

**GENARO R. REYES CONSTRUCTION, INC. AND UNIVERSAL DOCKYARD LTD., PETITIONERS, VS. THE HONORABLE COURT OF APPEALS, THE DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS, JOSE P. DE JESUS, R...**

*G.R. No. 108718. July 14, 1994*

Ponente: MELO, J.

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**MELO, J.:**

Herein petitioners Genaro G. Reyes Construction, Inc. (or GGRCI) and Universal Dockyard Ltd. (or UDL) seek the nullification of the decision dated October 20, 1992 and the resolution dated January 20, 1993 of the Eighth Division of the Court of Appeals in CA-G.R. SP No. 28632. The said decision and resolution affirmed the two orders issued by the Regional Trial Court of the National Capital Judicial Region (Branch 15) dated June 22, 1992 and August 5, 1992 in its Civil Case No. 92-61345 which denied herein petitioners' application for a temporary restraining order and a writ of preliminary injunction to enjoin the Department of Public Works and Highways (DPWH) and then DPWH Secretary Jose P. de Jesus, and others therein impleaded from enforcing and implementing the notice of pre-termination of petitioners' contract for the implementation of Lower Agusan Development Project, Stage I, Phase 1, Butuan City, or any part thereof, to any person; and prohibiting said defendants from bidding said project or any part thereof, or awarding it to any person.

On March 1, 1992, the Government through respondent DPWH on one hand, and the joint venture of Genaro G. Reyes Construction, Inc. (GGRCI), Universal Dockyard, Ltd. (UDL), a British construction firm, Home Construction (HC), and JPL Construction (JPLC), (represented by petitioner Genaro G. Reyes, as President of lead contractor GGRCI) on the other hand, entered into a "Contract for the construction of the flood control facilities and land improvement works of the Lower Agusan Development Project, Stage 1, Phase 1, Butuan City" (Annex B, Petition; pp. 75-88, Rollo).

In the bidding which preceded the awards by the DPWH of the contract to the GGRCI, et al. Joint Venture, petitioners submitted the lowest bid below the Approved Government Estimate (AGE) of P492,563,998.00.

The following bids were submitted:

1. Petitioner -- P445,858,196.02 -- 9.45% below approved government estimate of P492,563,998.00.
2. D.M. Wenceslao & Associates -- P659,980,029.00 33.99% above government estimate.
3. Hanil Development Corporation -- P696,524,897.91 - 41% above government estimate.
4. F.F. Cruz and China Stage Engineering -- backed out.
5. C.M. Pancho and A.M. Oreta - disqualified.

On May 8, 1992 the Notice to Proceed (Annex C, Petition; p. 89, Rollo) was issued by DPWH Undersecretary

Romulo Del Rosario. It was received by petitioners on May 9, 1992 and they forthwith mobilized and deployed their men and equipment. The notice to proceed specifically stated that the contract would take effect not later than thirty days from its receipt by petitioners.

On April 23, 1992, the other respondents, DPWH Project Engineers Japanese Eiichiro Araide and Engineer Aquiles C. Sollano recommended termination of the contract alleging that as of that date "the project work progress is already 9.50 percent behind schedule (negative slippage)" (Annex F, Petition; pp. 92-93, Rollo). Four days later, or on April 27, 1992, Consultant Eiichiro Araide gave another figure of 9.8% negative slippage (Annex G, Petition; pp. 93-96, Rollo).

Under the law, specifically Presidential Decree No. 1870, the Government (herein represented by the DPWH) is authorized to take over delayed infrastructure projects only whenever a contractor is behind schedule in its contract and incurs 15% or more negative slippage based on its approved PERT/CM, and the implementing agency, at the discretion of the Minister concerned, may undertake the administration of the whole or a portion of the unfinished work or have the whole or portion of such unfinished work done by another contractor through a negotiated contract at the current valuation price.

Also, Department Order No. 102, Series of 1988 of the DPWH, provides:

To insure timely and effective remedial steps in response to delays in project implementation, all Project Managers (PMs), Regional Directors (RDs) and District Engineers (DEs) concerned shall undertake the following calibrated actions where contracts for infrastructure projects reach the levels of negative slippage (attributable to the contractor) indicated below:

1. Negative Slippage of 5% (Early Warning Stage). The contractor shall be given a warning and required to submit a "catch-up" program to eliminate the slippage. The PM/RD/DE shall provide temporary supervision and monitoring of the work.
2. Negative Slippage of 10% ("ICU" Stage). The contractor shall be given a second warning and required to submit a detailed action program on a fortnightly (two weeks) basis which commits him to accelerate the work and accomplish specific physical targets which will reduce the slippage over a definite time period. Furthermore, the contractor shall be instructed to specify the additional input resources -- money, manpower, materials, machines, and management in which he should mobilize for this action program. The PM/RD/DE shall exercise closer supervision and meet the contractor every other week to evaluate the progress of work and resolve any problems and bottlenecks.
3. Negative Slippage of 15% ("make or break" stage). The contractor shall be issued a final warning and required to come up with a more detailed program of activities with weekly physical targets together with the required additional input resources. On-site supervision shall be intensified, and evaluation of project performance will be done at least once a week. At the same time the PM/RD/DE shall prepare contingency plans for the termination and rescission of the contract and/or take over of the work by administration or contract.
4. Negative Slippage beyond 15% ("terminal" stage). The PM/RD/DE shall contract and/or take over of the remaining work by administration or assignment to another contractor/appropriate agency. Proper transitory measures shall be taken to minimize work disruptions, e.g., take over by administration while rebidding is going on.

Because of negative slippage of 9.50% as of April 23, 1992, or 9.86% as revised on April 27, 1992, respondent Project Director Antonio A. Alpasan wrote a memorandum (Annex H, Petition; p. 98, Rollo) dated May 8, 1992 to respondent DPWH Undersecretary Romulo Del Rosario recommending either of two alternatives:

1. Negotiate the entire balance of the work with the second lowest bidder, but if the second lowest bidder is blacklisted, then to the third lowest bidder; or
2. Rebid the whole balance of the work or divide it into contract packages.

