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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

M ELECTRIC CORPORATION,
Plaintiff-Appellant,

v.

PHIL-GETS (GUAM) INTERNATIONAL TRADING CORPORATION D.B.A. J&B MODERN TECH, and CHUNG KUO INSURANCE COMPANY, LTD.,
Defendants-Appellees.

Supreme Court Case No.: CVA18-035
Superior Court Case No.: CV1423-10

OPINION

Cite as: 2020 Guam 23

Appeal from the Superior Court of Guam
Argued and submitted on October 14, 2019
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and ROBERT J. TORRES, Associate Justice.[1]

CARBULLIDO, J.:

[1] Plaintiff-Appellant M Electric Corporation ("MEC") appeals a final judgment of the Superior Court of Guam finding against MEC on all its claims and dismissing the cause of action on the merits. After a bench trial, the trial court determined that no exception to the "no damages for delay" clause applied and that Defendant-Appellee Phil-Gets (Guam) International Trading Corporation ("J&B") was not liable for MEC's overtime costs. For the reasons below, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The facts are stated in detail in our prior opinions. *See M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp.*, 2012 Guam 23 ¶¶ 3-9 ("*MEC I*"); *M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp.*, 2016 Guam 35 ¶¶ 4-22 ("*MEC II*"). We recite the facts most relevant to this appeal.

[3] The Guam Power Authority ("GPA") solicited bids for two projects, Macheche-GIAA and Macheche-Harmon-San Vitores. At the pre-bid conference, Joven Acosta, an engineering manager for GPA, warned bidders of the "no damages for delay" ("NDFD") clauses in the contracts, as delays were anticipated. J&B was awarded the prime contracts for both projects. J&B then subcontracted with MEC. MEC representatives were present at the pre-bid conference. The subcontract for the Macheche-GIAA project included a completion date of December 2008, and the subcontract for the Macheche-Harmon-San Vitores project included a completion date of January 13, 2009. Both contracts contained a "time of the essence" ("TOE") clause. J&B became responsible for obtaining the required permits to complete the work after MEC struggled to do so.

[1] The signatures in this opinion reflect the title of the justices when this matter was argued and submitted.

Permit delays, a sewer line issue, and fuel line problems caused project delays. Both projects were substantially completed by November 2009.

[4] MEC filed a complaint for declaratory relief and money owed on the construction project. The court granted J&B's motion for summary judgment, finding that the NDFD clause exculpated J&B from liability to MEC for the delays in work. On MEC's appeal of the judgment, we remanded to the trial court to determine whether the first exception to the NDFD clause applies. *MEC I*, 2012 Guam 23 ¶ 49. After remand, MEC moved to amend its complaint to add a claim for overtime costs. The trial court denied MEC's request to amend. After a two-day bench trial, the court determined that the delays were foreseeable, that a delay of 162 days was not manifestly unjust, and, therefore, the first exception of the NDFD clause was not satisfied. MEC appealed the judgment denying its claim for delay damages.

[5] In *MEC II*, we held that the trial court abused its discretion in denying MEC's motion to amend its complaint to add the overtime claim because the liberal policy of granting amendments to complaints should be afforded to MEC. 2016 Guam 35 ¶¶ 63, 98. We also asked the trial court to consider the TOE clause in its determination of reasonableness within the first recognized exception to the NDFD clause. *Id.* ¶¶ 85-88. After additional briefing on the applicability of the first exception to the NDFD clause, the trial court found that the first exception was not satisfied because the delays were foreseeable and were not of a manifestly extreme duration. After a bench trial on the merits of MEC's overtime claim, the trial court denied MEC's claim for overtime costs because MEC failed to meet its burden of proof that J&B compelled MEC to work overtime.

[6] MEC timely appealed the trial court's judgment dismissing its claims for standby delay damages and overtime costs.

II. JURISDICTION

[7] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (current through Pub. L. 116-216 (2020)); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[8] Following a bench trial, we review the trial court's findings of fact for clear error. *Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶ 21. We review questions of law *de novo*. *Unified Interest v. PacAir Props., Inc.*, 2017 Guam 9 ¶ 24.

