Rollo*, p. 531, Comment of respondent on the Petition for Review; *CA rollo*, p. 61 Final Award of the CIAC.

¹⁶ *Id.*

¹⁷ CIAC Records, Envelope No. 6, Terms of Reference, p. 5, No. 21.

¹⁸ *Rollo*, p. 532, Comment of respondent on the Petition for Review; *CA rollo*, p. 62, Final Award of the CIAC.

conformed to the punch list resulting from the joint inspection and second, demanding arbitration for respondent's unpaid amounts.¹⁹ Respondent replied through counsel, asserting that petitioners cannot deny having expressed conformity to the punch list report after accepting the obligation to correct and complete the project based on the same report. Respondent also rejected the demand for arbitration for being premature.²⁰

On 8 July 2005, petitioners' counsel wrote respondent to convey that petitioners had fully accomplished the project under the Contract, including the agreements reached on 6 June 2005, and requested a joint inspection anew. The second joint inspection was conducted on 25 July 2005. The following day, 26 July 2005, respondent wrote petitioners a letter detailing the various defects and deficiencies in the building that need to be corrected and completed before respondent finally accepts the project and pay the final billing. The defects highlighted were: (1) the brand of electrical wirings used were not "Phelps Dodge" or its accepted equivalent, as specified in the Contract; (2) absence of any waterproofing in the gutters; (3) uneven floor patterns; and (4) absence of a number of electrical materials required to be installed. Respondent reiterated its demand for corrective and other rehabilitative works on the project in a letter dated 12 August 2005.²¹

In another meeting held on 26 August 2005, petitioners demanded full payment of its billings. No payment from respondent apparently forthcoming, petitioners, on 26 September 2005, gave respondent a second notice and demand for arbitration to press settlement of their unpaid claims. Petitioners named their arbitrator and gave respondent fifteen days within which to respond.²²

¹⁹ CIAC Records, Envelope No. 1, Annexes "Q" and "R" of the Complaint.

²⁰ Id., Annex "S."

²¹ Id., Annex "W."

²² Id., Annex "Y."

In a letter²³ dated 10 October 2005, counsel for respondent denied the request for arbitration and insisted that petitioners enter the construction site within seven days from notice to complete and correct all the unfinished and defective works consistent with respondent's letter of 26 July 2005. Respondent warned petitioners that should they ignore the matter, they would be considered to have abandoned the project, giving respondent the right to take full possession of the building and allow other contractors to complete the unfinished works, with a right to collect the costs of completion from petitioners.

Petitioners did not respond to respondent's ultimatum within the given period; neither did they undertake remedial measures to correct and finish the deficiencies in the project. With no word either from petitioners or their counsel, respondent was compelled to take-over the building on 19 October 2005 in the presence of *barangay* and police officials from Calamba City. Upon take-over of the building, respondent re-confirmed and re-documented the various defects and deficiencies earlier noted and determined.²⁴

In order to ascertain the extent of petitioners' accomplishment on the project and its corresponding value, respondent engaged the services of Davis Langdon and Seah Philippines, Inc. (DLSPI), a specialized quantity surveyor firm. Contrary to petitioners' claim of 100% project completion, the cost analysis and evaluation performed by DLSPI revealed that the building was only 94.12% complete and that the actual cost of work performed was worth only ₱49,244,814.09. Aggrieved, respondent filed an arbitration complaint before the CIAC pursuant to the arbitration clause contained in the Technical Specifications Book.²⁵

²³ Id., Annex "Z."

²⁴ *Rollo*, p. 535, Comment of respondent on the Petition for Review; *CA rollo*, p. 63, Final Award of the CIAC.

²⁵ Id. at 536.

Respondent claimed that it is entitled to payment in the total amount of ₱18,923,519.54 representing expenses incurred in the construction of temporary facilities, hiring of consultants for the detailed inspection of the building, damages, attorney's fees and arbitration expenses.²⁶

The Decision of the CIAC

After hearing, the CIAC issued a Final Award in favor of petitioners, ordering respondent to pay the following amounts:

Unpaid balance of Progress Billing No. 2 dated 10 February 2005	₱4,581,129.86
Final Billing	5,418,870.14
Monthly surcharge of 2% on unpaid claims	799,999.99
Moral damages	1,500,000.00
Exemplary damages	500,000.00
Attorney's fees and litigation expenses	800,000.00
Arbitration cost	<u>303,722.94</u>
TOTAL:	₱13,903,722.94 ²⁷

The award of the CIAC is basically anchored on the fact that respondent did not pay the down payment and progress billings within the time and manner provided for in the Contract and Technical Specifications.

According to the CIAC, respondent's legal basis for its claims was petitioners' failure to deliver on schedule a complete building pursuant to their Contract. The CIAC noted, however, that respondent did not pay the 25% down payment and progress billings in accordance with the Contract

²⁶ CA *rollo*, p. 73.

²⁷ Id. at 85.

and Technical Specifications. Under the Contract, the down payment should be paid within seven (7) days from the signing of the Contract, or on 24 November 2003, since the Contract was signed on 17 November 2003. However, respondent paid the full amount of the down payment only on 27 February 2004 or three (3) months after the Contract was signed and on a staggered basis starting 9 December 2003. Also, by 12 July 2004, petitioners had accomplished works on the project equivalent to ₱14,325,196.07 but respondent paid the amount over a period of more than three (3) months starting 28 July 2004 up to 26 October 2004. Then, on 8 February 2005, petitioners submitted their second progress billing for the sum of ₱9,586,057.06 but respondent paid only ₱4,994,927.20, likewise on a staggered basis from March to April 2005. Under the Technical Specifications Book, approved requests for payment should be paid within five (5) days from date of approval of the request or the issuance of a certificate of payment by the Architect.²⁸

Considering that respondent did not pay the down payment and progress billings on time, the CIAC declared that it cannot demand that petitioners deliver on time a 100% completed building. The CIAC held that the Contract between petitioners and respondent created reciprocal obligations between them so that respondent, who did not comply faithfully with its terms, cannot demand performance by petitioners of their obligations thereunder, nor recover damages by reason of its own breach.²⁹

The CIAC justified its grant of the amounts claimed by petitioners in the following manner:

²⁸ Id. at 77-78.

²⁹ Id. at 78.

1. Petitioners are entitled to their claim for the unpaid balance of Progress Billing No. 2 because respondent refused to pay the amount, not because there was no accomplishment, but because it allegedly represented only 18.32% performance over a 6-month period compared to an 80% accomplishment earlier over the same period of time.³⁰

2. Petitioners should be paid their Final Billing covering accomplished works from 9 February to 30 April 2005 because the works performed resulted in the completion of the project as evidenced by the fact that respondent took over the building and had it blessed in the presence of officials from the Commission on Higher Education (CHED) and other guests and since then respondent has been using it for its purpose as a college of nursing and central library. The CIAC considered as “wrong” the Cost Evaluation Report of DLSPI engineer Mary Joyce C. Areola (Engr. Areola) stating that the percentage of completion of the building was only 94.12% because she did not consider the revised plans, Bill of Quantities (BOQ) and detailed cost estimates. The CIAC believed that the opinion of petitioners’ expert witness, Engr. Eustaquio T. Coronel (Engr. Coronel), that completion was 100% based on the joint inspection, review of construction plan, as-built plan, BOQ, and comparative table of costs, had more weight. The ocular inspection conducted by the Arbitration Tribunal on 12 February 2007 also gave it strong basis to support the conclusion that completion was 100% as the items inspected were observed to be punch list in nature.³¹

3. Considering respondent’s failure to pay the amounts demanded by petitioners, the latter are entitled to their claim for a monthly surcharge of 2% on the total of their claims from the time they were due until fully paid. The CIAC held that the reckoning date of the 2% surcharge on the unpaid

³⁰ Id. at 80.

³¹ Id. at 81.

Second and Final Billings totaling ₱9,999,999.99 is 30 April 2006, the date of expiration of the one (1) year retention period. Thus: from 30 April 2006 to 17 August 2006 (date of filing of the arbitration case), there are four (4) months. Hence, the total amount of the surcharge is ₱799,999.99 (₱9,999,999.99 x 4 months = ₱39,999,999.96 x 2%).³²

4. Petitioners are entitled to moral damages for respondent's gross violation of their contract amounting to bad faith or malicious breach thereof. Respondent did not only fail to pay the down payment within seven (7) days from the signing of the Contract, it also paid the amount on a staggered basis. When respondent paid the sum of ₱4,994,927.20 for the Second Progress Billing, the same was paid in installments but the remaining balance of ₱4,581,129.86 was not paid. Lastly, respondent refused to pay the final billing of ₱5,418,870.14 even if the building had been completed. These circumstances drained the petitioners financially and emotionally. They had to apply for additional loans to finish the project. Their reputation and credit standing were adversely affected. They could not participate in biddings for other projects because of their financial problems.

Considering that petitioners are entitled to moral damages, the CIAC ruled that they are also entitled to recover exemplary damages by way of example or correction for the public good.³³

5. Petitioners are entitled to recover attorney's fees inasmuch as they retained the services of counsel to protect their rights and interests under the contract.³⁴

³² Id. at 81-82.

³³ Id. at 82-83.

³⁴ Id. at 83.

6. Respondent should pay for the entire cost of arbitration having unnecessarily filed the Request for Arbitration. The CIAC administrative staff reported that respondent's share in the cost of arbitration was 45.34%, or the amount of ₱251,935.57 whereas petitioners' share was 54.66%, or the amount of ₱303,722.95. Hence, respondent should pay petitioners the sum of ₱303,722.95.³⁵

The Ruling of the Court of Appeals

On appeal by respondent, the CA completely reversed and set aside the ruling of the CIAC. The challenged Decision held:

x x x CIAC opined that “[respondent] cannot demand fulfillment of [petitioners’] obligation to deliver a 100% completed project on time because [respondent] failed to pay the 25% down payment and the progress billings as provided in the contract.” CIAC construed the argued “25% down payment” as a suspensive condition to [petitioners’] obligation to deliver a 100% completed building.

When a contract is subject to a suspensive condition, its birth or efficacy can take place only if and when the event which constitutes the condition, happens or is fulfilled. If the suspensive condition does not take place, the parties would stand as if the conditional obligation had never existed. Pertinently, the parties’ x x x **Contract** provides:

“1. That the CONTRACTOR shall complete the project for the period of fourteen (14) months **effective upon signing of this contract and issuance of necessary permits.**” x x x

Concededly, the argued suspensive condition of prior payment of “25% down payment” **does not exist**. Neither does said paragraph mandate that completion of the project is dependent **on [respondent’s] payment of “progress billings”**. Clearly, the CIAC gravely erred when it read into the contract a suspensive condition that did not exist. x x x.

If the parties’ contract was subjected to any suspensive condition, the same was limited to: (1) the **parties’ signing of the contract**; and (2) the issuance of necessary permits, particularly, **the issuance of a building permit**. It is undisputed that the parties’ contract was signed on “17

³⁵

Id.