On May 14, 1992, DPWH Acting Secretary Gregorio Alvarez notified petitioner GGRCI that its contract is being terminated (Annex D, Petition; p. 90, Rollo). Also on May 14, 1992, respondent DPWH Undersecretary Romulo Del Rosario wrote respondent Secretary De Jesus a memorandum (Annex I, Petition; p. 99, Rollo), "recommending that the balance of the work be offered to the third lowest bidder, the Korean firm of Hanil Development Corporation and that in the event that the negotiation with Hanil fails, the balance of the work be repackaged into several components for rebidding as soon as possible.

At this juncture, note must be taken of the circumstance that the bid price of Hanil of P696,524,897.96 was 41.4% over and above the approved government estimate (AGE) of P492,563,998.00 for the project. Hanil's bid was higher by P254,666,701.94 vis-a-vis petitioners' bid and contract price.

On May 14, 1992, respondent DPWH Secretary De Jesus wrote petitioners that its contract for the project was terminated (Annex E, Petition; p. 91, Rollo). On May 22, 1992, petitioners wrote a letter requesting reconsideration of the termination order, pointing out, inter alia, that:

...the bid of Hanil Corp. when the project was bidden 15 October 1990 was already P696,524,897.00, 41.4% above the Approved Agency Estimate (AAE), which amounts to P492,563,998.00. Categorically, we are taking a price difference of P203,960,849.00, which is obviously much to the disadvantage of the Department and the Filipino people.

In comparison to the contract price of P445,858,196.00, 9.48% below the AAE, the government and Filipino people stand to earn a savings of P46,705,802.00 and P250,666,651 compared to Hanil's bid price.

... Reviewing the incurred negative slippage in detail, it can clearly be seen that the bulk can be attributed to the unaccomplished spoilbank and dredging section of the project.

The spoilbank section, supposedly 100 hectares in area had right of way problems; that is, only 40 hectares or 40% of the total area have been acquired. (Annex J, Petition; pp. 100--101, Rollo.)

The request for reconsideration was reiterated on May 26, 1992 and June 14, 1992 (Annexes K and L, Petition; pp. 102-106, Rollo) inviting the DPWH's attention that: (a) based on Hanil's bid price the government stands to lose P250,666,651.00, apart from the additional P100 Million worth in escalation price as indicated in the recommendation of respondents Alpasa (Annex H, Petition) and Del Rosario (Annex I, supra); (b) the delay and failure of the DPWH Project Office (PMO) to procure the 100 hectares right of way for the project's spoilbank area (only 40 hectares was acquired by the DPWH) as provided for in the tender documents, thereby contributing to a negative slippage equivalent to 3% due to the suspension of work in that area because of right of way problems.

On June 2, 1992, DPWH Secretary De Jesus terminated the contract of the GGRCI, et al. Joint Venture (Annex M, Petition; p. 107, Rollo).

On October 8, 1992, respondent DPWH Undersecretary Romulo del Rosario sent a letter (Annex N, Petition; pp. 108-110, Rollo) to Mr. Hideo Tanaka, Chief Representative of Japan's Overseas Economic Cooperation Fund (or OECF) recommending that the termination of petitioners' contract be lifted upon the following observations:

... some reasons contributed to the delay covering the negative slippage was also due to the government's fault, such as:

- a. Overlapping of duties and responsibilities among the expatriates, the local consultants and the field PMO.
- b. Unauthorized variation order with the project manager and the expatriate consultant issuing it without prior authority from the central office reducing the length of the flood wall from 5.825 km. to 1.868 km. and change it to levee, with a total cost reduction of P75,458,091.03.
- c. The right of way problem where the project has a so-called spoiled bank section which is supposed to be 100 hectares and the government has to secure the right-of-way. But as of the present, only about 40 hectares or 40% has been acquired, out of which, about 20 hectares are contiguous while the remaining are scattered. Because of this the contractor found it difficult to pursue the project as it is quite unrealistic to dispose of the dredged materials. Aside from this, there is also the right-of-way problems encountered in the floodwall and levee construction.

3. With the termination effected, the contractor filed a case in the trial court twice denied by the trial court. Right now the case has been appealed to the Court of Appeals.

4. The DPWH sent an investigating team to verify the allegations of the contractor on the faults of the Government and found to have been true.

5. To resolve the issue, we have studied and came up with three options to continue the project as presented in our report to Secretary De Jesus (copy attached). Considering the advantages and disadvantages presented, we recommend that the termination order be lifted and the contract with the joint venture be pursued on the premise that the vigorous action of the contractor in pursuing the case, it is evident that they have all the intention to finish the project. Otherwise all their actions would prove nothing and futile.

The above recommendation was based on the report of Andres Canlas, DPWH Project Manager IV, dated September 8, 1992 (Annex C-2, Urgent Motion for Issuance of Temporary Restraining Order; p. 196, Rollo) that the negative slippage of the project was caused not only by the contractor but also by the government side.

On May 28, 1992 GGRCI, et al. Joint Venture filed a case for prohibition, specific performance, and injunction against respondent DPWH as the sole defendant before the Regional Trial Court of Manila (Civil Case No. 92-61345). The joint venture subsequently filed an Amended Petition impleading additional defendants (respondents herein) and including claims for damages.

On June 25, 1992 and August 5, 1992, the regional trial court issued orders denying the joint venture's prayer for preliminary injunction citing Section 1 of Presidential Decree No. 1818 providing that:

No court in the Philippines shall have jurisdiction to issue any restraining order, preliminary injunction, or preliminary mandatory injunction in any case, dispute or controversy involving any infrastructure project or a mining, fishery, forest or other natural resource development of the government or any public utility operated by the government including any other public utilities for the transport of the goods or commodities, stevedoring and arrastre contracts, to prohibit any person or persons, entity or government official from proceeding with, or continuing the execution or implementation of any such project, or the operation of such public utility, or pursuing any lawful activity necessary for such execution, implementation or operation.

On August 11, 1992 the joint venture filed with the Court of Appeals a petition for certiorari and prohibition with a prayer for a writ of preliminary injunction to set aside the trial court's orders.