IV. ANALYSIS

[9] We must address two principal arguments raised by MEC. First, MEC argues the Superior Court erred in concluding J&B was not liable for its overtime costs. Appellant's Br. at 2 (Mar. 15, 2019). Second, MEC argues the trial court erred in denying its claim for standby damages because the court, in violation of our prior mandate, did not consider the TOE clause in its analysis of the first exception to the NDFD clause. *Id.* We do not find either argument to be meritorious, and we find no basis to reverse the judgment.

A. The Trial Court Did Not Err in Concluding J&B Is Not Liable for MEC's Overtime Costs

[10] MEC asserts that it is entitled to recover its overtime costs from J&B based on two theories of recovery. First, MEC argues that J&B compelled MEC to have its employees work overtime hours. Second, MEC contends, even if the evidence does not support a finding that J&B compelled it to incur overtime costs, it is entitled to recover those costs based on equitable principles.

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1. The trial court did not clearly err in finding that J&B did not compel MEC to have its employees work overtime

[11] The trial court concluded that MEC failed to prove its overtime claim because MEC did not show, by a preponderance of the evidence, that J&B compelled MEC to have its employees work around the clock. We see no reason to depart from those findings.

[12] MEC claims, under 22 GCA § 3107 (2005), J&B owes it overtime pay to the amount of $71,104.74 because J&B allegedly ordered MEC to accelerate its work by having its employees work around the clock and on weekends. Appellant's Br. at 17. During the bench trial, MEC drew particular attention to emails between J&B, MEC, GPA, and the Department of Public Works ("DPW"), where J&B appears to request approval for weekend work. Transcript ("Tr.") at Exs. 1-4, 6, M1-M8, M-10 (Bench Trial, June 13, 2018). But the trial court found those emails—and the rest of MEC's evidence—unconvincing. *See, e.g.*, RA, tab 130 at 9 (Finds. Fact & Concl. L., Nov. 15, 2018) ("[N]othing on the face of the emails indicates whether J&B had made the decision to compel MEC to work straight through weekends, or [whether] J&B was merely relaying a request from MEC to seek DPW approval for that schedule."). We will not set aside this factual finding unless it is clearly erroneous. *Unified Interest*, 2017 Guam 9 ¶ 24.

[13] "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *See Chung v. Blair Constr. Co.*, 2019 Guam 28 ¶ 13 (quoting *Fargo Pac.*, 2006 Guam 22 ¶ 22). "[U]nder the clear error standard of review, we only look at whether the trial court's finding of fact is supported by substantial evidence." *Fargo Pac.*, 2006 Guam 22 ¶ 30.

[14] We also emphasize, when reviewing for clear error: "The applicable standard of appellate review is narrow; the test is whether the lower court rationally could have found as it did, rather than whether the reviewing court would have ruled differently." *JWS Refrigeration & Air*

Conditioning, Ltd. v. Cain, 2013 Guam 19 ¶ 26 (quoting *Yang v. Hong*, 1998 Guam 9 ¶ 7); *see also Haeuser v. Dep't of Law, Gov't of Guam*, 1999 Guam 12 ¶ 14 ("If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." (alteration in original) (quoting *Merchant v. Nanyo Realty, Inc.*, 1998 Guam 26 ¶ 12)). "The standard of review for findings of fact, then, is very deferential to the determinations of the trial court." *Craftworld Interiors, Inc. v. King Enters., Inc.*, 2000 Guam 17, at *2.