November 2003”, and “**the building permit was secured on January 27, 2004**”. When, therefore, the CIAC conceded that:

“Considering that **the building permit was secured on January 27, 2004, the project should be completed on March 27, 2005** and [petitioners] **admitted that the building was completed in April, 2005** x x x.”

it became jurisdictionally obliged to **deny [petitioners’] claims** and instead, **grant [respondent] its claims** which, after all, were admittedly raised for determination by the CIAC. x x x.³⁶ (Emphases in the original).

Thus, the CA concluded, the CIAC had no basis in granting the monetary awards contained in its challenged decision. According to the CA, respondent and not petitioners deserved the awarded moral damages, exemplary damages, and attorney’s fees, in addition to actual and liquidated damages. Thus:

Resolving now the question of how much each of the parties here owe each other, [petitioners] contends that the agreed project cost was “**₱52,319,927.20**.” Since per “DLSPI’s report” the project was only “94.12% finished at the time [respondent] took over the project, [petitioners’] billable cost would therefore amount to only “**₱49,244,814.99**.” And considering that the **total payments made by [respondent]** to [petitioners] amounted to **₱42,319,927.20**, it then follows that [petitioners’] collectible amounts would only be “**₱6,924,887.79**.” Deducting from it the **actual expenses** incurred by [respondent] in finishing the **work on overtime basis**, which as conceded by CIAC in its final award, amounted to “**₱2,959,534.10**”, petitioners’ reconciled collectible would only amount to “**₱3,965,353.69**”.

Applying [petitioners’] aforesaid collectible to what it owes respondent as liquidated damages in the sum of **₱10,463,985.44**, [petitioners] would now owe [respondent] **₱6,498,631.75**”. Adding thereto the moral damages of **₱1,500,000.00**, exemplary damages of **₱500,000.00**, and attorney’s fees of **₱800,000.00** which the **CIAC held to be due to the aggrieved party**, [petitioners are] consequently obligated to pay [respondent] **₱9,298,631.75**.

Finally, it being clear here that the **erring party** [are the petitioners] (and not [respondent]), it is duty bound to pay CIAC the **Arbitration cost of ₱303,722.95**.³⁷ (Emphases in the original).

³⁶ Id. at 523-525.

³⁷ Id. at 527-528.

As a result of the foregoing disquisition of the CA, petitioners are now before us praying for, among others, the setting aside of the Decision of the CA and the reinstatement of the Final Award of the CIAC.

The Issues

The issues for resolution in this case are:

1. Whether or not petitioners were able to complete the project on time; and
2. Whether or not petitioners were able to deliver a 100% complete building.

Our Ruling

At the outset, it must be pointed out that the issues presented in this case are factual in nature and, therefore, generally not subject to review by this Court. As a rule, in the exercise of its power of review, the Supreme Court is not a trier of facts and does not normally undertake the re-examination of the evidence presented by the contending parties during the trial of the case.³⁸ Nevertheless, there are recognized exceptions to this rule, one of which is when the findings of fact of the lower court and the Court of Appeals are conflicting,³⁹ as in the case at bar.

Here, a glaring contradiction exists between the factual findings of the CIAC and the CA. While the CIAC granted most of petitioners' claims and none of respondent's, the CA, on the other hand, completely reversed the award of the CIAC in favor of petitioners and granted respondent's claims.

³⁸ *Ong v. Bogñabal*, G.R. No. 149140, 12 September 2006, 501 SCRA 490, 501.

³⁹ *Ek Lee Steel Works Corporation v. Manila Castor Oil Corporation*, G.R. No. 119033, 9 July 2008, 557 SCRA 339, 348, citing *Ong v. Bogñabal*, supra; *Yao v. Matela*, G.R. No. 167767, 29 August 2006, 500 SCRA 136.

In view of the diametrically opposed findings and conclusions of the CIAC and the CA, a review of the respective factual determinations of the two tribunals is in order, if only to fully and finally settle the conflicting claims of the parties.

From the narrated facts of this case, it is apparent that both parties failed to strictly comply with the provisions of their contract. The CIAC and the CA affirm this in their respective decisions. Thus, respondent failed to pay the down payment on the contract on time; whereas petitioners, on the other hand, failed to deliver a completed building within the period stipulated in the contract, did not follow the procedure for requesting payments as specified in the Contract, and made changes in the execution of the terms of the Contract without respondent's approval.

Respondent Letran's Breach

Paragraph 6(a) of the Contract provides that "the OWNER [respondent] shall pay the CONTRACTOR [petitioners] x x x 25% down payment payable within seven days upon signing of this Contract." This provision is clear and unqualified: thus, the full amount of ₱13,079,981.80, representing 25% of the contract price of ₱52,319,927.20, should have been paid by respondent not later than 24 November 2003, the seventh day after the signing of the Contract. Instead, respondent paid the down payment in installments beginning 9 December 2003, finally settling the amount in full on 27 February 2004 or three (3) months after the Contract was signed.

Respondent is, therefore, indisputably guilty of violating the terms of the Contract on the payment of the down payment.

Petitioner Contractor's Breach

1. Failure to finish the project on time

Paragraph 1 of the Contract states that “the CONTRACTOR shall complete the project for the period of fourteen (14) months effective upon the signing of this contract and issuance of necessary permits.” The Contract was signed on 17 November 2003 and the corresponding building permit was issued on 27 January 2004. Hence, petitioners should have completed the building on 27 March 2005. However, contrary to petitioners’ claim and the findings of the CIAC, the records of this case clearly reveal that as of the latter date, the building had not been turned-over to respondent because the same had not been finished. Thus:

1. Respondent’s Second Progress Billing Report dated 8 February 2005 indicated April 2005 as the move-out date;⁴⁰
2. The Final Billing,⁴¹ stating that project completion is 100%, covered the period 9 February 2005 to 30 April 2005 – proof that by 27 March 2005, the date the project should have been completed, construction was still ongoing;
3. The series of communication between petitioners and respondent after the 16-17 May 2005 joint inspection of the building, such as:
 - a.) the letter of respondent dated 3 June 2005 inviting petitioners to a meeting to discuss matters in connection with the project;⁴²

⁴⁰ *Rollo*, p. 179.

⁴¹ CIAC Records, Envelope No. 4, Exhibit “75” of “Submission of List of Exhibits including Additional Exhibits.”

⁴² *Id.*, Envelope No. 2, Annex “K” of the Affidavit of Rodolfo Ondevilla.

- b.) the letter of respondent dated 8 June 2005 giving petitioners notice to proceed with the repair and rework of the project;⁴³
- c.) the letter of petitioners dated 8 July 2005 informing respondent of their full accomplishment of the project;⁴⁴
- d.) the letter of respondent dated 26 July 2005 detailing the various items which petitioners need to complete and correct before final acceptance of the project and payment of the final billing;⁴⁵
- e.) the letter of respondent to petitioner dated 12 August 2005 demanding prompt completion of works as detailed in its 26 July 2005 letter;⁴⁶
- f.) the letter of counsel for petitioners dated 16 August 2005 requesting a final meeting between the parties;⁴⁷ and
- g.) the letter of respondent dated 10 October 2005 demanding that petitioners re-enter the construction site within seven (7) days from notice to complete and repair all unfinished and defective works, failing which, petitioners would have confirmed abandonment of the project,⁴⁸

all demonstrate that as of that period, the project still had not been completed;

- 4.) The following documents, prepared during the days following the two-day joint inspection of the building, also confirm the non-completion of the project within the period specified in the Contract:

- a.) Checklist and Construction Schedule dated 23 May 2005

⁴³ Id., Envelope No. 1, Annex "P" of respondent's Complaint before the CIAC.

⁴⁴ Id., Annex "T."

⁴⁵ Id., Annex "V."

⁴⁶ Id., Annex "W."

⁴⁷ Id., Annex "X."

⁴⁸ Id., Annex "Z."

specifying the areas of the building needing completion and/or correction and the corresponding action to be taken by petitioners thereon;⁴⁹

b.) Checklist and Construction Schedule dated 8 June 2005 likewise enumerating the items to be completed/corrected by petitioners pursuant to the joint inspection conducted on 16 and 17 May 2005;⁵⁰

c.) Tabulation of completion/corrective works done (used during the second joint inspection of 25 July 2005);⁵¹ and

d.) Field Reports of respondent's Project Evaluating Committee (PEC) dated 13-17 June 2005, 22-23 June 2005, 29-30 2005, and 8 July 2005, respectively, documenting the monitoring done by the PEC of the completion/corrective works carried out by petitioners;⁵²

5.) The building was not ready for use by the time classes opened in June 2005, as in fact, its blessing took place only in October⁵³ of that year, after respondent was forced to take over the building. As declared by respondent: When the school year opened in June 2005, the classrooms in the new building were still unavailable.⁵⁴ In fact, the second and third floors were still under construction; as a result of which, the municipal building officials did not allow the use of the

⁴⁹ Id., Annexes "12-I" to "12-L" of petitioners' Answer with Counterclaims.

⁵⁰ Id., Annexes "12-D" to "12-G."

⁵¹ Id., Annexes "19-D" to "19-I."

⁵² Id., Envelope No. 2, Annexes "N" to "N-7" of the Affidavit of Rodolfo Ondevilla.

⁵³ *Rollo*, p. 254, No. 30 of the admitted facts of the Terms of Reference.

⁵⁴ CIAC Records, Envelope No. 5, Memorandum of Claimant (respondent herein), p. 16.

building;⁵⁵

- 6.) Even petitioner Emelyne Abaño, in her Affidavit dated 17 January 2007, admitted her and her co-petitioners' failure to complete the building on time. Thus:

Q: Despite the faults and broken promises of the claimant Letran, when did you complete the construction of the building?

A: **We completed the construction of the building by month of April 2005.** x x x;⁵⁶ (Emphasis supplied)

7. The CIAC likewise acknowledged petitioners' failure to finish the project on time in its Final Award when it held:

Considering that Claimant has not paid the 25% down payment and the accepted progress billings on time as provided in the Contract and Technical Specifications it is not entitled to demand that Respondent JJBP delivers on time a one hundred (100%) completed building x x x.⁵⁷

Based on the foregoing, there is no doubt that petitioners failed to comply with their undertaking to complete the building on 27 March 2005.

Petitioners and the CIAC fault respondent's failure to pay the down payment and the progress billings in full and on time for the delay in the completion of the project.

It should be noted that, aside from Paragraph 6(a) of the Contract which required respondent to pay a 25% down payment within seven (7) days from the signing of the Contract, the Technical Specifications Book charges respondent with the obligation of paying the progress billings

⁵⁵ Id., quoting from Envelope No. 7, TSN, 12 February 2007, p. 122.

⁵⁶ Id., Envelope No. 4, Paragraph No. 9 of Engr. Emelyne's Affidavit.

⁵⁷ *Rollo*, p. 125.