The petition in CA-G.R. 28632 was dismissed by respondent Court of Appeals in a decision dated October 20, 1992 (Annex A, Petition; pp. 68-75, Rollo) and a subsequent motion for reconsideration was denied in a resolution dated January 20, 1993 (Annex A-1, Petition; p. 77, Rollo).

Much reliance is placed on the prohibition embodied in Section 1 of Presidential Decree No. 1818 which forbids

any Court in the Philippines, including this Court, from issuing any restraining order, preliminary injunction, or preliminary mandatory injunction in any case, dispute or controversy involving, as in the case at bar, an infrastructure project, to prohibit any person or entity from continuing with the execution or implementation of such project. It is on the basis of such provision that the door is being closed on petitioners' prayer for redress.

Such proposition is not well-taken.

Against the backdrop of the undisputed facts that (a) respondents terminated petitioners' contract based on slippage of 9.86% and (b) the contributory fault of the government which substantially added to the slippage -- the primary question that presents itself is whether the termination was proper even if the slippage had not reached the 15% level mentioned by the law as to justify termination. This is a legal, not a factual question. In consequence, if the termination be adjudged unjustified, are the courts powerless to intervene due to the caveat under the aforequoted Section 1 of Presidential Decree No. 1818?

Although we entertain serious doubts in regard to the constitutionality of Presidential Decree No. 1818, we nonetheless feel that said decree finds no application to the case at bench. It will be observed that what Presidential Decree No. 1818 proscribes is the issuance of a writ of injunction to impede or, in the language of the statute:

. . . to prohibit any person or persons, entity or government official from proceeding with, or continuing the execution or implementation of any such project, or the operation of such public utility, or pursuing any lawful activity necessary for such execution, implementation or operation.

In the case at bench, the net effect of granting the petition is not to stave off implementation of a government project but precisely to say to public respondents that they ought to implement the award and should not thus cancel the contract of petitioners inasmuch as the negative slippage is less than the minimum level specified by Presidential Decree No. 1870. Hence, the proscription under Presidential Decree No. 1818 is inapplicable since we are not restraining implementation of a government project. Verily, we are instructing public respondents to allow petitioners to proceed with the project.

In the determination of whether respondents have acted within the bounds of the law when they terminated the contract based on the admitted 9.86% slippage, resort must be had to the very law, Presidential Decree No. 1870 and DPWH Circular No. 102, upon which respondents anchor their authority to terminate the contract.

The pertinent provisions of Presidential Decree No. 1870 give the implementing agency (in this instance, the DPWH) authority to terminate the contract whenever the contractor is behind schedule in its contract work and incurs 15% or more negative slippage based on its approved PERT/CPM. Section 1 of Presidential Decree No. 1870 reads thus:

1. Whenever a contractor is behind schedule in the contract work and incurs 15% or more negative slippage based on its approved PERT/CPM, the implementing agency, at the discretion of the Ministry concerned, may undertake by administration the whole or a portion of the unfinished work done by another qualified contractor through negotiated contract at the current valuation prices.

Now Circular No. 102, Series of 1988, promulgated to implement Presidential Decree No. 1870, provides four stages of negative slippage with which calibrated action, at each stage, has to be undertaken as remedial steps to correct delays in project implementation, as follows:

- 1) Negative slippage of 5% ("early warning" stage). Contractor is given a warning;
- 2) Negative slippage of 10% ("ICU" stage). The contractor is given a second warning.

- 3) Negative slippage of 15% ("make or break" stage). The contractor shall be issued a final warning;
- 4) Negative slippage beyond 15% ("terminal" stage). The PM/RD/DE shall initiate termination/rescission of the contract and/or take-over of the remaining work by administration or assignment to another contractor/appropriate agency.

The discretion, therefore, of the DPWH to terminate or rescind the contract comes into play only in the event the contractor shall have incurred a negative slippage of 15% or more. In the instant case, the negative slippage of petitioners at the time they were served the notice of termination was only 9.86%. Hence, respondents violated the law and committed an illegal act and abused their discretion when they terminated petitioners' contract based on negative slippage of only 9.86%. Such wrongful and illegal act is in derogation of petitioners' right not to be deprived of property without due process of law. Petitioners' contract with the DPWH covering the project in question is a proprietary right within the meaning of the Constitution and can only be rescinded strictly in accordance with the governing law, Presidential Decree No. 1870, as implemented by DPWH Circular No. 102. And relative to this axiom, it has been previously emphasized that courts may declare an action or resolution of an administrative authority to be illegal because it violates or fails to comply with some mandatory provision of the law or because it is corrupt, arbitrary, or capricious (*Borromeo vs. City of Manila and Rodriguez Lanuza*, 62 Phil. 512; 516 [1935]; Annotation on the Power of Judicial Review of Public Bidding and Awards of Government Contracts, 50 SCRA 491; 498 [1973])

The Office of the Solicitor General maintains that under Paragraph 2 of Presidential Decree No. 1870, the DPWH may take over or award a project to another contractor whenever work is not done on schedule, meaning anywhere from zero slippage to 15% slippage. This would lead to hopeless contradiction between Paragraph 1 and Paragraph 2. A law cannot possibly negate in one paragraph what it grants in another. Paragraph 2 can only be interpreted as allowing discretion after the 15% limit in Paragraph 1 is exceeded. It cannot be doubted that in cases of force majeure, revolution, anomalous transactions in the DPWH itself, and other similar reasons, the Department Head may still extend the contract beyond 15% slippage. Only then may sound discretion come in.

Paragraph 3 of Presidential Decree No. 1870 refers to specific causes -- (a) refusal of the contractor to provide tools, equipment, and workers; (b) subletting or assigning the contract to subcontractors without DPWH permission; and (c) willful violation of covenants and agreements. Not one of the above exists in the case at bench. Respondents cannot, as they allege, rely on the ordinary rules of contract under the Civil Code that if the obligor does not comply with the terms and conditions of the contract, the obligee has the right to ask for rescission with damages. A special law fixes the condition of slippage at 15%. This has to be followed. The law on contracts cannot also penalize the obligor for faults of the obligee.

The 15% slippage required by Presidential Decree No. 1870 can be likened to the 15-day reglementary period for appealing that cannot co-exist with a contradictory provision allowing a court, in its discretion, to reduce the period to one or two days. Fifteen days means fifteen days. Fifteen percent slippage does not mean 9.5%.