[15] Under the clear error standard, MEC gives us no reason to question the trial court's factual findings. In its brief, MEC does little more than describe the evidence the trial court already considered below, specifically: (1) testimonies of MEC executives Marcelo Moises and Nonie Amar, who said J&B ordered MEC to accelerate its work, compared to conflicting testimony of J&B President Gene Bangayan, who said MEC set its own work schedule, Appellant's Br. at 17; (2) emails from J&B allegedly showing it was the party that requested allowance to work on weekends, *id.* at 18-19; and (3) GPA's email to J&B supposedly threatening liquidated damages, *id.* at 19-20. However, the record also contains other evidence that supports J&B, instead. Three pieces of evidence specifically suggest MEC set its own work schedule: (1) J&B President Gene Bangayan testified that MEC set its own weekend schedules and J&B merely applied for a matching permit; (2) section 18.5 of the subcontracts, which did not give J&B control over MEC's hiring or scheduling; and (3) certain statements in the J&B emails. *See* RA, tab 130 at 8-10 (Finds. Fact & Concl. L., Nov. 15, 2018). Given the conflicting nature of the evidence, the trial court rationally and plausibly found that the weight of J&B's evidence overcame MEC's evidence. As an appellate court, we must defer to the trial court's resolution of disputed factual matters where

there is evidence to support its findings. Because there was evidence supporting J&B's position, it was not clearly erroneous to resolve the matter against MEC.

[16] With respect to J&B's emails to MEC, GPA, and DPW specifically, we are unpersuaded that we have to disturb the trial court's findings on whether the emails are sufficient proof J&B "ordered MEC to accelerate its work." Appellant's Br. at 17. None of those emails, including those from J&B to MEC, contain language proving J&B ordered MEC to accelerate its work. The principal contract reasonably explains the emails from J&B to GPA, because the contract requires GPA's consent before any weekend work could commence. *See* Tr., Ex. E at GC-27. (Cont'd Bench Trial, Nov. 13, 2014). J&B's emails to DPW can be explained because J&B needed to obtain work permits from DPW directly after MEC failed to obtain them despite being contractually obligated to do so. *See* Tr., Ex. A at 5, Ex. B. at 5 (Bench Trial, June 13, 2018). Even viewed most favorably to MEC, only one email from J&B's president "suggests" and "advises" that MEC pour cement in a certain area on a "Saturday and Sunday" in March 2009. Tr. at Ex. 3 (Bench Trial, June 13, 2018). However, that email occurred after MEC requested a change to the schedule requiring J&B to make some scheduling changes to accommodate MEC. *Id.* Regardless of the ways we can read the email evidence, the trial court went through the emails and found they "do not provide adequate evidence that J&B compelled MEC to work around the clock in order to complete the projects within a certain timeframe." RA, tab 130 at 10 (Finds. Fact & Concl. L., Nov. 15, 2018). Given the content of the emails, the Superior Court's finding is not implausible or irrational.

[17] MEC also alleges that the fact GPA threatened J&B with liquidated damages under the TOE clause shows J&B had reason to compel MEC to work overtime. MEC points to GPA's notice of default and liquidated damages dated July 1, 2009. But at this point, two trial courts have

determined GPA did not assess liquidated damages against J&B, and J&B did not assess liquidated damages against MEC. RA, tab 84 at 10 (Finds. Fact & Concl. L., May 22, 2015); *accord* RA, tab 130 at 7 (Finds. Fact & Concl. L., Nov. 15, 2018). Without actual liquidated damages or a serious threat of damages to MEC, a sole letter showing one possible motivation J&B may have had to threaten MEC is not enough for us to find clear error in the trial court's finding.

[18] Further supporting the conclusion that MEC faced no real threat of liquidated damages, the trial court also found that J&B waived its right of performance under the TOE clause based on the parties' conduct. "Like any other contractual terms, timeliness provisions are subject to waiver by the party for whose benefit they are made." *Galdjie v. Darwish*, 7 Cal. Rptr. 3d 178, 183 (Ct. App. 2003); *see also CBS, Inc. v. Merrick*, 716 F.2d 1292, 1295 (9th Cir. 1983) (applying New York law) ("A contractual deadline may be waived by acts, words or conduct inconsistent with the deadline."). The record shows that J&B responded to GPA's notice of default by requesting, in writing, a time extension. Tr., Pl.'s Ex. vol. 2 at B90 (Bench Trial, Nov. 5, 2014); *id.* at 7. MEC offers no evidence that GPA formally rejected J&B's request, formally extended J&B's deadline for performance, sent another notice of default before or after the initial deadline, or assessed liquidated damages. MEC also offers no evidence that J&B sent a notice of default to MEC, threatened MEC with liquidated damages, or assessed liquidated damages on MEC. MEC substantially completed its work on the projects by November 2009, nearly one year after the deadlines explicitly stated in the subcontracts' TOE clauses. Yet, J&B did not threaten or assess liquidated damages on MEC. MEC continued to work on the project until completion without objection or notice to J&B about the need for time extensions due to project delays it did not cause. Based on the lack of objection and the parties' other conduct, the trial court reasonably concluded that J&B waived its right of performance under the TOE clause in the subcontract. The parties'