“within five days from the date of approval of a Request for Payment or issuance of a Certificate of Payment by the Architect.”⁵⁸

Significantly, the Transcripts of Stenographic Notes (TSNs) of the hearings held before the CIAC reveal that petitioners, through Engr. Emelyne Abaño, agreed to a staggered payment of the First Progress Billing. Hence:

MR. R. C. ONDEVILLA [respondent’s comptroller]:

x x x when she [Emelyne] submitted the billing for ₱14 million, Exhibit “H”, [1st Progress Billing] she was actually asking already for the payment. So, Father Roland, I, and she had a meeting, **we’ll just scheduled [sic] the payment.** x x x.

x x x x

ATTY. V. F. ABAÑO [counsel for petitioners]:

Did you make that payment?

MR. R. C. ONDEVILLA:

Yes.

ATTY. V. F. ABAÑO:

How much? You said it was ₱1.3 million or ₱14 million?

MR. R. C. ONDEVILLA:

That was the first payment.

ATTY. V. F. ABAÑO:

And when were the others?

MR. R. C. ONDEVILLA:

And we paid ₱3.5 million every other fifteen days.

x x x x

ATTY. V. F. ABAÑO:

So, that amount that you said was promised was paid when, the last, was completed when?

MR. R. C. ONDEVILLA:

That was actually **completed based on schedule.**

ATTY. R. C. CREENCIA [counsel for respondent]:

⁵⁸ Id. at 575, Par. 6 of the Technical Specifications.

The schedule, your Honor, is found in paragraph 12 in the Terms of Reference.

x x x x

MR. R. C. ONDEVILLA:

That was a very informal meeting, your Honor. That is only following up the payment actually. So, this is actually the one we had and **she agreed to this schedule.** x x x.⁵⁹ (Emphases supplied).

Likewise, with respect to the 2nd Progress Billing, the “Construction Updates and Other Details” submitted by petitioners to respondent on 8 March 2005 provides as follows:

RE: Owner’s Compliance

Partial payment of Php4,994,927.20 from the remaining balance of Php14,994,927.20 be paid in *staggered basis* within the month of March 2005.⁶⁰

Considering that petitioners agreed to a staggered payment of the progress billings, respondent cannot be held to have violated the aforequoted provision of the Technical Specifications, contrary to the allegation of petitioners and the finding of the CIAC. Having agreed to the payment of the progress billings in installments, petitioners cannot now claim that the same caused delays in the project.

In any case, the records confirm that despite respondent’s delay in the payment of the down payment and the staggered payment of the progress billings, construction was actually ahead of schedule. Thus:

1. Petitioners’ 1st Progress Billing Report indicated a revised completion period of 12 months from the original contract duration of 14 months. Thus, the revised completion date was set to 31 December 2004 and

⁵⁹ CIAC Records, Envelope No. 7, TSN of 29 January 2007, pp. 167-170.

⁶⁰ Id., Envelope No. 2, Annex “D-1-B” of the Affidavit of Rodolfo Ondevilla.

the move-out date to 28 February 2005;⁶¹

2. Construction of the building began only on 27 January 2004, the date when the building permit was issued. By this time, however, respondent had already paid petitioners a total of ₱6 million;⁶²

3. More telling is the testimony of petitioner Emelyne Abaño during the hearings before the CIAC:

ATTY. B. G. FAJARDO (Chairman, Arbitration Panel):

The delay in the payment of the down payment, did it cause delay?

x x x x

ENGR. E. P. CAYETANO-ABANÑO:

In one way or another, it really caused the delay, in one way or another. But **it was not really the main point**. There are so many factors contributing to the delay, and **I cannot single out the payment alone**, the rain alone or the weather alone, or the cause of delay by trade and subcontractors hired by the owner. x x x.

x x x x

ATTY. R. C. CREENCIA:

Would you agree with me Madame Witness, that the down payment, the schedule by which the down payment was fully settled, would not have caused the delay, because as of your August 2 payment certificate no. 1, you in fact reported that the actual physical accomplishment is [sic] already 80%. Would you agree with me Madame Witness?

ENGR. E. P. CAYETANO-ABANÑO:

Yes, I agree.⁶³

x x x x

ATTY. R. C. CREENCIA:

And in your request for payment, you reported that you are 80% complete?

ENGR. E. P. CAYETANO-ABANÑO:

⁶¹ *Rollo*, p. 137.

⁶² Id. at 340, Progress Billing Chart.

⁶³ CIAC Records, Envelope No. 7, TSN, 31 January 2007, pp. 67-68.

Yes, **at that time, we are [sic] ahead of schedule.** x x x.⁶⁴
(Emphases supplied.)

Thus, petitioners' claim that the delay in the completion of the project was due to respondent's delayed and staggered payments falls flat in the light of the aforementioned circumstances.

It must be emphasized that the Technical Specifications Book specifically states that "time is an essential feature of this Contract" and since the Technical Specifications Book was prepared by petitioners themselves, they were well aware of the importance of finishing the project on time.

Besides, number 4 of Paragraph 1.03C of the Technical Specifications specifically authorized petitioners to request for an extension of time to complete the project in case of delays, as follows:

4. EXTENSION OF TIME: The Contractor will be allowed an extension of time based on the following conditions:
 - a. Should the Contractor be obstructed or delayed in the prosecution or completion of the work by the act, neglect, delay, or default of the Owner or any other Contractor employed by the Owner on the work; strikes, lockouts, or by Act of God such as fire, flood, lightning, earthquakes, typhoons, by act of the Owner, or by delay authorized by the Architect pending arbitration, then the Contractor shall within ten (10) days from the occurrence of such delay file the necessary request for extension. x x x.⁶⁵

If petitioners truly believed that the delayed and staggered payments of respondent was jeopardizing the early or scheduled completion of the building, they could have filed a written request to extend the due date of the project pursuant to the afore-quoted provision of the Contract. Petitioners, however, chose not to avail of this prerogative. Hence, they cannot now shift

⁶⁴ Id. at 71.

⁶⁵ *Rollo*, p.572.

the blame to respondent for their own lapse.

2. Failure to deliver a complete building

a.) 94.12% completion as found by DLSPI vs. 100% completion as determined by the CIAC

The report of DLSPI, the quantity surveyor engaged by respondent to ascertain the extent of work accomplished by petitioners on the project, indicate a 94.12% work completion, valued at ₱49,244,814.09. The ocular inspection conducted by the CIAC, on the other hand, convinced its arbitrators that petitioners' accomplishment on the project is 100%.

After a thorough and comprehensive study of the records of this case, particularly the exhibits submitted by the parties, this Court finds and so holds that the DLSPI report is more reliable.

In the first place, contrary to the allegation of petitioners and the finding of the CIAC that the report prepared by DLSPI was based on the unrevised plans, the report itself states that the contract cost is ₱52,319,927.20 – a clear indication that DLSPI relied upon the revised plans and not the original ones. It will be recalled that the contract price originally proposed by petitioners was ₱64.2 Million. This was later on reduced to ₱55 Million, and after further negotiations, the contract price of ₱52,319,927.20 was finally agreed upon by the parties.⁶⁶ This latter amount was what was reflected in the report of DLSPI. Notable are the following:

1. Page D / 1 (Summary) of the report states that the contract cost is

⁶⁶ At the parties' first meeting, petitioners' proposal consisted of a total contract price of ₱64.2M, which was later reduced to ₱55M. Further negotiations resulted in the final contract price of ₱52.319M. *Rollo*, p. 542, Comment of respondent on the Petition for Review.

₱52,319,927.20;⁶⁷

2. Table 1 of page D / 2 of the report (Cost of the items considered in the report) likewise indicates a contract cost of ₱52,319,927.20;⁶⁸
3. In the computation of liquidated damages to which respondent may be entitled, DLSPI once more based the amount on the “Original Contract Value” of ₱52,319,927.20;⁶⁹
4. Appendix A-1 (Summary of Cost) of the report states a total contract cost of [₱]52,319,927.20;⁷⁰ and
5. Appendix B of the report once more indicates a total contract cost of ₱52,319,927.20.⁷¹

In fact, nowhere in said report were the amounts of ₱64.2 Million or ₱55 Million even mentioned. Certainly, if the report was based on the unrevised plans, DLSPI would have pegged the amount of the contract at either ₱64.2 Million or ₱55 Million, in which case, the value of work accomplished, which DLSPI assessed at ₱49,244,814.09, would not have amounted to an accomplishment rate of 94.12%.

In the second place and, again, contrary to the finding of the CIAC that the DLSPI report did not consider the Detailed Cost Estimates, the report specifically states:

1. In connection with the preparation of the report, the following were

⁶⁷ Id. at 672.
⁶⁸ Id. at 673.
⁶⁹ Id. at 676.
⁷⁰ Id. at 680.
⁷¹ Id. at 705.

used as reference:

x x x x

C. Copy of **cost break down** x x x;⁷² and

2. In doing the evaluation, the following were performed by DLSPI to obtain the objective:

x x x x

D. Evaluated the **summary of cost that was provided by the Contractor**, and list [sic] down the works deleted from their cost breakdown.⁷³ (Emphases supplied)

The foregoing considered, it is questionable how the CIAC came to its conclusion that: “the Cost Evaluation Report [of DLSPI stating] that the percentage of completion x x x was 94.12% was wrong because [it] did not consider the revised plans and BOQ and Detailed Cost Estimates.” There is no doubt that DLSPI took into consideration the Detailed Cost Estimates in the preparation of its report. In addition, and more significantly, Appendix B⁷⁴ (Break Down of Cost) of the report is merely a reproduction of the Detailed Cost Estimates⁷⁵ provided by petitioners to respondent. The Detailed Cost Estimates specify the details of the works that petitioners were required to accomplish.

Petitioners and the CIAC likewise lament the failure of the DLSPI report to consider the BOQ. A comparative study of the BOQ⁷⁶ and Detailed Cost Estimates⁷⁷ reveals, however, that the two documents are actually the same in terms of the items listed therein. Thus, the items enumerated in the BOQ are all also included in the Detailed Cost Estimates, the only difference being that the latter document contains the details as to the quantity (number of units, unit measures, per unit cost, etc.) of each item of work and is,

⁷² Id. at 665.

⁷³ Id. at 667.

⁷⁴ Id. at 681-705.

⁷⁵ Id. at 318-334.

⁷⁶ Id. at 311-316.

⁷⁷ Id. at 318-334.

therefore, a more comprehensive listing of the scope of work of petitioners than the BOQ.

The foregoing, consequently, also belie petitioners' claim that Engr. Areola of DLSPI was not familiar with petitioners' scope of work.

Third, petitioners' allegation that the report of DLSPI cannot be given credence because DLSPI had only the architectural and structural plans but not the electrical, plumbing and sanitary plans, is, once more, contradicted by the records of this case:

ENGR. P. C. CAL (Member, Arbitration Panel):

I'm confused. I want clarification. Iyong comparison na 94-100 [%], syempre on the basis of plans, di ba?