The six (6) instances cited as capable of offsetting or negating the first requirement of 15% slippage would give the DPWH blanket prerogative to terminate a contract at anytime and on the slightest pretext, including those created by DPWH itself as in this case. It is a grant of arbitrary power. It is delegation running riot.

The requirement of public bidding might as well be abolished. DPWH officials are compelled by law to accept only the best bid in the award of contract. However, what is the point in conducting a public bidding if, only a short while later, a winning bidder can be disqualified on a one or two percent slippage caused by DPWH itself or a claim that certain tools and equipment have not been provided or a pretext that any term or condition has been violated. The 15% limiting point must be followed. The other provisions come in only if they caused the slippage

to go beyond 15%.

It is argued that this Court is not a trier of facts. However, neither can this Court ignore facts coming from DPWH itself. Except for general statements and conclusions, there is nothing presented by respondents to show that the logical and convincing assertions of petitioner are not true.

According to respondents, petitioners failed to mobilize the minimum equipment for the project and to send a sufficient number of engineers. Respondents state that from Day One, there should have been thirty-four (34) pieces of light and heavy equipment but that petitioners dispatched only fourteen (14) to the job site. Precisely, all these alleged shortcomings of petitioners were clearly taken into consideration in arriving at a conclusion that the negative slippage is only 9.50%.

Petitioners, of course, deny the allegation of delay. They state that they mobilized surveyors, engineers, and laborers; brought all the necessary equipment to the job site, constructed bunk houses, relocated buildings such as those of the Pagatpatan Elementary School. Petitioners' engineers were old hands of DPWH and familiar with every aspect of the construction. The best evidence that the statements of petitioners are more accurate than those of respondents is that the DPWH Investigating Team went to the jobsite and thereafter filed a lengthy report. It was on the basis of the report that then Undersecretary del Rosario later recommended that the termination order be reconsidered and revoked and that petitioners should be allowed to continue with the construction under the original contract. The Undersecretary did not mention what respondents now allege in their memorandum.

Common sense also dictates that 34 pieces of light and heavy equipment cannot all be used simultaneously on Day One. More so, because the right of way was admittedly not secured by DPWH. The machinery would only be idle or get in each other's way.

Assuming respondents to be correct that there was a three-month delay in commencing the job, the slippage is still 9.86% inspite of all petitioners' alleged shortcomings. Petitioners claim to have mobilized the men and the materials on time and attribute the delay to DPWH but emphasize that "whatever dates are chosen and whatever causes are adduced by the respondents and given the worst scenario, the slippage does not go beyond 9.85%, still not a basis to cancel the contract" (p. 4, Petitioners' Memorandum dated February 2, 1994).

Respondents keep on blaming petitioners for delay but their own DPWH Investigating Team and the second highest official of the DPWH laid the blame on the government engineers and purchasing officials.

The right of way problem calls for special mention. The letter of DPWH Undersecretary Romulo del Rosario dated October 8, 1992 recommended the lifting of the cancellation of the contract, because of, among other things, the right-of-way problem.

It was ascertained during the hearing conducted by the Court on January 12, 1994 that of the 100-hectare spoiled bank section, only 40 hectares have been acquired. Half of this 40 hectares is broken down into small parcels separate from each other. In the other half, DPWH paid the landowners but took no steps to attend to the tenants who refused and continue to refuse to vacate their farms unless compensated. The dredging on the river shall result in 1,300,000 cubic meters of mud, silt, and debris flowing into the area. Unless a ring embankment is constructed around the entire 100 hectares, the mud and silt would inundate neighboring areas. Petitioners cannot possibly start dredging until after the 100 hectares are acquired because this would drown or bury the people, work animals, and farms in the still-to-be acquired 60 hectares, not to mention the tenants who refuse to leave their farms in the 40 hectares already purchased until compensation benefits are given to them.

The Solicitor General has also failed to explain the purchase of non-essential areas. There was no explanation for the sudden change from a reinforced concrete floodwall to an earthen levee along a six kilometer stretch of the

project. The concrete floodwall calls for the purchase of a 10-meter wide strip of land along it. The earthen levee requires a 35-meter wide adjacent strip of land. Anywhere up to 25 meters wide and six kilometers long of expensive urban land had to be purchased to cover up the use of right-of-way funds where it is not essential.

There should likewise be an explanation why an extra P71,000,000 in addition to the earlier amount of P51,000,000 had to be appropriated for right of way.

What is appalling and seemingly anomalous is the recommendation of respondent officials to offer the project to Hanil Corporation, the third lowest bidder, and whose bid had been previously disqualified for being 41.40% over and above the government estimate for the project of P492,563,998.00. Indeed, the Hanil bid was P696,524,897.96, or higher by P254,666,701.94 as compared to petitioners' bid and contract price of P445,858,196.02.

Respondents' wrongful termination of the contract which petitioners agreed to execute, and have in fact executed partially, at the price of P445,858,196.02 and in offering it to Hanil, a disqualified bidder which previously entered with a bid of P696,524,817.96, would result in a financial loss to the government in the amount of no less than P254,666,201.94. Hence, respondents would seem to appear to be entering into a negotiated contract grossly disadvantageous to the government.

The intent of the law (P.D. 1870) in allowing the government to take over delayed construction projects with negative slippage of 15% or more is primarily "to save money and to avoid dislocation of the financial projections and/or cash flow of the government", as clearly stated in the 3rd preambulatory clause of said decree, as follows:

Whereas, any delay in the completion of the contract in accordance with the approved PERT/CPM and/or contract time as stipulated, will not only dislocate the financial projections and/or the cash flow of the Government on these projects, but also unduly prejudice the public interest sought to be subserved by the timely completion of the infrastructure project.