conduct suggests the TOE clause was waived because J&B did not enforce the deadlines or assess liquidated damages. Again, without any evidence of actual or threatened liquidated damages, we find no clear error in the trial court's finding.

2. MEC failed to prove it is entitled to recovery on equitable grounds

[19] We also must address MEC's alternative argument. MEC contends that, even if it is not legally entitled to overtime pay, it is entitled to recover costs based on equitable principles described in *Tanaguchi-Ruth + Associates v. MDI Guam Corp.*, 2005 Guam 7 ¶ 40. In *Tanaguchi-Ruth*, we recited the rule that "[w]hen one person performs services at the request of another, the law raises an obligation to pay the reasonable value of the services." *Id.* (alteration in original) (quoting *Coleman Eng'g Co. v. N. Am. Aviation, Inc.*, 420 P.2d 713, 728 (Cal. 1967) (in bank) (Traynor, C.J., dissenting)). While not expressly raised, MEC appears to be seeking recovery under a *quantum meruit* theory, which we discussed extensively in *Tanaguchi-Ruth*. Under MEC's *quantum meruit* theory, it alleges it is entitled to recovery because its overtime work was not extra, additional, or changed work, but accelerated work, and thus was not covered by the subcontracts. Appellant's Br. at 21.

[20] Recovery under a *quantum meruit* claim is a mixed question of law and fact. *See Tanaguchi-Ruth*, 2005 Guam 7 ¶ 22; *see also Hensel Phelps Constr. Co. v. King Cty.*, 787 P.2d 58, 61 (Wash. Ct. App. 1990). Under this standard of review, MEC's reliance on *Tanaguchi-Ruth* is misplaced. In *Tanaguchi-Ruth*, we discussed the elements of *quantum meruit* and recognized that a plaintiff who performed services at the defendant's inducement should recover for conferring a benefit to the defendant. *See* 2005 Guam 7 ¶ 49. For *quantum meruit* to apply, a plaintiff must show that it acted in detrimental reliance on a representation that the defendant will give value for the detriment suffered. *Id.* That theory does not apply here for the same reasons the legal claims

failed. As the trial court found, there is insufficient evidence that J&B compelled MEC to work overtime—which means MEC could not have detrimentally relied on J&B's promise to reimburse for overtime costs. Moreover, unlike the defendant in *Tanaguchi-Ruth*, J&B was not unjustly enriched since J&B merely gained the benefit it bargained for under the contract—namely, the project's completion. J&B did not get an additional benefit or request any work beyond the original contract. *Quantum meruit*, therefore, is not an appropriate basis for recovery.

B. The Trial Court Did Not Err in Concluding the NDFD Is Enforceable Because MEC Did Not Satisfy the First Exception

[21] MEC also challenges the trial court's conclusion that its standby claim did not satisfy the first exception to the applicability of the contracts' NDFD clause because the delays were foreseeable and not of a manifestly unreasonable duration. According to MEC, we should reverse this finding because the trial court supposedly did not consider the TOE clause in its determinations and relied only on non-TOE cases in its analysis. MEC believes the the trial court failed to follow our mandate from the prior appeals. We disagree and find no reason to reverse the judgment. We begin with a discussion of NDFD clauses and their exceptions.