ENGR. M. J. AREOLA (DLSPI engineer who prepared the report):

Yes.

ENGR. P. C. CAL:

Kung me mga missing plans, how would you factor in, na-covered ba ito o hindi covered.

ENGR. M. J. AREOLA:

So, iyong mga missing plans which are sanitary, plumbing...

ENGR. P. C. CAL:

Electrical meron?

ENGR. M. J. AREOLA:

I even assumed 100% na eh.

ENGR. P. C. CAL:

Ah, so, sa 94% kasama na iyon?

ENGR. M. J. AREOLA:

Yes.

ENGR. P. C. CAL:

In-assumed mo na 100%.⁷⁸ (Emphases supplied).

⁷⁸

CIAC Records, Envelope No. 7, TSN, 31 January 2007, pp. 160-161.

Thus, the 94.12% accomplishment rate determined by DLSPI already assumed a 100% completion of the electrical, sanitary and plumbing works on the project. Hence, petitioners have no basis in claiming that the report is inaccurate.

Fourth, with respect to the additives and the deductives, the testimony of Engr. Areola clearly shows that these had also been factored in the report:

ENGR. P. C. CAL:

From your standpoint, would you accept iyong sinabi ni Engr. Coronel na dapat talaga hindi included iyong interpretation of finishing? Parang sinasabi mo, x x x, okay tama iyon pero meron ding deduction. So, you are admitting na the cost estimate does not reflect iyong mga finishing works?

ENGR. M. J. AREOLA:

Sir, very clear naman sa breakdown ng contractor na there are **works not really included in their work**, which **also we did not include**.

x x x x

ENGR. P. C. CAL:

In the same manner na meron din silang ginawa na hindi dapat. You are admitting that?

ENGR. M. J. AREOLA:

Yes. And **we consider that also in our report. Iyong works done by them na naki-credit pa rin namin sa kanila.** Iyon hong talagang wala, wala naman, x x x.⁷⁹

x x x x

ATTY. V. F. ABAÑO (RESPONDENT):

Then perhaps Ms. Areola can mention whether she considered those additives and the deductive also or just the deficiencies.

ENGR. M. J. AREOLA (CLAIMANT):

I don't know the list of the additive and deductive when we made that [report] but even in my report **I consider some items that I saw on the site and still consider them already.** In the absence of any as built so at least in the ocular inspection **we**

⁷⁹

Id. at 162-163.

added them consider them already in the report.⁸⁰ (Emphases supplied.)

Finally, in order to verify the extent of work actually accomplished by petitioners on the project, DLSPI conducted not just one, but two ocular inspections on the site. The first ocular inspection was done on 6 December 2005 – almost two months after the take-over by respondent of the building – and the second one was carried out on 27 March 2006.⁸¹ The second inspection was done in order to confirm the observations made during the first inspection prior to the preparation and submission of the report,⁸² which was completed on 17 July 2006.

In contrast, petitioners' expert witness, Engr. Coronel, whose "well-considered opinion x x x that completion was 100%" was given more weight by the CIAC because the same was based on an ocular inspection and a review of the construction and as-built plans, as well as the BOQ and comparative table of costs, did not even bother returning to the site in order to verify and validate the correctness of the findings and evaluation of DLSPI.⁸³ As pointed out by respondent: "[i]f he did not go back to inspect the building, what was his basis for concluding that the building was fully completed?" Such inspection would have been proper considering his many comments to the report prepared by DLSPI.⁸⁴

b.) Finding of the CIAC that "items inspected were observed to be punchlists in nature"

The CIAC, after ocular inspection of the project, concluded that completion of the building was 100% as the items inspected were allegedly

⁸⁰ Id., TSN, 12 February 2007, p. 20.

⁸¹ *Rollo*, p. 665.

⁸² CIAC Records, Envelope No. 7, TSN, 29 January 2007, pp. 33-34.

⁸³ Id., TSN, 31 January 2007, p. 135.

⁸⁴ Id., Envelope No. 5, Memorandum of Claimant Letran (respondent herein), p. 44.

mere punch list in nature. Apparently, the CIAC considered the items included in the punch list as in the character of “finishing touches.”⁸⁵

In the case of *Perini Corporation v. Greate Bay Hotel & Casino, Inc.*,⁸⁶ the Supreme Court of New Jersey had the occasion to define “punch list” as “a comprehensive list of items to be completed or corrected.”⁸⁷ Generally, the punch list includes those items that restrict the final completion of the project.⁸⁸ Also, in *J.A. Sullivan Corporation v. Commonwealth*,⁸⁹ the Supreme Judicial Court of Massachusetts stated that a punch list is an itemized list of finish work, corrections, repairs, and services to be performed in order to complete a construction contract. In the more recent cases of *Weitz Company v. MH Washington, et. al.*⁹⁰ and *Arch Insurance Company, et. al. v. Precision Stone, Inc.*,⁹¹ the United States Court of Appeals defined “punch list” as “the report of unfinished work identified during an inspection by the owner and contractor just before completion of a building” and “work called for by the original contract (or subcontract) which the contractor (or subcontractor) has not satisfactorily completed.” Clearly, by its very nature, unless and until the items in a punch list are completed and/or corrected, accomplishment on a project can never be considered 100%.

⁸⁵ CA *rollo*, p. 81.

⁸⁶ 129 N.J. 479, 610 A.2d 364 N.J. (1992). https://web2.westlaw.com/find/default.wl?cite=129+N.J.+479&rs=W12.04&vr=2.0&rp=%2ffind%2fdefault.wl&utid=1&fn=_top&mt=WLIGeneralSubscription&sv=Split (27 June 2012).

⁸⁷ Id. citing Justin Sweet, Sweet on Construction Industry Contracts: Major AIA Documents § 1.1 (1987)

⁸⁸ *Perini Corp. vs. Greate Bay Hotel & Casino*, supra note 86, citing 2 Steven G.M. Stein, Construction Law ¶ 7.09 at 7-78 (1991)

⁸⁹ 397 Mass. 789, 494 N.E.2d 374 (1986). https://web2.westlaw.com/find/default.wl?cite=397+Mass.+789&rs=W12.04&vr=2.0&rp=%2ffind%2fdefault.wl&utid=1&fn=_top&mt=WLIGeneralSubscription&sv=Split (27 June 2012).

⁹⁰ 631 F.3d 510, C.A.8 (Mo.) (2011). https://web2.westlaw.com/find/default.wl?cite=631+F.3d+510&rs=W12.04&vr=2.0&rp=%2ffind%2fdefault.wl&utid=1&fn=_top&mt=WLIGeneralSubscription&sv=Split (27 June 2012)

⁹¹ 584 F.3d 33, C.A.2 (N.Y.) (2009). https://web2.westlaw.com/find/default.wl?cite=584+F.3d++33&rs=W12.04&vr=2.0&rp=%2ffind%2fdefault.wl&utid=1&fn=_top&mt=WLIGeneralSubscription&sv=Split (27 June 2012)

Given the many defects and unfinished works on the building subject of this case, the items in the punch list submitted by respondent for petitioners' action are definitely not in the nature of mere "finishing touches." Even assuming that there may be instances when a punch list may contain only items which are in the character of finishing touches, the photographs⁹² submitted by respondent documenting the state of the building after it took over the same in October 2005 unmistakably rebut this presumption. Thus:

1. Photograph 49 shows a very thin layer of paint coating on the steel railings of the stairs going to the upper floors of the building, such that the primer coat can actually be seen;
2. Photographs 50-52 and 55 show cracks on the interior walls of the building – understandably a serious cause of concern for respondent considering that this affects the stability of the structure and considering further that the building is only a few months old. The video recording accompanying the photographs shows longer cracks along the interior walls;
3. Photograph 58 shows improper installation of the building's insulation. The video recording shows further instances of improper insulation, such as insulation sheets not properly laid out and some sheets falling off the ceiling;
4. Photographs 61 & 62, 163, 195 and 196 show various leaks on the interior walls and floors of the building, confirming respondent's claim of lack of proper waterproofing. The video recording likewise shows other occasions of leaks on the building's floors;

⁹² CIAC Records, Envelope No. 2, Annex "S."

5. Photograph 72 shows a mirror in the male comfort room which had not been properly installed;
6. Photograph 73 shows that the floor of the ladies' comfort room had been installed with chipped or broken tiles;
7. Photograph 74 shows a rusted floor drain in the ladies' comfort room;
8. Photograph 70 shows a sink in the male comfort room with missing fixtures. The missing fixtures are the result of petitioners' act of installing a single-hole faucet to a sink requiring a center-set faucet; thus, leaving two holes where the hot and cold taps should have been;
9. Photographs 69, 193, and 202 show the surface of the building's interior walls with uneven portions – an indication of poor or improper wall plastering;
10. Photograph 79 shows a hole on the roof of the building big enough to cause a possible flooding within the building in case of rains;
11. Photograph 85 shows the absence of a down spout for the drainage in the outer walls of the building in order to prevent the adherence of moss or algae on the walls of the building;
12. Photographs 86, 95, 96, 99, and 100 seek to demonstrate that the ramp for the disabled is not wide enough so as to provide ease of access to wheelchairs;

13. Photographs 92-94 show an exposed electrical outlet on the exterior wall of the building – an electric shock hazard;
14. Photograph 175 shows improper grouting of floor tiles;
15. Photographs 188-189 show the interior walls of the building with peeled or peeling paint;
16. Photographs 190-191 show that the tiles used on the floor of the building are of different shades, resulting in an uneven floor pattern/appearance;
17. Photograph 196 shows a rain gutter with the spout aimed/directed at the roof of the building so that when it rains (as was the case when the photograph was taken), rainwater floods the roof of the building;
18. Photograph 200 shows electrical conduits clamped with galvanized iron wires only instead of proper electrical hangers or clamps. As pointed out by Engr. Reynaldo Natividad, one of respondent's consultant, during the ocular inspection of the building with the CIAC:

If you will see the layout of the PVC it is not properly provided with bracket and some of the connections has [sic] no fitting specially some of dummies just hanging on the cross angular of the structural. So it is not so acceptable that the layout of the electric is improper.

x x x x

x x x whatever it is, if you will install or lay out a[n electric] pipe it must be proper not with galvanize [sic] wire. Just you provide a bracket where you hang it there in the

structure. It should be properly fixed and it must be aligned, as standard of the Philippine Electrical Code x x x.⁹³

Even petitioner Emelyne Abaño herself admitted during the 6 June 2005 technical meeting between petitioners and respondent, held after the 16-17 May 2005 joint inspection, that they committed errors with respect to the materials actually used in the building as compared to those specified in the Contract.⁹⁴

The foregoing items were included in the “Checklist,”⁹⁵ dated 8 June 2005, which enumerates the works which still need correction/completion by petitioners after the first joint inspection of the building on 16 and 17 May 2005. These defective and incomplete works were acknowledged by petitioner Emelyne Abaño herself, as evidenced by her signature on the “Checklist” as the person who prepared the same and by the fact that opposite each item to be corrected she indicated “will act on this as soon as possible” as the action to be taken. The fact that these defects and/or incomplete works were still existing at the time of the takeover of the building leads this Court to the inevitable conclusion that PETITIONERS NEVER DID COMPLETE THE PUNCH LIST.