The termination of petitioners' contract does not, therefore, subserve public interest. On the other hand, it would result in a huge dislocation of the financial projections and/or cash flow of the Government. On this score, it has been said as a general doctrine that though the law be fair on its face, and impartial in appearance, yet if it is applied and administered by the public authorities charged with their administration and thus representing the government itself, with an evil eye and unequal hand so as practically to make unjust and illegal discrimination, the denial of equal justice is still within the prohibition of the Constitution. (*Yick Wo vs. Hopkins*, 128 U.S. 356; *Ex parte Virginia*, 100 U.S. 339; *Henderson vs. Mayor*, 92 U.S. 259; *Chy Lung vs. Freeman*, 92 U.S. 175; *Ned vs. Delaware*, 103 U.S. 320; *Soon Hing vs. Crowley*, 113 U.S. 703).

If the unjust and unlawful acts of respondents are not struck down and respondents are not restrained, the Government stands to lose from Three Hundred Fifty Million (P350 Million) Pesos additional expenditures. Under Presidential Decree No. 1870 when the project is rebid or awarded through negotiated contract, compensation is at "current valuation price" (Sec. 1, P.D. 1870). Considering the increase in prices of labor and materials, it is a certainty that any new bidder would ask for prices much higher than the already high prices which the losing bidders offered in the March 1, 1991 bidding. Tremendous loss of taxpayers' money thus is inevitable. This Court cannot, therefore, close its eyes to the resultant evil which will be inflicted not only upon petitioners, but also on the Filipino people and the dissipation of taxpayers' money arising from the unjust termination of petitioners' contract and the rebidding to or renegotiation with other parties of the project. Public interest and the stakes of the Government dictate the issuance of the writs of injunction and prohibition restraining respondents from enforcing the order terminating petitioners' contract for the construction of the flood control facilities and land improvement works of the Lower Agusan Development Project, Stage I, Phase 1.

It may be emphasized that the law fixing the stages of negative slippage before termination of a contract may be effected and the undisputed loss of P350 million if the termination is pushed through are not the only reasons why this petition should be granted.

By the very admissions of respondent DPWH, such as the October 8, 1992 letter of Undersecretary Roberto del Rosario to the Japanese consultant, earlier cited, the main cause of the delay was due to respondent DPWH officials and not to petitioner. A total of P51 million was appropriated and released to acquire rights of way or to buy the lands upon which the flood control project would be constructed. The farmers and landowners refused to move out when the funds to compensate them were not forthcoming. This was the main cause of the 9.6% slippage and it is not attributable to petitioners.

The DPWH Team which investigated the causes of slippage further found that there was an overlapping of duties and responsibilities among the Japanese consultant, the local consultants, and the Field Project Manager, thus sustaining petitioners' claim of unwarranted delays in the approval of work and equipment, not to mention changes of orders which left petitioners wondering what to do and whom to follow.

There is ample evidence in the record before us to show that the DPWH was responsible for the main causes of the delay. As stated by petitioners, DPWH, in failing to comply with its obligations seemingly wants the contractors to work in a most unorthodox if not unthinkable manner to justify irregular purchases which should not have been made.

In fine, not only was the slippage within legally tolerable limits but the causes of the slippage are attributable to respondent DPWH officials. The inflexible stance of respondents towards the compromise offers of petitioners, even before this Court ordered them to explore such a possibility, but especially after we asked them to do so, convinces the Court all the more that there are irregularities which respondents are sweeping under the rug. The record also shows that even after the stop-work order was given and while petitioners were trying to have it reconsidered, they continued working full force on the project thus minimizing or eliminating the slippage which caused the disputed problems.

WHEREFORE, the petition is hereby GRANTED and the decision dated October 20, 1992, as well as the resolution dated January 20, 1993 of the Court of Appeals in CA-G.R. SP No. 28632 are hereby SET ASIDE.

**SO ORDERED.**

Bidin and Romero JJ., concur.

Feliciano, (Chairman), and Vitug, JJ., see dissenting opinion.

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Dissenting OPINION

Feliciano, J.:

I join in the dissent of my distinguished brother in the Court, Mr. Justice Vitug. I also confess to some difficulty in fully grasping what exactly the majority opinion by my learned brother Mr. Justice Melo is actually saying.

I have assumed that the majority is saying that the Regional Trial Court (RTC) committed a grave abuse of discretion in denying the petitioner companies' application for a temporary restraining order or a writ of preliminary injunction, and that the Court of Appeals' refusal to set aside the RTC's order of denial constituted reversible error on the part of the appellate court. This would be straightforward enough. However, it should be

noted that the RTC denied petitioners' application on legal grounds, that is, that the RTC had no lawful authority to grant that application. Assuming, for purposes of argument merely, that the RTC had erred in reaching its legal conclusion, it is very difficult to suppose that the RTC's error of law constituted grave abuse of discretion amounting to lack or excess of jurisdiction. And that is precisely what the Court of Appeals held.

It would appear, however, that the majority opinion is also saying something else: that the Department of Public Works and Highways (DPWH) committed either an unlawful act or a grave abuse of discretion in terminating its contract with petitioner Construction Company.

A principal problem with this position is that there has as yet been no trial on the merits in the lower court. Petitioners' application for a temporary restraining order or a preliminary writ of injunction was made very early in the case, such that the RTC could not, and did not, make any findings of fact, and denied the application solely on legal grounds. The majority opinion is, however, replete with descriptive, fact-type, statements which cannot be said to reflect findings of fact, since none were made either by the RTC or by the Court of Appeals. It would, accordingly, appear that the majority opinion has treated the allegations of one or the other party (but principally the petitioners) as if such allegations constituted statements of established facts. They can scarcely be regarded as undisputed facts, since the respondents, defendants before the RTC, have not yet even filed their answer. I fear, therefore, that this Court, which is, of course, not a trier of facts, will, among other things, be pre-empting the results of the still forthcoming trial before the RTC.

The Petition for Review on Certiorari should be denied, and I so vote.

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## DISSENTING OPINION

**VITUG, J.:**

I regret inability to join my esteemed colleagues in their majority opinion.