[22] In *MEC I*, we determined that NDFD clauses are valid and enforceable in Guam. *MEC I*, 2012 Guam 23 ¶ 36. "NDFD clauses exculpate an owner from liability for damages resulting from delays in the performance of the contractor's work by ordinarily limiting a contractor's remedy to an extension of time." *Id.* ¶ 33. The enforceability of such a clause is subject to four exceptions,[2] of which the first exception is relevant here. *See MEC II*, 2016 Guam 35 ¶ 79. In *MEC II*, we remanded to the trial court to determine whether that first exception applies. *See id.* ¶ 88. The

[2] Those exceptions are: "(1) unreasonable delays not contemplated by the parties when the agreement was made; (2) delays not covered by the plain language of the clause; (3) delays caused by the contractor's bad faith or its willful, malicious, or grossly negligent conduct; and (4) delays resulting from a breach of a fundamental obligation of the contract." *MEC I*, 2012 Guam 23 ¶ 37 (footnote omitted).

first exception applies if the trial court finds either (a) "that both the type of delays was unforeseeable and the actual delays experienced were of an unreasonable duration" (hereinafter, "condition (a)"), or (b) "that the duration of delay reached the level of manifestly extreme unreasonableness—even if the delays were of a type theoretically contemplated" (hereinafter, "condition (b)") *Id.*

[23] Condition (a) of the first exception requires the court to first consider whether the delays were "unreasonable delays not contemplated by the parties when the agreement was made." *Id.* ¶ 79 (quoting *MEC I*, 2012 Guam 23 ¶ 37). Stated differently, "the court must inquire into the reasonable foreseeability of the type of delays in question." *Id.* ¶ 80. This analysis requires considering attendant circumstances and other extrinsic evidence. *Id.* In determining if the delays are unreasonably long, the court looks at the facts and circumstances surrounding the agreement. *Id.* ¶ 81. If the court finds that the delays were foreseeable, it must then consider condition (b). Condition (b) requires the court to examine whether "the delay was so manifestly extreme that the parties cannot be said to have contemplated such a delay." *Id.* ¶ 82. Stating condition (b) another way, "if the type of delays was foreseeable, then the first NDFD exception does not apply *unless* the delays were of a manifestly extreme duration." *Id.* ¶ 88 (emphasis added) (footnotes omitted). This test requires a stringent showing. Condition (b) is not satisfied when the delays are foreseeable and merely unreasonable. Only an explicit finding of manifestly extreme duration of delay satisfies the unreasonableness inquiry in condition (b).[3]

[24] On remand, the trial court found the delays were foreseeable because GPA apprised MEC's representatives of possible delays at the pre-bid conference. The trial court also found the delays

[3] MEC appeals the trial courts' finding that the delay was not manifestly extreme in duration. We note, however, that a finding that the delay is a reasonable length defeats applying the first NDFD exception whether the inquiry is under condition a or b. *See MEC II*, 2016 Guam 35 ¶ 88 ("If the delays were of a reasonable duration, then the first NDFD exception does not apply and MEC's standby claim is barred by the NDFD clause . . . .").

were not of a manifestly extreme duration after looking at what courts in other jurisdictions have found to be manifestly extreme. Given those findings, the court found the first exception to the NDFD clause did not apply, and so MEC could not claim damages for the delays. We find no clear error in either of these determinations. *See Fargo Pac.*, 2006 Guam 22 ¶ 21.

1. The trial court did not err in concluding the type of delays was foreseeable

[25] The trial court concluded that delays caused by the procurement of highway encroachment permits from DPW and on-field adjustments based on the Ground Penetration Radar ("GPR") were foreseeable delays. The record supports the trial court's finding.

[26] We see no error in the trial court's determination that the parties should have foreseen the delays because MEC knew GPA had suffered similar permitting delays in recent projects. "Where parties enter into a construction contract with a customary no-damage clause they clearly contemplate . . . that the contractor himself will bear the risks of the 'ordinary and usual types of delay' incident to the progress and completion of the work." *Ace Stone, Inc. v. Twp. of Wayne*, 221 A.2d 515, 519 (N.J. 1966) (citations omitted). Here, GPA manager Acosta testified that some of GPA's recent projects had been delayed for about one year because of trouble getting highway encroachment permits from DPW and due to the uncertain location of some underground utilities. The record shows Acosta told attendees in the pre-bid conference—which included MEC representatives—about the difficulties in obtaining permits from DPW, stated that the permitting process could take months, and warned bidders to adjust their bids to account for these difficulties because there would be no change orders because of delays. Further, MEC had reason to know DPW typically issued permits one segment at a time from manhole to manhole and would not issue a blanket permit. In the Macheche-GIAA project alone, there were at least 17 manholes. DPW's policy not to consider permits for multiple or non-consecutive segments foreseeably would have