To all these must be added the missing and other corrective works not included in the documentation which, pursuant to the letter,⁹⁶ dated 26 July 2005, of respondent to petitioners, are as follows:

1. Construction and finishing of Floor Podium 13.14 sq. m. around the Building

⁹³ Id., Envelope No. 7, TSN, 12 February 2007, pp. 92-93.

⁹⁴ Id., Envelope No. 3, Exhibit “PP-1,” with sub-markings, minutes of the 6 June 2005 technical meeting.

⁹⁵ Id., Envelope No. 2, Annexes “M-1” to “M-3.”

⁹⁶ Id., Envelope No. 1, Annex “V.”

2. Correction works – Floor Pattern, re-tiling (Class “A” Tiles)
x x x
3. Construction and finishing of 16 sq. m. of canopy with polycarbonate (2 pcs.) (16 sq. m.)
Left side elevation and right side elevation.
4. Construction and finishing of concrete square mouldings 0.60 x 0.60 parapet area (20 pcs.)
5. Construction and finishing of decorative moldings columns area 0.855 sq. m. (40 pcs)
6. Construction and finishing of pre-cast concrete baluster 138 sets at Parapet wall line
7. Finishing and water proofing of wall at front elevation approximately 219.90 sq. m
8. Finishing and water proofing of wall at rear elevation approximately 358.03 sq. m
9. Finishing and water proofing of wall at right-side elevation approximately 157.9775 sq. m.
10. Finishing and water proofing of wall at left-side elevation approximately 202.02 sq. m.
11. Construction of Polycarbonate roofing (arched) at roof deck area 7.40 x 8.36 m. = 61.86 sq.m.
12. Stainless steel handrail approximately 81.50 meters
13. Stainless steel “Letran Logo” 48 pcs.
14. Construction of handicapped toilet 2.50 x 3.50 meters with complete toilet fixtures incl. Water closet and stainless hand grab rail for handicapped person. (6 pcs.)
15. 1.50 2.10 door for handicapped toilet at Nursing skills laboratory.
16. Male toilet with water closet at Nursing skills laboratory
17. 2.10 x 6.30 meter with folded door at nursing skills laboratory
2.10 x 7.00 meter with folded door at nursing skills laboratory
19. 1.50 x 7.50 ramp for handicapped person
20. Seating area at main entry 0.60 meter x 5.60 meter
21. Correction of installation of Whiteboard (8 pcs.)

22. Ceiling lay out of third floor
23. Steel Truss approximately 1,152.00 sq. m.
24. Re-works, water proofing Roof deck area approximately 8.00 x 12.00 = 96 sq. m.
25. Finishing and water proofing of mechanical and electrical room 2.5 x 2.5 = 6.25 sq. m.
26. Hardwares – “door knob” Yale brand
 - Ground Floor – 32 pcs.
 - Second Floor – 9 pcs.
 - Third Floor – 10 pcs.
27. Main Stair from 3rd floor to Roof Deck approximately 18 steps with the area of 34.50 sq. m.
28. Railing at Front Elevation 2 inches diameter B.I. Pipe railing 35.00 meters
29. 111 pcs. 1/8 inches thk. – 2 inches wide banisters x 0.90 height
30. Construction and fabrication of wall partition at third floor
31. Installation of weight lifter
32. Construction and finishing, waterproofing Parapet wall

x x x x

Subject **Electrical Materials breakdown not installed but included in construction Plan**

ITEM DESCRIPTION	QTY
A. Ground Floor	
1. Industrial Lighting Fixtures Complete Set 2x40W	32
2. –ditto- Except 1x40w	10
3. Pin light fixture complete set	44
4. Spot light fixture complete set Par38	13
5. Chandilier [sic]	4
6. Wash room mirror light fixture Complete Set 1x20W	6
7. Exhaust Fan and Outlet	4
8. ACU outlet	3
9. Orbit Fan and Outlet	24
10. Telephone Outlet	2
11. Computer Outlet	2

B. Second Floor

1. Industrial Lighting Fixture Complete Set 2x40W	45
2. Wash room mirror light fixture Complete Set 1x20W	6
3. Orbit Fan and Outlet	10
4. ACU Outlet	12
5. Telephone Outlet	12
6. Computer Outlet	12

C. Third Floor

Industrial Lighting Fixtures Complete Set 2x40W	149
Wash room mirror light fixture Complete Set 1x20W	6
Pin light fixture complete set	10
Orbit Fan and Outlet	21
ACU outlet	13
Telephone Outlet	5
Computer Outlet	5

Considering the foregoing, the CIAC clearly erred in finding that the building was 100% complete. The afore-enumerated defective and incomplete works strongly militate against a finding of 100% completion of the project. The above findings likewise lend credence to the report of DLSPI that the completion rate is only 94.12%.

More importantly, the fact that petitioners failed, and even refused, despite several demands from respondent, to correct and finish the defective and deficient works supports the allegation of respondent that petitioners eventually abandoned the project. It may be recalled that prior to its takeover of the building on 19 October 2005, respondent wrote petitioners no less than three letters (dated 26 July 2005,⁹⁷ 12 August 2005,⁹⁸ and 10 October 2005⁹⁹) demanding that petitioners correct and complete their works on the building, with the last letter containing a warning that should petitioners fail to act on respondent's demands, they would be considered to have

⁹⁷ Id.

⁹⁸ Id., Annex "W."

⁹⁹ Id., Annex "Z."

abandoned the project. Petitioners, however, ignored the demands of respondent. Thereby, the fact of abandonment of the project was established.

Justifiably, respondent cannot be expected to accept an incomplete building. The completion of the punch list was, therefore, essential before respondent could finally accept the building.

3. Requests for payment without accompanying photographs

The Technical Specifications Book requires that requests for payment must be supported by progress photographs and that “no partial payment shall be considered for approval without the above mentioned prints accompanying the Request for Payment.”¹⁰⁰ It is an admitted fact,¹⁰¹ however, that on 12 July 2004, petitioners requested payment from respondent in the amount of ₱14,325,196.07 without the requisite photographs, as in fact, petitioners’ First Progress Billing Report was submitted only on 2 August 2004.

Indeed, even prior to the submission of their First Progress Billing, and after the 12 July 2004 request for payment, petitioners again requested, on 20 July 2004, payment for additional works on the ground floor amounting to ₱1,598,698.00¹⁰² without the necessary accompanying photographs. Respondent, however, did not pay this amount as the alleged additional works were not previously approved by respondent.

4. Unapproved changes in the project

Paragraph 1.01, No. 4 of the Technical Specifications states:

¹⁰⁰ *Rollo*, pp. 575-576.

¹⁰¹ CIAC Records, Envelope No. 6, Terms of Reference, p. 3, No. 12.

¹⁰² *Id.* at 4, No. 13.

4. CONFORMITY TO CONTRACT DOCUMENTS: All work shall conform to Contract Documents. No change therefrom shall be made without the Contractor having first received permission from the Architect, in writing, to make such changes. x x x¹⁰³

Specifically, with respect to change orders, the same document, which forms part of the Contract, provides:

7. CHANGES IN THE WORK:
- a. CHANGE ORDER BY THE OWNER: The Owner may at anytime without invalidating the Contract and without notice to sureties, order extra work or make changes by altering, adding to or deducting from the work, as covered by the Drawings and Specifications of this Contract and within the general scope thereof. Such changes shall be ordered by the Owner in writing, and **no change** or omission from the Drawings and Specifications **shall be considered to have been authorized without written instructions by the Owner.**¹⁰⁴(Emphasis and underlined supplied.)

Notwithstanding the afore-quoted provisions, petitioners made variations in and deviations from the Contract without first securing respondent's approval in writing. These include:

1. The reduction of the number of toilets on the ground floor from three to one;¹⁰⁵
2. Construction of additional comfort rooms;¹⁰⁶
3. Increase in the number of toilet cubicles from two to four plus an additional cubicle for the faculty;¹⁰⁷
4. Changes in the alignment of the trusses;¹⁰⁸
5. The plan specifies eight steps for the main stair section of the

¹⁰³ *Rollo*, p. 562.

¹⁰⁴ Id. at 569.

¹⁰⁵ CIAC Records, Envelope No. 7, TSN, 29 January 2007, p. 92.

¹⁰⁶ Id., TSN, 31 January 2007, pp. 153.

¹⁰⁷ Id. at 154.

¹⁰⁸ Id., TSN, 29 January 2007, pp. 212-213.

- building but petitioners placed only five steps;¹⁰⁹
6. The seating areas for the students on the left and the right side of the podium were not constructed;¹¹⁰
 7. Changes in the number of columns of the building;¹¹¹
 8. The balustrades were supposed to be placed on the roofs but were transferred to the lower floors;¹¹² and
 9. The interconnection of the main water tank was transferred from the annex building to another building.¹¹³

Even Engr. Coronel, petitioners' consultant, admitted in his affidavit¹¹⁴ that petitioners carried out changes in the implementation of the contract:

The joint inspection was in the morning of 25 July 2005 conducted by [petitioners] JJBP and the [respondent] Letran, with their representatives including myself x x x. Among others, I found out that **there were variations and changes in classroom layout, the toilets were transferred**, x x x. (Emphasis supplied.)

In all the foregoing, the records distinctly demonstrate that they were all unapproved changes. In fact, petitioners themselves admitted that they never secured the written consent of respondent before they executed the changes. Thus:

1. With respect to the toilets:

ENGR. E. I. EVANGELISTA [CIAC Arbitrator]:
So, you have not seen any change orders?

ARCH. J. R. L. MARTINEZ [Consultant for respondent]:

¹⁰⁹ Id., TSN, 12 February 2007, p. 28.
¹¹⁰ Id.
¹¹¹ Id. at 28-30.
¹¹² Id. at 46.
¹¹³ Id. at 47.
¹¹⁴ Id., Envelope No. 4, Exhibit 48, p. 2, No. 11.

Wala.

ENGR. E. I. EVANGELISTA:

Specifically like the toilet in the ground floor?

ARCH. J. R. L. MARTINEZ:

Wala.

x x x x

ENGR. E. I. EVANGELISTA:

Sa ground floor, sa kabilang side, wala kang nakitang dalawang toilet?

ARCH. J. R. L. MARTINEZ:

Pero based pa rin sa plans nila.

ENGR. E. I. EVANGELISTA:

Me plano no. Sa plano nakalagay three toilets here. Oh ngayon pag tingin mo ngayon ng toilet, isa lang ito di ba? x x x

x x x x

ENGR. E. I. EVANGELISTA:

Kasi ang (unintelligible) niya iyong tatlong toilet isa rito inilipat iyong dalawa sa dulo. Iba naman iyong tatlong toilet naging isa, iba iyon.