The facts and the events that led to petitioners' recourse to this Court, as far as I can gather from the available records of the case, could be detailed thusly:

On 14 October 1990, a joint venture agreement was entered into by and among Genaro R. Reyes Construction, Inc. (GRRCI), Universal Dockyard Limited (UDL), Home Construction, and JPL Construction for the purpose of engaging in the construction business. On 01 March 1991, respondent Department of Public Works and Highways (DPWH), represented by then Secretary Jose P. de Jesus, executed a contract with the joint venture, represented by GRRCI President Genaro R. Reyes, for the construction of flood control facilities and land improvement works at the Lower Agusan Development Project, Stage I, Phase I, Butuan City. The project was to be completed within fifty-two (52) calendar months from the date of the receipt of the formal notice to proceed.[1]

On 14 May 1992, GRRCI, through Genaro R. Reyes, received identical notices from the DPWH, one from Undersecretary Gregorio S. Alvarez and another from Secretary Jose P. de Jesus, informing him of DPWH's decision to terminate the contract in "view of the minimal accomplishment of the Joint Venture despite x x x repeated granting of grace period x x x to register substantial accomplishment x x x." [2] The notices were issued in response to the memorandum, dated 23 April 1992, addressed by Project Engineers Eiichiro Araida and Aquiles Sollano, to DPWH Regional Director Julio M. Luspo, recommending said termination. The memorandum, in part, expressed:

"Please be informed that as of April 23, 1992, the project work progress is already 9.50 percent behind schedule (negative slippage), and it has been observed that there is no indication at present that the situation will improve.

"xxx xxx xxx.

"Considering the present situation, we believe that sooner or later, the negative slippage of the work progress will continue to increase beyond negative 15 percent.[3]

On 27 April 1992, Project Engineer Araida issued another Memorandum to Regional Director Luspo, in which he indicated the individual performances of the joint venture, except UDL, and forecasted negative slippages for the succeeding months, which would reach 16.86% by October 1992.[4]

On 28 May 1992, the joint venture filed a Petition (Civil Case No. 92-61345) for "Prohibition, Specific Performance and Injunction, with Prayer for the Issuance of a Writ of Preliminary Injunction and/or Temporary Restraining Order," with the Regional Trial Court (RTC), Branch 15, of Manila, seeking to prohibit DPWH from terminating the contract and rebidding the same.

On 22 June 1992, the RTC denied the prayer for the issuance of a writ of preliminary injunction. On 08 July 1992, respondent DPWH filed a "Manifestation (In Lieu of Answer)," praying that it be relieved from filing an answer considering that the 22nd June 1992 order of the court has rendered the issues raised in the petition moot and academic. The petitioners filed an amended petition by adding other respondent officials of DPWH. On 05 August 1992, the RTC issued another order to the following effect:

"Anent the ground that there is no basis for DPWH to terminate its contract with plaintiff as this is depriving the latter of their right to property without due process, this Court believes that DPWH being an agency of the government is presumed to have performed a lawful activity. That, in fact, the acts done or to be done by DPWH is unlawful is for plaintiff to prove after due hearing. In the meantime, this Court following the directive of PD 1818, has no power to enjoin DPWH from pursuing any lawful act relative to the implementation of the infrastructure project.

"WHEREFORE, motion for the issuance of preliminary injunction is hereby DENIED.

"SO ORDERED."

A petition for "Certiorari and Prohibition, with Prayer for Preliminary Injunction and Temporary Restraining Order," was filed with the Court of Appeals, followed, on 17 August 1992, by an "Extremely Urgent Motion for Issuance of Temporary Restraining Order."

Meanwhile, the Solicitor-General, in his comment to the petition before the Court of Appeals, manifested that Home Construction and JPL Construction "had already signified their willingness to adhere to the DPWH Secretary's decision to terminate the contract." [5]

On 10 September 1992, the appellate court issued a Resolution denying the petitioners' Urgent Motion. On 20 October 1992, the court dismissed the petition for lack of merit. The motion for reconsideration filed by the petitioners was denied in a resolution of 20 January 1993.

The question that is sought to be resolved in the instant petition to the Court is whether or not the respondent appellate court has committed grave abuse of discretion in denying the petitioners' prayer for the issuance of the preliminary injunctive writ and in dismissing the petition.

In opposing the grant of the petition, the Solicitor General cites the proscription on courts under Presidential Decree No. 1818, similar to Presidential Decree No. 605, against the issuance of injunctive writs.[6] He argues

that the law, signed on 16 January 1981, is aimed at avoiding disruptions in the undertaking of essential government infrastructure projects. Letter of Instructions No. 1186 defines the term "infrastructure project," to include -

"x x x all projects of all the Ministries of Government, those of offices and agencies under their supervision and those of corporations and institutions attached to them, excluding the Ministry of National Defense. For this purpose, infrastructure projects shall mean construction, improvement and rehabilitation of roads, and bridges, railways, airports, seaports, communication facilities, irrigation, flood control and drainage, water supply and sewerage systems, shore protection, power facilities, national buildings, school buildings, hospital buildings, and other related construction projects that form part of the government capital investment."

There can hardly be any dispute that the project covered by the contract in question is embraced by Presidential Decree No. 1818. Section 1 of the Decree reads:

"Sec. 1. No court in the Philippines shall have jurisdiction to issue any restraining order, preliminary injunction, or preliminary mandatory injunction in any case, dispute, or controversy involving an infrastructure project, or a mining, fishery, forest or other natural resource development project of the government, or any public utility operated by the government, including among others public utilities for the transport of the goods or commodities, stevedoring and arrastre contracts, to prohibit any person or persons, entity or government official from proceeding with, or continuing the execution or implementation of any such project, or the operation of such public utility, or pursuing any lawful activity necessary for such execution, implementation or operation." (Underscoring supplied).