added to the delay compared to a blanket permit. Acosta testified that GPA was unsure of the location of underground utilities, and, therefore, on-field adjustments would be necessary. Under General Notes for the Macheche-GIAA site plan, MEC conducted a GPR survey to trace and verify the location of underground utilities. The GPR revealed the existence of subsurface utilities not shown on the design drawings and which interfered with the placement of Manhole #9. Acosta also told pre-bid conference attendees about the contracts' NDFD clause. This evidence amply supports the trial court's finding that the type of delay was foreseeable.

[27] Further, MEC has not shown that the project's delays were attributable to any reason other than those associated with projects of this nature. We thus find no clear error in the trial court's conclusion that MEC failed to prove condition (a) of the first exception to the NDFD clause.

2. The trial court did not err in concluding the duration of the delays was not manifestly extreme

[28] MEC also challenges the trial court's finding that the delays were not of a manifestly extreme duration, and therefore do not trigger condition (b) of the first exception to the NDFD clause. Again, under the deferential clear error standard, MEC has given us no reason to disturb the trial court's factual determinations.

[29] We have not previously defined what kinds of delays "reach the level of manifestly extreme unreasonableness" under the first exception to the NDFD clause. *See MEC II*, 2016 Guam 35 ¶ 82. We agree with the trial court's conclusion, based on authority from other jurisdictions, that delays are of a manifestly extreme duration when they amount to intentional abandonment or relinquishment of the contract. *See* RA, tab 118 at 10 (Finds. Fact & Concl. L., Mar. 22, 2018) (citing *Travelers Cas. & Sur. Co. v. Dormitory Auth.-State of N.Y.*, 735 F. Supp. 2d 42, 58 (S.D.N.Y. 2010) (finding an exception to an NDFD clause for "delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee")); *see also* 74 A.L.R.3d

187 § 7(i) (originally published in 1976) ("[A] 'no damage' clause does not preclude recovery for damages due to a delay which is specifically unreasonable in length or duration, and particularly delay which might fairly be deemed to be equivalent to an abandonment of the contract, or which would justify the contractor in abandoning the contract." (footnotes omitted)); *cf. Corinno Civetta Constr. Corp. v. City of New York*, 493 N.E.2d 905, 912 (N.Y. 1986) ("[C]ontractee is responsible for delays which are so unreasonable that they connote a relinquishment of the contract by the contractee with the intention of never resuming it."); *Law Co. v. Mohawk Constr. & Supply Co.*, 702 F. Supp. 2d 1304, 1325 (D. Kan. 2010) (finding no reasonable contractor would consider eight-month delay as contract abandonment, when parties in frequent communication about shortening delay). Contract abandonment and intent to abandon a contract is generally a question of fact. *See J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1019 (Nev. 2004) (per curiam); *Law Co.*, 702 F. Supp. 2d at 1325. The length of specific delays in the project and the parties' conduct inform this analysis. *See Law Co.*, 702 F. Supp. 2d at 1325 (compiling cases that show delays ranging from six months to twenty-eight months did not constitute abandonment of the contract).

a. The trial court did not err in its assessment of the length of delay

[30] The trial court determined that a 162-day delay was not of manifestly extreme duration, considering both the length of delay and the parties' conduct throughout performance. Under the clear error standard of review, we find no reason to set aside that finding.