ARCH. J. R. L. MARTINEZ:

I'm talking about kung merong nilipat, **kung nilipat nila iyong dalawang toilet doon sa specific area, dapat meron silang shop drawings na attachment na inilipat namin iyong dalawang CR dito sa area na ito.** x x x

x x x x

ARCH. J. R. L. MARTINEZ:

Ngayon ang sinasabi nilang dinagdag nilang CR, eto nilabas daw nila ang handicapped dito, parang ganoon ang explanation nila during the punchlisting.

x x x x

ARCH. R. A. KING [for petitioners]:

Dalawa po ang naalis na CR doon. Dito tatlo ang original ito no? Naging apat po iyan. Naging tig-apat. Nadagdagan ng dalawa plus faculty. x x x.

ENGR. E. I. EVANGELISTA:

Pero okay na sa iyo talaga na walang papeles na inililipat iyon doon? Wala?

ARCH. R. A. KING:
Wala kasi po...

x x x x

ATTY. B. G. FAJARDO:
Pero part ng plano iyong faculty diyan? Part ng plano ang faculty?

ARCH. R. A. KING:
Hindi po part. Pinadagdag po iyon dahil ang gusto ng faculty ayaw nilang maki-share ng CR sa estudyante, gusto nila hiwalay ang CR nila. (Emphases supplied).¹¹⁵

Emphasizing the importance of a written consent for any changes in the implementation of the project, one of the members of the arbitral panel repeatedly confirmed the absence of a written agreement documenting the transfer of the location of the comfort rooms:

ENGR. E. I. EVANGELISTA:
Kaya nga ang tanong ko ngayon eh iyong **walang dokumento na inililipat.** (Emphasis supplied.)

x x x x

ENGR. E. I. EVANGELISTA:
Gusto ko rin linawin na walang dokumentong ililipat doon kaya nako-confuse iyong nag-ano... (Emphasis supplied.)

x x x x

ENGR. E. I. EVANGELISTA:
Kasi alam mo kaya ko itinatanong iyon, **without the proper documentation of all of these,** talagang malilito iyong... (Emphasis supplied);¹¹⁶

2. In connection with the trusses:

ENGR. E. I. EVANGELISTA:
One last question to the architect. When you say misaligned, it is not that the trusses are like that? So, it is based on

¹¹⁵ Id., Envelope No. 7, TSN, 31 January 2007, pp. 150-154.

¹¹⁶ Id. at 154-156.

the plan, it is not on top of the beam as in the plan, something like that?

ARCH. J. R. L. MARTINEZ:

Yes. **They have a conflict with the plans based on the actual implementation.**

ENGR. E. I. EVANGELISTA:

Yes. You mean the alignment of the trusses not the distorted like that?

ARCH. J. R. L. MARTINEZ:

Based on the plans that I see and the actual implementation, it's not aligned, your Honor. x x x.

ARCH. J. R. L. MARTINEZ:

Any change order or any documentation to see to give evaluation that iyong trusses na iyon matibay di ba? Kasi iyon ang practice talaga sa construction. If you are design and build, you need to submit a request for information na alam ng owner na eto po iyan, eto po ang nabago, eto po dapat, ganito po nangyari, me conflict po sa beam kaya po namin nilihis ang trusses.¹¹⁷

3. Anent the change in the number of steps of the main stairs leading to the building:

ARCH. J. R. L. MARTINEZ:

So the design intend is for the 8 steps x x x. Can you give **any shaft drawings for owner approval that the stairs changed**, that the sitting area not constructed disappear and the planter box and saw in the ramp while that... **to make the transparency between the contractors and the owner agreement. Do we have any change order form** or something that... Sa side naman ng owner at least bakit nabago.

x x x x

ENGR. M. J. AREOLA (CLAIMANT):

Base [sic] on the drawing if it's a higher floor and they find out that the existing ground level is higher **they should have raised it to the client** base [sic] on usual process acceptable. And if the client did not agree they should have filled the existing floor just to meet the desired number of steps. x x x. But here probably it was reduce [sic] to just 5 floors [should be "steps"] and just you know put it on a lower level on the usual process. **There should be approval request x x x from the client before anything is made on the major ground floor entrance.**

¹¹⁷ Id., TSN, 29 January 2007, pp. 212-213.

x x x x

DR. P. C. CAL (ARBITRATOR):

x x x but the other point is have you called the attention of the...

ENGR. E. C. ABAÑO (RESPONDENT):

Yes they know it.

DR. P. C. CAL (ARBITRATOR):

Discovered by an agreement or what or verbal.

ENGR. E. C. ABAÑO (RESPONDENT):

Actually, **it was all verbal instructions...**¹¹⁸ (Emphases supplied.)

On the attempt of petitioners to justify the reduction of the number of steps on the ground that the contour and elevation of the area called for it, Engr. Areola countered this by pointing out that:

Before they submitted their quotation x x x. You know the existing conditions. You know the requirements of the client's. You were the ones that filled it. And when you made the construction plan, it should have reflected what you foresaw could have been a problem but this is what the client approved. For me kasi as a quantity surveyor also I will quantify what was approve [sic]. But let [sic] say **in the course of construction you find some problems x x x it should be properly notified iyong client** "meron tayong problema sa elevation, x x x."¹¹⁹ (Emphasis supplied).

Indeed, the Technical Specifications mandates:

2. **SITE CONDITIONS:** Before submission of proposal and the awarding of the contract, **the Contractor is expected to have visited the locality of the work and made his own estimates of the facilities and difficulties attending to the execution of the proposed contract, including local conditions and all other contingencies.** x x x
 - a. **The Contractor shall verify all grades, lines, levels and dimensions as indicated on the Drawings. He shall report any**

¹¹⁸ Id., TSN, 12 February 2007, pp. 35-37.

¹¹⁹ Id. at 43.

error or inconsistency to the Architect before commencing work.¹²⁰ (Emphasis supplied.)

On the explanation of petitioners that some of the changes were pursuant to respondent's verbal instructions, two of the members of the arbitral panel had this to say:

ENGR. P. C. CAL:

But normally the contract also provides **while it's done verbally, the contractor follows up in writing to be confirmed by the client. Kasi mahirap ngang later on sasabihin mo verbal. Talagang iyon ang procedure. While you respond positively to the request by the client, it is to your interest that few days later you translate it into writing, di ba? Ang tanong ko, ginawa ba iyon para in the end we will now reconcile between the plan and As-built covered iyang ganyang changes in writing.**

ATTY. B. G. FAJARDO:

We know that change plans in order to be valid, in order to be allowed, must comply with certain requirements. It must be in writing, approved by both parties, and the amount must be specified. Me Supreme Court decision na about that.¹²¹ (Emphases supplied).

As the following testimony of petitioner Emelyne Abaño demonstrates, petitioners were cognizant of the provisions of their Contract requiring all change orders to be approved in writing, yet, they decided to execute these changes without complying with this requirement:

ATTY. R. C. CREENCIA:

x x x. Are you aware of the provision in your contract relative to additional works?

ENGR. E. P. CAYETANO-ABANÑO:

Yes, sir.

ATTY. R. C. CREENCIA:

You are aware that any changes in the work should be approved by both parties in writing?

¹²⁰ *Rollo*, p. 565.

¹²¹ CIAC Records, Envelope No. 7, TSN, 29 January 2007, p. 103.

ENGR. E. P. CAYETANO-ABAÑO:
According to the contract, yes.

ATTY. R. C. CREENCIA:
And you are aware of that?

ENGR. E. P. CAYETANO-ABAÑO:
Yes.

ATTY. R. C. CREENCIA:
In your claim for additional works, I noticed that not a single document was attached evidencing that indeed the authorized officer of [respondent] Letran or any other officer for that matter has specifically given a go signal for you to perform all these additional works.

ENGR. E. P. CAYETANO-ABAÑO:
In writing there is none. Verbally, there is.

ATTY. R. C. CREENCIA:
Although you agree that the contract says it should be in writing?

ENGR. E. P. CAYETANO-ABAÑO:
Yes, x x x.¹²²

It should be emphasized that in a letter¹²³ dated 24 August 2004, respondent's Rector at that time, Father Rolando De La Rosa, wrote petitioners directing them to defer all construction works which are not part of the contract.

Likewise, it is precisely for the reason that the changes carried out by petitioners did not conform to the requirements that they were denied by the CIAC in its Final Award. Hence, even the CIAC acknowledged that petitioners breached the provisions of the Contract on change orders.

Based on the foregoing findings of this Court, We will now proceed to evaluate the respective monetary claims of each party.

¹²² Id., TSN, 31 January 2007, pp. 90-91.

¹²³ Id., Envelope No. 1, Annex "G."

Respondent's monetary claims

1. Liquidated Damages

The Contract provides:

3. That a penalty of one tenth of one percent of the unfinished portion of the Contract shall be deducted per day of delay and the maximum penalty of twenty percent (20%) of the project cost for failure of the Contractor to complete the work within the time stipulated above.¹²⁴

The provision of the Contract on liquidated damages is amplified by the Technical Specifications in the following manner:

5. LIQUIDATED DAMAGES: It is understood that time is an essential feature of this Contract, and that upon failure to complete the said Contract within the time stipulated, the Contractor shall be required to pay the Owner the liquidated damages in the amount stipulated in the Contract Agreement, and not by way of penalty.

The Owner may deduct from any sum x x x to become due the Contractor any sum accruing for liquidated damages as herein stated.¹²⁵

Considering petitioners' abandonment of the project, respondent is entitled to the maximum amount of liquidated damages which is 20% of the cost of the project. Thus:

$$\text{₱}52,319,927.20 \times 20\% = \text{₱}10,463,985.44$$

2. Actual Damages (Cost of construction of facilities to house temporary classrooms, library and nursing laboratories)

Respondent claims that as a result of the failure of petitioners to finish the building on time, it incurred expenses as follows:

¹²⁴ *Rollo*, p. 335.

¹²⁵ *Id.* at 573-574.

a.) Cost of construction of temporary classrooms	₱2,205,000.00
b.) Cost of construction of temporary nursing skills laboratory at L Building	440,000.00
c.) Cost of Conversion of Humbert Hall as temporary library	<u>29,534.10</u>
TOTAL :	₱2,674,534.10

In support of its claims, respondent submitted, as Annexes “U” to “U-30,”¹²⁶ the vouchers and corresponding official receipts evidencing payment of the aforesaid expenses. After a studious examination of the documents, the Court is disposed to grant only the following claims of respondent:

I T E M	Amount
a.) Construction of dry wall partition, white boards, bulletin boards and feederline for 5 air-conditioning units – 50% down payment (Annex “U-1”)	₱315,000.00
b.) Construction of dry wall partition, white boards, bulletin boards and feederline for 5 air-conditioning units (Annex “U-2”)	315,000.00
c.) Installation of floor tiles (2 nd floor new canteen) and 2 glass doors (Annex “U-3”)	225,000.00
d.) Building improvement – Nursing Skills Laboratory refurbishing (Annex “U-4”)	410,000.00
e.) Additional works for Nursing Lab and installation of glass partition (Annex “U-5”)	62,000.00
d.) Payment for janitorial services for the period 16-31 July 2005 (Annexes “U-6” to “U-7”)	69,329.45
e.) Janitorial services for the period 1-15 September 2005 (Annex “U-8”)	72,531.52
f.) Janitorial Services for the period 16-30 November 2005 (Annexes “U-9 to “U-12”)	<u>110,375.06</u>
TOTAL:	₱1,579,056.03

¹²⁶

CIAC Records, Envelope No. 2, Affidavit of Rodolfo C. Ondevilla.