On the above score, the respondent appellate court elucidated, as follows:

"PD 1818 was promulgated to prohibit the courts from issuing restraining orders or preliminary injunctions in cases involving infrastructure projects in order not to disrupt or hamper the pursuit of essential government projects critical to the economic development effort of the nation (Second 'Whereas' clause). The injunction sought seeks to restrain the DPWH and its officials from carrying out the order terminating the contract of petitioners, and if granted would in effect amount to an interference by the court or the substitution of its judgment for that of the said administrative agency in the discharge of its functions in pursuing the infrastructure project in question. The issuance of an injunction is clearly covered by the peremptory language of PD 1818. While the prohibition is by no means absolute, as the courts are not prevented from exercising jurisdiction where questions of law are involved (*Datiles & Co. vs. Sucaldito*, 186 SCRA 704) or when the administrative agency violates a citizen's constitutional right, or commits a grave abuse of discretion, or acts in excess of or without jurisdiction (*Mantruste System, Inc. vs. CA*, 179 SCRA 136) We are not convinced that petitioners' plea of a violation of its contractual/property rights is sufficient to override the letter and legislative purpose behind PD 1818. The arguments raised by petitioner in questioning the percentage of negative slippage and the computation of days of delay due to the various problems encountered which are allegedly attributable to respondent DPWH, involve questions of fact and the exercise of official discretion on the part of the administrative officials concerned, and do not justify judicial interference. As stated in *Datiles and Co. vs. Sucaldito*, supra., which involves a similar statutory prohibition contained in PD 605:

“The prohibition pertains to the issuance by the courts of injunctions or restraining orders, against administrative acts or controversies which involves facts or exercise of discretion in technical cases because to allow courts to judge these matters would disturb the smooth functioning of the administrative machinery.”

"We are not convinced that the issues raised fall outside of the above dimension so that the courts will not be prevented by PD 1818 from exercising its power to restrain or prohibit administrative acts.

"The allegation that petitioners' constitutional right is being violated cannot be upheld. Its right to continue with the contract should be considered in light of the DPWH's official prerogative to terminate the same, and

until the merits of this issue are fully litigated, the issuance of the preliminary injunction must be deemed covered by PD 1818, if the purpose of the latter issuance is to be served at all.

"The petitioner's insistence that its negative slippage of 10% as of May, 1992 is below the 15% negative slippage that would authorize take-over of its contract pursuant to PD 1870 and its implementing Circular No. 102 goes into the merits of the legality of the termination order, which merely adverted to petitioner's 'minimal accomplishment.' The idea behind PD 1818 to restrain the courts from interfering with administrative decisions arrived at in the pursuit of infrastructure projects is to enable the agency concerned, which is presumably more knowledgeable with respect to the technical matters involved in such critical projects, to utilize its technical expertise in the pursuit of the essential infrastructure projects. Courts should not block by an injunction the discharge of the agency's functions and the implementation of its decisions, in the absence of a clear violation of constitutional right. We are not convinced that there is such a violation." [7]

Indeed, as the majority opinion (concurring with the petitioners) so well point out, one can take issue on what the respondents would assume to be a limitless application of the aforequoted provision. Section 5, Article VIII, of the 1987 Constitution explicitly vests in the Supreme Court original jurisdiction "x x x over petitions for certiorari, prohibition, mandamus, quo warranto and habeas corpus." The conferment of that jurisdiction may be contended to likewise implicitly vest in the Court the ancillary remedies incidental to the proper exercise thereof. So, also, Section 1 of the same Article VIII provides that judicial power, this time residing in all courts of competent jurisdiction, includes the duty "x x x to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government." [8]

The Court need not, in my view, pass upon this constitutional question, albeit submitted by the parties, there being neither urgency nor necessity for it at this time. The settled rule is that if there are other grounds upon which a case may be disposed of and resolved, such as, I believe, in this case at bench, courts must refrain from ruling on constitutional issues. [9]

What should be apropos, instead of now making a peremptory dictum on the question of the constitutionality or scope of application of the decree, is an inquiry beforehand on the legal propriety, on the basis of Rule 65 of the Rules of Court, of the petition for certiorari and prohibition itself. For the extraordinary writ to issue, the rules require the attendance, among other conditions sine qua non, of "grave abuse of discretion." Has there really been one in the case at bench? This is the prejudicial question to be asked.

Grave abuse of discretion, albeit an "elastic phrase," [10] has always been understood as a capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, such as, to exemplify, "where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, x x so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law." [11]

Looking at the several propositions advanced to support the petition, concededly well presented and skillfully argued by counsel, on the one hand, and evaluating the same on the basis of the foregoing standard, on the other hand, I can not see my way clear to holding the appellate court guilty of reversible error in not attributing grave abuse of discretion on the part of the court a quo in refusing to grant the extraordinary writ prayed for. In terminating the contract, said respondents have acted on the basis, preclusive of unessential details, of an official report to the effect that the pace of work on the project, despite "repeated grantings of grace period," has been unsatisfactory and behind schedule. The fear on their part of further delays in the completion of the projects has not at all been imaginary. To say that they have acted whimsically or capriciously I find hard to accept.

The petitioners allege that under Presidential Decree No. 1870, signed on 12 July 1983, the authority to take over

a delayed infrastructure project may be done only when the negative slippage, which must be actual and not merely anticipated, is more than 15%; hence -

"1. Whenever a contractor is behind schedule in its contract work and incur 15% or more negative slippage based on its approved PERT/CPM, the implementing agency, at the discretion of the Minister concerned, may undertake by administration the whole or a portion of the unfinished work, or have the whole or a portion of such unfinished work done by another qualified contractor through negotiated contract at the current valuation price."

Petitioners' invocation is poorly placed according to public respondents who, on their part, strongly maintain that the termination of the contract is based on paragraphs 2 and 3 of the same Presidential Decree, providing thusly -

"2. Whenever a work activity in the project is not being done on schedule per approved PERT/CPM, the Minister concerned/Head of Implementing Agency shall notify and direct the contractor to immediately undertake such work activity. If, within fifteen (15) days from receipt of such notice, the contractor fails to start the work and to show satisfactory performance, the Government may take over the whole or a portion of such work and, at the discretion of the Minister concerned, have such work done by administration or award the same to another qualified contractor through negotiated contract at the current valuation price.

"3. If, at any time during the progress of the contract work, the contractor should fail, refuse or neglect to supply and provide the required tools, materials, supplies, equipment, facilities and labor-workmen; or if the contract or any part thereof is being sublet or assigned without the previous written consent of the Government; or if the contractor is willfully violating any of the terms, conditions, covenants, agreements or technical requirements of the project, the Government shall have the option to take over the project in whole or in part and to complete the same. The Government, at the discretion of the Minister/Head of Implementing Agency concerned, may have the contract work done by administration or award the same to another qualified contractor through negotiated contract at the current valuation price."

Additionally, the Solicitor General cites Section 11 of Presidential Decree 1594, which reads:

"Section 11. Government's Right to Take Over Contract Work. The Government may take over the contract work should the contractor abandon the contract work, or unduly delay the prosecution of the contract work, or become insolvent, or assign his assets for the benefit of his creditors, or be adjudged bankrupt, or assign the contract work without written approval by the Government, or violate any condition or term of the contract. In any of these cases, the Government may terminate the employment of the contractor and take over the contract work after giving due notice to the contractor and his sureties."

The above-quoted provisions of Presidential Decree No. 1594 and Presidential Decree No. 1870 must be deemed to form part of, and to co-exist with, the contract, even if the parties did not explicitly provide for them. Applicable peremptory provisions of law of this nature, affecting as they do public policy or impressed as they are with public interest, are held to be written into the contract.[12] In *Commissioner of Internal Revenue vs. United States Lines Company*, [13] this Court ruled:

"x x x. Any agreement or contract to be enforceable in this jurisdiction is understood to incorporate therein the provision or provisions of law specifying the obligations of the parties under such contract. The contract between herein respondent Company and its principal consequently imposed upon the parties not only the rights and duties delineated therein, but also the provisions of law such as that of the Code of Commerce aforecited."

Looking closely at Presidential Decree No. 1594 and Presidential Decree No. 1870, relied upon by DPWH, it is obvious that the government can terminate or take over a contract work in any of the following cases:

1. Whenever a contractor is behind schedule in its contract work and incurs a 15% or more negative slippage

based on the approved PERT/CPM;

2. Whenever a work activity in the project is not being done on schedule per approved PERT/CPM and the Contractor fails, within fifteen (15) days from receipt of notice, to undertake the work and to show satisfactory performance;
3. If, at any time during the progress of the contract work, the contractor should fail, refuse or neglect to supply and provide the required tools, materials, supplies, equipment, facilities and labor-workmen;
4. If the contract or any part thereof is being sublet or assigned without the previous written consent of the Government;
5. If the contractor is willfully violating any of the terms, conditions, covenants, agreements or technical requirements of the project;
6. If the contractor abandons the contract work, or unduly delays the prosecution of the contract work; or
7. If the contractor becomes insolvent, or assigns his assets for the benefit of creditors, or be adjudged a bankrupt.

It cannot be seriously disputed that petitioners' work has been behind schedule, and that said petitioners' attention to such delays has more than once been called. It is rather on the extent and on the cause of such delays, both factual matters, that the parties strongly differ (reiterated by the parties during the hearing held by the Court on 12 January 1994 and again stressed in their respective memoranda). It should be understandable if courts would in the first place, and pending the judicial determination of the facts after due hearing, count on the findings of agencies equipped with the manpower, as well as technical competence, such as the DPWH in this case, to make that evaluation. This Court itself is not a trier of facts, and it must accord due respect and weight to their conclusions. And even if I were to assume, for the sake of argument, that there has been on the part of the public respondents, including both the trial court and the appellate court which sustained them, a misappreciation of the facts here involved, I cannot view such flaw, given the circumstances, as amounting to grave abuse of discretion more than, if at all, as mere error of judgment.

In sum, I fail to see a clear case that can justify the grant of the petition and the issuance of the extraordinary writs prayed for.

This Court's attention is called by herein petitioners on another matter. It is averred that there has been a recommendation by Undersecretary Romulo del Rosario to award the balance of the project to the third lowest bidder, the Hanil Construction (Hanil), whose bid is 41.4% (P203,960,899.96) over and above the government estimate for the venture;<sup>[14]</sup> hence, the petitioners' apprehension that the ultimate losers could be the government itself. There is absolutely no reason for such fear. The DPWH "Resolution Recommending the Prequalification of Fifteen (15), Thirteen (13) and Nine (9) Individual/Joint Venture Contractors and the Predisqualification of Twenty Three (23), Twenty One (21) and Eighteen (18) Individual/Joint Venture Contractors for Contract Packages A, B and C Respectively of the Lower Agusan Development Project, Stage I, Phase I," dated 30 June 1993, signed by "PBAC Chairman" and Undersecretary Romulo M. del Rosario, Bureau of Construction Director Clarita A. Bandonillo, Bureau of Design Director Bienvenido C. Leuterio, Chief of Legal Service Cesar D. Mejia and Project Director, PMO-Flood Control and Drainage Projects Antonio A. Cabrasan, and approved on 14 July 1993 by Secretary Gregorio R. Vigilar, explicitly states that the DPWH's request to negotiate the balance of the work to the next complying bidder has been denied by the Office of the President; instead, a directive was issued to repackage and rebid the project.<sup>[15]</sup>

Accordingly, I vote for the dismissal of the petition, and the denial of the preliminary injunction or temporary

restraining order prayed for.

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[1] The notice was actually received on 09 May 1991.

[2] Rollo, p. 90.

[3] Rollo, p. 92.

[4] Rollo, p. 97.

[5] Rollo, p. 17.

[6] Presidential Decree No. 605, signed on 12 December 1974, banned the issuance by courts of preliminary injunctions in cases involving concessions, licenses, and other permits issued by public administrative officials or bodies for the exploitation of natural resources.

[7] Rollo, pp. 74-75.

[8] Section 1, Article VIII, 1987 Constitution.

[9] Sotto vs. Commission on Elections, 76 Phil. 516; Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345; Compare Lord v. Veazie, 8 How. 251; Atherton Mills v. Johnston, 259 U.S. 13, 15; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348 (1936).

[10] Cruz, Philippine Political Law, 1991 ed., p. 229.

[11] Bustamante vs. Commissioner on Audit, 216 SCRA 134; Planters Products, Inc. vs. Court of Appeals, 193 SCRA 563; Kapatiran ng mga Naglilingkod sa Pamahalaan ng Pilipinas, Inc. vs. Tan, 163 SCRA 371.

[12] General Milling Corporation vs. Torres, 196 SCRA 215; Pakistan International Airlines vs. Ople, 190 SCRA 90.

**[13] 5 SCRA 175, 181-182.**

[14] Hanil was eventually disqualified; Petitioner's Memorandum, p. 5, (Rollo, p. 222).

[15] Rollo, p. 190.

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