[31] To reach its conclusion, the trial court looked at cases from other jurisdictions that discussed reasonableness in the context of the NDFD exception and looked at lengthy delays those courts have found to be reasonable. *See* RA, tab 118 at 10 (Finds. Fact & Concl. L., Mar. 22, 2018); *see also Law Co.*, 702 F. Supp. 2d at 1324 (eight-month delay was not abandonment and thus did not nullify NDFD clause, with no evidence showing intent to abandon and parties

communicated during delay); *White Oak Corp. v. Dep't of Transp.*, 585 A.2d 1199, 1204-05 (Conn. 1991) (six-month delay in highway construction project was not so unreasonable as to exceed parties' contemplation or so great to equate to abandonment of contract, where delay was caused by third-party event, i.e., tardy removal of gas line); *cf. Dickinson Co. v. Iowa State Dep't of Transp.*, 300 N.W.2d 112, 113-15 (Iowa 1981) (despite work period of fifty days and cancellation clause allowing plaintiff to cancel contract if delayed for over thirty days, delay of two years not manifestly extreme because "some delay was to be expected" and "there was no evidence that two-year delays were unknown or even that they were uncommon in highway construction"). The trial court also considered the other evidence presented by the parties. Considering the other evidence is consistent with *MEC II*, where we held that "extrinsic evidence is admissible in order to determine whether delays were unreasonable and not contemplated by the parties." *MEC II*, 2016 Guam 35 ¶ 84.

[32] To begin its analysis, the trial court compared the delays from other cases to the delay here, which totaled 162 days—or around five-and-a-half months. The trial court found the 162-day delay here was reasonable because it was shorter than in those other jurisdictions, where courts considered longer delays reasonable. RA, tab 118 at 11 (Finds. Fact & Concl. L., Mar. 22, 2018). The trial court also observed it had "not been presented with sufficient evidence to prove that the delays constituted an abandonment of the contract." *Id.* We see no clear error with the court's approach, especially since there is little precedent on this issue from this court. And the trial court's determination is not clearly erroneous because reasonableness in these cases is a fact-sensitive determination, and "the specific length of time that constitutes an 'unreasonable' delay is subject to court discretion." *MEC I*, 2012 Guam 23 ¶ 40. Finally, the delays here were not manifestly extreme since the project was completed, and J&B fully paid MEC per their agreement.

Based on these facts, J&B cannot be considered to have intentionally abandoned or relinquished either the prime contract or the subcontract.

[33] We also must address one final argument of MEC. In its opening brief, MEC asserts for the first time that the delay was not 162 days, but instead consisted of "three distinct, separate periods of significant delay, totaling 329 days." Appellant's Br. at 6-7. However, this court, absent extraordinary circumstances, will not address issues raised for the first time on appeal. *Tanaguchi-Ruth*, 2005 Guam 7 ¶ 78. And, "resolution of factual issues not evaluated by the trial court is not an appropriate function of an appellate court." *Gov't of Guam v. Gutierrez*, 2015 Guam 8 ¶ 21; *see also Kloppenburg v. Kloppenburg*, 2014 Guam 5 ¶ 27 ("[I]t is more appropriate for the trial court to decide the issue in the first instance given the factual nature of the inquiry . . . ."); *McNeil v. Pub. Def. Serv. Corp.*, Civ. No. 90–00044A, 1990 WL 320362, at *2 (D. Guam App. Div. Oct. 30, 1990) ("An appellate court has no fact-finding function. It cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination." (emphasis omitted)).

b. The trial court did not violate our mandate in evaluating the TOE clause

[34] Finally, MEC claims the trial court failed to analyze the TOE clause, as required by our mandate in *MEC II*. MEC urges us to overturn the judgment for that reason. Appellant's Br. at 6, 11. "On remand, a trial court must comply with the mandate of the appellate court." *In re Moylan*, 2017 Guam 28 ¶ 26 (quoting *Town House Dep't Stores, Inc. v. Ahn*, 2003 Guam 6 ¶ 16). We disagree for two reasons. First, while TOE clauses may help determine whether a delay is unreasonable or manifestly unreasonable, by themselves, such clauses do not resolve the reasonableness question. Second, the trial court did consider the TOE clauses and found the parties waived them through their conduct. Since the parties waived the TOE clauses, the clauses are not a basis for finding the delays manifestly unreasonable. The appellate court's "mandate cannot be

applied in a vacuum." *Id.* (quoting *Town House*, 2003 Guam 6 ¶ 16). On remand, the trial court must "examine both the mandate and the opinion and proceed in accordance with the views expressed therein." *Id.* (quoting *Town House*, 2003 Guam 6 ¶ 16).