The CIAC rejected all of the foregoing claims on the ground that the expenses were the result of a mere conversion of already existing facilities. It cannot be denied, however, that the expenses were indeed incurred and were the direct result of petitioners' failure to finish the building on time. If the project had been completed as planned, there would not have been any need for the afore-enumerated expenses. As testified to by Mr. Rodolfo Ondevilla (Mr. Ondevilla) during the hearings before the CIAC:

ATTY. V. F. ABAÑO:

And you had these temporary classrooms constructed when, Mr. Witness?

MR. R. C. ONDEVILLA:

Actually, that was constructed June already, x x x, **we have nowhere to go but to make these classrooms.**¹²⁷

x x x x

ATTY. B. G. FAJARDO:

But these were constructed by other contractors, and these were constructed before the takeover of the project by the [respondent].

MR. R. C. ONDEVILLA:

Yes, your Honor.

x x x x

MR. R. C. ONDEVILLA:

And the reason for that is because we are already short of classrooms, because the classrooms supposed to be delivered were not actually delivered.¹²⁸ (Emphases supplied.)

More instructive is the following portion of his testimony:

MR. R. C. ONDEVILLA:

x x x, your Honor, we have [sic] the punch listing in May, we are about ready to transfer in time for the opening of the school year, because at that time, we knew that they will be doing the reworks. However, in June 2006 [should be 2005], when Father

¹²⁷ Id., Envelope No. 7, TSN, 29 January 2007, p. 117.

¹²⁸ Id. at 121.

[unintelligible] said we could [transfer] already, x x x they said they will do the rework in twenty seven days. It is impossible for us to open classes without [a] library. So, what we did is those shelves and chairs which were already transferred to that building were again pulled out to be brought to the Humbert Hall, the temporary library. That is the reason why there was overtime at that time, because we have to do it at night. We cannot do it in the morning when there are a lot of students in the school. So, that is the reason why we have to transfer some of those chairs, because then at that time, we are about ready, because they were saying it is finished. x x x. But because the academic departments are complaining and they were saying that we cannot open the school year without a library, we have to make a temporary library. So, that is the reason why we have to pull out again those bookshelves which were already transferred there to the temporary library. Your Honor, on the retiling, the second floor of the canteen building is not actually tiled, it is unfinished. So, the center part was actually made the temporary office of the Nursing Dean, because the office which was occupied by the Nursing Dean was converted into a temporary laboratory. Because those temporary rooms will be occupied by the nursing students, it is but right that the dean should be located in that area. So, that is why, also because there is no other room that can be converted into a temporary library. That is why that one room being occupied by the dean and other faculty was transferred to that canteen where the temporary classrooms were made. x x x. And the other classrooms, your Honor, opposite the temporary laboratory, because this Nursing faculty cannot be accommodated in that room, the other classrooms were also made a temporary faculty room, x x x.¹²⁹

Nevertheless, the Court is disinclined to grant the following claims of respondent:

1. Construction of Jacob Joseph Student Center offices in the amount of ₱1,350,000.00 (Annex “U”)¹³⁰

Respondent wants the cost of this building charged against petitioners because, allegedly, it had to be demolished to make way for the temporary classrooms.¹³¹

¹²⁹ Id., TSN, 31 January 2007, pp.10-11.

¹³⁰ CIAC Records, Envelope No. 2, Affidavit of Rodolfo C. Ondevilla.

¹³¹ Id., Envelope No. 7, TSN, 29 January 2007, p. 117 and 122.

A careful scrutiny of the records reveals, however, that the building was not actually demolished, but its rooms were merely converted into classrooms. Thus:

ATTY. B. G. FAJARDO:

In the site, how were these eight classrooms distributed in the different floors?

MR. R. C. ONDEVILLA:

We actually **converted** the ground floor, (unintelligible) as the former library into classrooms, your Honor. So, we make four there. And again on the canteen of the second floor where the supposed student center were also **converted** into classrooms.¹³² (Emphasis supplied).

It would, therefore, be unfair to charge petitioners with the cost of the building when no demolition actually took place. Petitioners should only be liable for the cost of converting areas of the building into temporary classrooms, the total cost of which, based on the testimony of Mr. Ondevilla, is ₱855,000.¹³³ This amount is already covered by Annexes “U-1” to “U-3,” under the list¹³⁴ of respondent’s claims to which this Court believes respondent to be entitled.

2. Honorarium of Performance Evaluation Committee (PEC) members
(Annexes “U-17” – “U-23”)¹³⁵

The PEC, made up of five members, was constituted by respondent in order to monitor and ensure that the project was being executed in accordance with the approved plans and specifications.¹³⁶ The Committee was created to oversee the construction of the building. It was not constituted as a result of the delays in the project.

¹³² Id. at 115-116.

¹³³ Id. at 122-123.

¹³⁴ Item No. 2 (Actual Damages) of Respondent’s Monetary Claims.

¹³⁵ CIAC Records, Envelope No. 2, Affidavit of Rodolfo C. Ondevilla.

¹³⁶ Id. at 4, numbers 22 and 23.

Hence, the payment of their allowance is an expense ordinarily associated with any construction project and has no connection with petitioners' delay in completing the building, which delay necessitated the construction of temporary facilities to accommodate respondent's students. Consequently, the expenses incurred by respondent in the payment of the honorarium of the PEC members should not be charged to petitioners.

With respect to the charges for the investigation and rectification of the nursing building comfort rooms (Annexes "U-24" and "U-25"), waterproofing (Annex "U-26" and "U-27") and taxes (Annexes "U-28" to "U-30"), these items were not included in the Terms of Reference, hence, were not considered during the hearings and were deemed excluded from the claims of respondent.¹³⁷

3. Actual Damages (Professional Fees of DLSPI)

Based on the evidence¹³⁸ presented by respondent, it incurred expenses in the amount of ₱200,000.00 as professional fees in the hiring of DLSPI, a specialized quantity surveyor firm, to conduct a cost analysis and evaluation of the total works done on the project.

Considering petitioners' failure to complete the building and their eventual abandonment of the project, respondent was compelled to engage the services of DLSPI to ascertain the extent of petitioners' accomplishment on the building. Had petitioners finished the project, there would not have been any need for respondent to resort to this measure. Petitioners should, consequently, be held answerable for this expense.

¹³⁷ Id., Envelope No. 7, TSN, 29 January 2007, pp. 112-114.

¹³⁸ Id., Envelope No. 2, Affidavit of Mr. Rodolfo C. Ondevilla, Annexes "U-15" and "U-16."

Petitioners' monetary claims

1.) Unpaid balance of Progress Billing No. 2

In connection with the payment of progress billings, the Technical Specifications require approval of the request for payment and progress photographs to accompany the request. It is significant to note that, as evidenced by the progress billings themselves, respondent never signed the certificate of payments to signify its approval thereof. Nevertheless, respondent paid petitioners' 1st Progress Billing in full and part of the 2nd Progress Billing without such approval. Considering respondent's act of paying part of the 2nd Progress Billing, it may be reasonably concluded that it has impliedly approved payment thereof. Therefore, respondent is under obligation to pay its balance in the amount of ₱4,581,129.86.

Besides, the foregoing amount is part of the unpaid value of the work accomplished by petitioners on the building equivalent to 94.12%.

2. Final Billing

Petitioners are not entitled to the payment of their final billing because they failed to finish the project. The Contract between petitioners and respondent stipulates that "the final payment shall be released only after the acceptance of the project." Since petitioners did not finish the building, there was never any occasion for respondent to accept the same. Hence, the obligation of respondent to make the final payment did not arise.

Nevertheless, even assuming, for the sake of argument, that petitioners were able to deliver a 100% complete building, their failure to

comply with the provisions of the Contract on the documentary requirements prior to final payment effectively hinders settlement of the final billing:

That the final payment shall be released only after the acceptance of the project and **submission of As-Built Plans, Affidavit, and other documents as may be required by the OWNER.**¹³⁹ (Emphasis supplied.)

The Technical Specifications contains the following additional requisites which were likewise not complied with by petitioners:

8. CORRECTION OF WORK BEFORE FINAL PAYMENT: The Contractor shall promptly remove from the premises all work condemned by the Architect as failing [to] conform to the Contract, [w]hether incorporated or [not], and the Contractor shall promptly replace and re-execute his own work in accordance with the Contract and without expense to the Owner and shall bear the expenses of making good all work of other Contractors destroyed or damaged by such removal or replacement. x x x.

9. OTHER REQUIREMENTS BEFORE FINAL PAYMENT: The Contractor shall submit (aside from those provided in the Contract Document) the following before final payment is made:
 - a. Certificate of Final Building Occupancy.
 - b. Certificate of Final Inspection of electrical, telephone, sanitary, mechanical, water, gas, safety and other utilities.
 - c. Original and three (3) sets of prints of “As-built Drawings” of Electrical, Sanitary, Gas, Telephone and Mechanical Works. x x x.

 - x x x x

 - g. Guarantee bond equivalent to ten percent (10%) of the Contract Price covering a period of one year after the final Acceptance of the Contract work and materials installed. x x x.

10. ACCEPTANCE AND FINAL PAYMENT: x x x. PROVIDED THAT FINAL PAYMENT ON THE CONTRACT SHALL NOT BE MADE UNTIL THE CONTRATOR HAS SUBMITTED A STATEMENT SWORN TO BEFORE AN OFFICER DULY AUTHORIZED TO ADMINISTER OATH, SHOWING THAT ALL TAXES DUE FROM HIM, AND ALL OBLIGATIONS FOR MATERIALS USED AND LABOR EMPLOYED IN CONNECTION WITH THIS CONTRACT HAVE BEEN DULY PAID, x x x.¹⁴⁰ (Emphasis in the

¹³⁹ *Rollo*, p. 336.

¹⁴⁰ *Id.* at 576-577.

original).

With respect to the requirement of a guarantee bond to insure the building's workmanship and materials (Paragraph [g] of number 9 above), while petitioners submitted a surety bond from Commonwealth Insurance Company,¹⁴¹ the document, nevertheless, cannot satisfy the requirement of the Contract as the same is "valid for government projects only."¹⁴²

In connection with the allegation of petitioners that respondent has been using the building since October 2005 when they took over the building, suffice it to say that the Technical Specifications Book states that:

11. USE OF COMPLETED PORTIONS OF WORK: The Owner shall have the right to take possession of and use any completed or partially completed portions of the work, notwithstanding that the time for completing the entire work or such portions may not have expired; but **such taking [or] possession and use shall not x x x be deemed an acceptance of any work not completed in accordance with the Contract Documents.** Neither shall it be deemed a waiver by the Owner of the rights to claim for damages due to delays in the completion of the work. x x x.¹⁴³ (Emphasis supplied.)

x x x x

5. CONDITIONS RELATIVE TO CERTIFICATES OF PAYMENT:

x x x x

- b. No certificate issued nor payment to the Contractor nor partial or entire use or occupancy of the work by the Owner, shall constitute an acceptance of any work or materials not in accordance with the Contract x x x.¹⁴⁴

One of the grounds relied upon by the CIAC in granting the claim of petitioners for the final billing is that as early as June 2004, the first floor of

¹⁴¹ CIAC Records, Envelope No. 2, Annex "Q-1" of the Affidavit of Rodolfo Ondevilla.

¹⁴² Id., Annex "Q-1-A."

¹⁴³ *Rollo*, p. 571.

¹⁴⁴ Id. at 575.

the building was already being used by respondent's nursing students.¹⁴⁵ This finding of the CIAC, which is based on the allegation of petitioners,¹⁴⁶ is evidently not supported by the evidence on record as demonstrated by the above discussions of this Court. It failed to take into consideration Our foregoing determinations that as of that period, works on the building were still ongoing. Such finding also disregarded the clear testimony of respondent's comptroller, Mr. Ondevilla, that the building cannot be used at that time, or even in November of that same year, since the building officials of Calamba City did not permit its use because of safety concerns. Thus:

ATTY. V. F. ABAÑO:

And isn't it a fact Mr. Witness that the ground floor of this subject building was used starting in June 2004?

MR. R. C. ONDEVILLA:

June 2004? **I don't remember the building being used in June 2004.** In fact, I remember that time that when (unintelligible) was actually (unintelligible) at the second and third floor (unintelligible), **since it is very dangerous for us to, x x x, let our students use that room.**

ATTY. V. F. ABAÑO:

Are you very sure of that?

MR. R. C. ONDEVILLA:

Yes.

ATTY. V. F. ABAÑO:

You're under oath.

MR. R. C. ONDEVILLA:

Yes.

ATTY. V. F. ABAÑO:

That the ground floor was not used by the nursing students?

MR. R. C. ONDEVILLA:

Yes. As far as I know, it was used actually, **it was attempted to be used in November**, your Honor, because that is the start of the. . .

¹⁴⁵ CIAC Records, Envelope No. 6, Internal Files, Final Award, p. 25 (4.e).
¹⁴⁶ Id., Envelope No. 4, Affidavit of Architect Richard A. King, p. 3, No. 16.

ATTY. V. F. ABAÑO:
November of?

MR. R. C. ONDEVILLA:

Of 2004. Because then they were promising to deliver the building December 31, 2004. So, we said that the ground floor could already be ready in November. **But then again that was stopped, your Honor, because the Building Officials were on the school** and then we have to stop (unintelligible) the building.¹⁴⁷

x x x x

MR. R. C. ONDEVILLA:

Again, your Honor, on the testimonies we had, I already mentioned that we said that **that building cannot be used because the second and third floor[s] are still under construction. So the Municipal building officials did not allow [us] to use that building.**¹⁴⁸ (Emphases supplied).

In fact, the Certificate of Occupancy was issued by the City Government of Calamba on 13 January 2006 only.¹⁴⁹

Based on all the foregoing, We hold that respondent was justified in refusing to pay petitioners' final billing.

3. 2% surcharge on unpaid claims

The Contract between petitioners and respondent provides that "all outstanding accounts not paid after the retention period shall bear a surcharge of 2% per month with a fraction of a month considered a full month." In view of petitioners' failure to finish the project, it is not entitled to the 2% surcharge.

Besides, based on the Contract, the surcharge was to start after the one-year period of retention. The retention period, on the other hand, was to

¹⁴⁷ Id., Envelope No. 7, TSN, 29 January 2007, pp. 117-118.

¹⁴⁸ Id., TSN, 12 February 2007, p. 122.

¹⁴⁹ CA *rollo*, p. 467, Annex 33.

be reckoned from the date of final turnover and acceptance of the project.¹⁵⁰ Since petitioners did not finish the building, there was no formal turn-over and acceptance of the project. Hence, the retention period, from which the surcharge must be computed, did not start to run.

4. Amount of work accomplished equivalent to 94.12%

As per report of DLSPI, the 94.12% work accomplishment of petitioners on the project amounts to ₱49,244,814.99. Since respondent has made payments in the total amount of ₱42,319,927.20, there remains a balance of ₱6,924,887.79. This amount includes the ₱4,581,129.86 unpaid balance of the 2nd Progress Billing to which, as We already declared above, petitioners are entitled. Thus, of the total work accomplished by petitioners, respondent still has a balance of ₱2,343,757.93, in addition to the ₱4,581,129.86 unpaid balance of the 2nd Progress Billing (₱4,581,129.86 + ₱2,343,757.93 = ₱6,924,887.79).

Other monetary claims

1. Moral and exemplary damages

Both petitioners and respondent demand moral and exemplary damages, claiming gross violation of the Contract amounting to bad faith or wanton or malicious breach thereof.¹⁵¹

Petitioners allege that respondent's failure to make payments on time and in full drained them financially and emotionally, compelling them to apply for additional loans for the project, as a result of which, their

¹⁵⁰ *Rollo*, p. 320, No. 6(e) of The Contract, p. 335.

¹⁵¹ Petition for Review, *id.* at 26-27 and Comment to the Petition, *id.* at 556-558.

reputation and credit standing were adversely affected.¹⁵²

Respondent, on the other hand, contends that petitioners' malicious breach embarrassed it in the eyes of its community when it had to make do with makeshift classrooms, laboratories, and library facilities for its students.¹⁵³

A breach of contract may give rise to an award of moral damages only if the party guilty of the breach acted fraudulently or in bad faith. Likewise, a breach of contract may give rise to exemplary damages if the guilty party acted in a wanton, fraudulent, reckless, oppressive or malevolent manner.¹⁵⁴

The CIAC awarded moral and exemplary damages in favor of petitioners on the basis of respondent's failure to make payments on time and in full. The CIAC gave merit to the allegations of petitioners that the delayed and staggered payments drained them financially and emotionally, compelled them to apply for additional loans, affected their reputation and credit standing adversely, made them suffer mental anguish, serious anxiety and sleepless nights, and prevented them from participating in the bidding of other projects because of their financial problems. However, as already explained above, with the exception of the down payment, petitioners agreed to a staggered payment of the progress billings; hence, they cannot now claim that they were adversely affected by respondent's payments in installment. Also, with respect to the down payment, there was no showing that respondent's failure to pay the same on time and in full was attended by fraud or bad faith or was in wanton or oppressive disregard of petitioners' rights.

¹⁵² Id. at 26.

¹⁵³ Comment to the Petition, id. at 557.

¹⁵⁴ *Salvador v. Court of Appeals*, G.R. No. 124899, 30 March 2004, 426 SCRA 433, 453-455, citing Articles 2220 and 2232 of the Civil Code.

More importantly, an award of moral damages must be anchored on a **clear showing** that the party entitled thereto **actually experienced** mental anguish, besmirched reputation, sleepless nights, wounded feelings, or similar injury. Here, while petitioners alleged that their finances were adversely affected, they did not present any evidence thereof, such as documents evidencing the loans they were supposedly compelled to obtain.

In the same manner, respondent also failed to present sufficient evidence of their entitlement to moral and exemplary damages. The alleged besmirched reputation it allegedly suffered as a result of the building not having been finished on time was not supported by any evidence other than respondent's bare allegation.

Absent any showing that the parties are entitled to moral and exemplary damages, their respective claims therefor must be disallowed.

2. Attorney's Fees

Again, on the ground that petitioners and respondent committed a mutual breach of their contract, each must bear his own damage with respect to the payment of the professional fees of their respective lawyers.

3. Costs of Arbitration

Based on the Final Award of the CIAC, the total cost of arbitration is ₱555,658.52.¹⁵⁵

Consistent with the finding that both parties breached their contract,

¹⁵⁵ CA rollo, p. 83.

the costs of arbitration must be equally divided between petitioners and respondent. Each party must, consequently, pay ₱277,829.26.

SUMMARY OF MONETARY AWARDS

For petitioners:

1. Unpaid balance of 2 nd Progress Billing	₱4,581,129.86
2. Unpaid balance on total work accomplished	2,343,757.93
3. Cost of Arbitration	<u>277,829.26</u>
TOTAL:	₱7,202,717.05

For respondent:

1. Liquidated damages	₱10,463,985.44
2. Cost of construction of temporary facilities	1,579,056.03
3. Professional fees of DLSPI	200,000.00
4. Cost of Arbitration	<u>277,829.26</u>
TOTAL:	₱12,520,870.73

In sum, petitioners owe respondent the amount of ₱5,318,153.68.


WHEREFORE, the petition is **PARTIALLY GRANTED** and the Decision dated 31 August 2007 of the Court of Appeals in CA-G.R. SP No. 99315 is hereby **MODIFIED** as follows:

1. The award of moral and exemplary damages and attorney's fees in favor of respondent are **DELETED**;
2. The amount of actual damages awarded to respondent is **REDUCED** to ₱1,779,056.03 (₱1,579,056.03 cost of construction

of temporary facilities plus ₱200,000.00 professional fees of Davis Langdon and Seah Philippines, Inc.);

3. Payment of the costs of arbitration in the amount of ₱555,658.52 shall be equally divided by petitioners and respondent;
4. Petitioners are awarded actual damages in the sum of ₱6,924,887.79 representing the aggregate amount of their unpaid accomplished work on the project. This amount shall be deducted from the ₱12,394,902.95 due respondent; and
5. The total award in favor of respondent is ₱5,318,153.68.


SO ORDERED.



JOSE FORTUGAL PEREZ
Associate Justice

WE CONCUR:


ANTONIO T. CARPIO
Senior Associate Justice
Chairperson

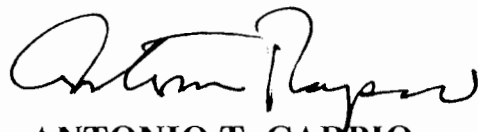

ARTURO D. BRION
Associate Justice


MARIA LOURDES P. A. SERENO
Associate Justice


BIENVENIDO L. REYES
Associate Justice

CERTIFICATION

I certify 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.


ANTONIO T. CARPIO
Senior Associate Justice
(Per Section 12, R.A. 296,
The Judiciary Act of 1948, as amended)