[35] We explained in *MEC I* that a TOE clause makes timely performance an essential term of the contract, and when violated may constitute a material breach of contract and render a delay *per se* unreasonable. *MEC I*, 2012 Guam 23 ¶ 43. Breaching a TOE clause can make a delay unreasonable unless the delay is caused or waived by the "non-breaching" party. *Id.* (citing *Elkins Manor Assocs. v. Eleanor Concrete Works, Inc.*, 396 S.E.2d 463, 467 (W. Va. 1990)). Nevertheless, we continue to refrain from drawing the bright-line rule that violating a TOE clause amounts to a *per se* breach of contract. The sensibility of that aversion is especially evident in cases like this, where the contract contains both a TOE clause and a NDFD clause—which means, if we were to hold that violating a TOE clause is a *per se* breach, every NDFD clause would have no effect since any delay would breach the contract.

[36] This approach is also consistent with our opinion in *MEC II*. In *MEC II*, we directed the trial court to consider the TOE clause when determining the delay's "reasonableness." 2016 Guam 35 ¶ 85. We also directed the trial court to consider "the nature of the relationship between the contracting parties, the objectives of that relationship, and any relevant extrinsic evidence and attendant circumstances" to determine whether the exception applied. *Id.* ¶ 89. In our reading of *MEC I* and *MEC II*, where a contract contains both a TOE clause and a NDFD clause, a TOE clause alone does not determine a delay's reasonableness. In these cases, a TOE clause is only one factor the trial court should consider alongside the other factors concerning the parties' relationship.

[37] Moreover, a party may waive its rights under a TOE clause. *See, e.g.*, *Stewart v. Spalding*, 23 Haw. 502, 516 (1916). And, waiver of the TOE clause can show that the delays were not unreasonable or manifestly unreasonable. Contrary to MEC's assertions, the record shows the trial court did consider whether the TOE clause affected the reasonableness of the delay, or whether instead it had no effect since the parties waived its application. The trial court observed that "'time is of the essence' clauses may be waived by the party entitled to insist upon timely performance," RA, tab 130 at 7 (Finds. Fact & Concl. L., Nov. 15, 2018), and found that such waiver need not be formal, meaning it could be "implied from a party's conduct," *id.* (citing *Davies v. Langin*, 21 Cal. Rptr. 682, 685 (Dist. Ct. App. 1962)). The trial court then found that GPA did not enforce deadlines against J&B, and in turn, J&B "did not . . . enforce the 'time is of the essence' clauses in the subcontracts." RA, tab 130 at 7 (Finds. Fact & Concl. L., Nov. 15, 2018). The only fair reading of these statements is that the trial court found J&B waived the TOE clauses. The record supports the trial court's conclusion that *both* parties waived the TOE clauses. J&B never assessed or threatened to assess MEC with liquidated damages for failing to complete the work within the TOE deadline—meaning J&B considered the delays reasonable. MEC also never requested extensions of time under Section 3.3. of the subcontracts, which shows MEC also considered the delays reasonable. As both parties appeared to consider the delays reasonable, the trial court could properly conclude that the parties waived the TOE clauses. Since the parties waived the TOE clauses, delays did not constitute a material breach of the contract, nor were they manifestly unreasonable.

[38] Based on the evidence, we find no clear error in the trial court's analysis, and we conclude that the trial court did not violate our mandate from *MEC II*. Further, since the trial court committed no clear error in its analysis on the delays' foreseeability and reasonableness, we agree

with its finding that no exceptions apply to the NDFD clauses. Therefore, MEC cannot seek damages based on its standby claim.

V. CONCLUSION

[39] For the reasons above, we **AFFIRM** the trial court's Judgment.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice