

NATIONAL HOUSING CORPORATION, PETITIONER, VS. COMMISSION ON AUDIT AND ARTURO D. DADUFALZA, IN HIS CAPACITY AS COA DIRECTOR, TECHNICAL SERVICES OFFICE, RESPONDENTS.*G.R. No. 101370. September 02, 1993*

Ponente: PUNO, J.

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Foreign loans usually obligate the debtor country to hire expatriate consultants. This part of the package makes these loans more onerous. The petition at bar assails the disallowance by the respondent COA of a contract extending the services of a foreign consultant on the ground that his work could well be performed by Filipinos. It cannot succeed.

There are no uncertainties on the facts of the case. Our government forged an agreement on financial cooperation with the Republic of Germany. On April 10, 1981, a Loan and Project Agreement was executed between the Republic of the Philippines as "Borrower" and the National Housing Authority (NHA) as "Project Sponsor" on the one hand, and the Kreditanstalt Fur Weideraufbau (KFW) on the other hand, for Urban Housing Dagat--Dagatan Project II A/B.[1] The agreement empowered the NHA and the KFW to determine the details of the project as well as the goods and services to be financed from the loan. They hired the services of Engineer Brian W. Murdoch of Kinhill Pty. Ltd. (Kinhill), a foreign corporation organized under the laws of Australia.

In 1987, the KFW proposed to extend the contract of Engr. Murdoch for another year. The NHA Board of Directors approved only a 3-month extension, from March 9 to June 9, 1987.[2] It also directed its management to make representations with KFW to replace Engr. Murdoch with a local consultant after June 9, 1987 if the project would still be unfinished. The 3-month consultancy contract was submitted to the National Economic Development Authority (NEDA) for approval.[3] On April 1, 1987, NEDA approved the contract with the following observations:

"This Office has no objection to the approval of the contract. His (NHA - General Manager) attention is called however on the previous observations made by this Office in the review of previous extension of services of Engr. Murdoch that Engr. Murdoch has been the consultant of NHA since August 1978 or about 8 years now and that considering the relatively simple supervision work required for the finishing stages of the Dagat-Dagatan Project, NHA should have considered hiring local consultant. It is expected that this extension of services of Engr. Murdoch is the last and that NHA shall make representations with KFW to substitute a qualified local consultant for Engr. Murdoch after expiration of the contract if a consultant for the project is still necessary."

On April 10, 1987, NHA and Kinhill executed the consultancy contract (original) covering the months of March 9 to June 9, 1987. It involved the amount of US \$30,800.00 (foreign cost) and P123,690.00 (local cost).

The 3-month contract, however, did not satisfy KFW. It wanted a 12-month contract. In June 1987, it got what it wanted. NHA and Kinhill signed a First Supplemental Contract. It extended the consultancy contract for nine (9)

more months from June 9, 1987 to March 8, 1988. Its total cost was US \$85,500.00 (foreign cost) and P332,850.00 (local cost).

The Urban Housing Dagat-Dagatan Project II was not completed as scheduled. On December 15, 1987, a request was made for an extension of the Loan Agreement for another year. KFW agreed provided the consultancy contract with Kinhill would be extended until the end of December 1988. NHA did not appear to have much choice. On May 8, 1988, it signed a Second Supplemental Contract extending the contract of Kinhill for another eight (8) months, from April 4 to December 4, 1988. Its total cost was US \$78,500.00 (foreign) and P315,000.00 (local).

The Loan Agreement was supposed to have expired on December 4, 1988. Nonetheless, there was another request for its extension for a period of six (6) months. KFW had no objection but again conditioned its approval on the extension of the consultancy services of Kinhill also for a period of six (6) months. This resulted in the signing on February 23, 1987 of the Third Supplemental Contract which extended Kinhill's consultancy services from January 4 to July 3, 1989. Its cost was US \$58,200.00 (foreign) and P250,000.00 (local).

NHA's legal difficulties started when the Third Supplemental Contract was reviewed in post audit by the Technical Services Office (TSO). The contract was disallowed in view of the following findings:

"This has reference to the review of the Third Supplemental Contract dated February 23, 1989 involving the amount of US\$58,200.00 (foreign cost) plus P250,000.00 (local cost) in the contract amount and covering an extension of six (6) months issued in favor of Kinhill Pty. Ltd. relative to the Consulting Services for Technical Assistance to National Housing Authority (NHA) under the Kreditanstalt fuer Wiederaufbau (KFW) Loan for Dagat-Dagatan Project.

"Please be informed that the Consultant's monthly rate was established as reasonable, however, the review conducted disclosed the following observations:

- a. Based on submitted documents, it was noted that this supplemental contract has no approval from KFW and the Secretary of Public Works and Highways as required in Article III, Paragraph 3.02 of the contract and Section 3 of Executive Order No. 164 dated May 5, 1987.
- b. The output requirements are not specified and there is no PERT/CPM[4] Network Diagram or equivalent program of work, thus there is no clear basis for NHA's evaluation of the consultant's accomplishment for purposes of payment. (Note: Appendix "AA" only reflects objectives).
- c. There is no contract provision for liquidated damages in case of delay in project completion attributed to direct fault of the consultant.

"In addition we reiterate our opinion that the KFW components of the Dagat-Dagatan Project involves simple design and construction procedures and it being in its finishing stage, requires simple engineering advisory services that can be undertaken by NHA or DPWH in-house technical staff or at the most a local consultant. However, perusal of the documents submitted showed NHA was compelled to continue the consultancy services of Kinhill, otherwise, NHA cannot get reimbursement from the KFW loan to pay their contractors. (underscoring supplied)

"It was also noted that in this supplemental contract the Management did not take into consideration the results of our review made on the previous contracts contained in our Memorandum dated September 7, 1988.

"In view of the above observation, it is recommended that the contract be disallowed in audit.

"Likewise, it is informed that the review of the selection and the manner of award and the evaluation concerning all reimburseable direct expense of the consultant are left with the Auditor.

"Attention is invited to the attached Consultancy Contract Review dated April 11, 1989, which is self-explanatory.

"sgd. EDITHA A. DE LA CRUZ

Assistant Commissioner

Officer-in-Charge

Technical Services Office"

On November 26, 1990, NHA requested for reconsideration. It offered the following explanations:

"ISSUE NO. 1. - This Supplemental Contract has no approval from KFW and the Secretary of the Public Works and Highways.

"ANSWER: 1.1. - On KFW approval, attached for your reference is a copy of KFW telex of no objection, dated December 22, 1988 "EXHIBIT A." The reply, action of KFW is usually communicated thru telex. Perusal of all previous consultancy contracts would support this. Furthermore, let it be informed that it was KFW's requirement why this consultancy Contract was engaged despite our earlier manifestation that we hire local consultants "EXHIBIT B."

1.2 - On the approval by the Secretary of the Department of Public Works and Highways xxx the Third Supplemental Agreement was approved by the NHA Board under Resolution No. 1231[5] of March 13, 1987 (sic) "EXHIBIT C."

It may be pointed out at this juncture, that the main reason why the consultancy had to be extended was due to the delay in the completion of the KFW-Funded River Bank Improvement Works, which was directly implemented by the Department of Public Works and Highways, hence, the presence of the foreign consultant was with the knowledge and acquiescence of the DPWH.

"ISSUE NO. 2. - The output requirements are not specified ... or equivalent program of work ... thus there is no clear basis for ... payment.

"ANSWER: In the original Consultancy Contract, as well as the First and the Second Supplemental Contract Agreements, the main basis for determining the consultant's responsibility have been defined in the Terms of Reference which specified the technical assistance to be provided by the Consultant to the National Housing Authority under the KFW Loan Agreement, to wit:

Assistance to the National Housing Authority for the Dagat-Dagatan Project in the form of engineering designs, contract documentation, project programming, supervision and monitoring procedures, evaluation and concurrence on contractor's billings and institutional arrangements with regards associated agencies. In addition, responsibility will include all associated functions necessary for the timely and satisfactory completion of the revetment works along the river banks in which the Department of Public Works and Highways is the responsible agency.

In this respect, since it is a prerequisite that all billings to be processed for payment to the contractors have to be certified by the consultant, it is the direct responsibility of the consultant to monitor, the consultant to monitor, verify and evaluate all the aspects of the project implementation for contracts funded by KFW Loan. This process will assure the NHA and KFW that disbursement are effected only to cover works accomplishment in accordance with plans and specifications.

"ISSUE NO. 3 - There is no contract provision for liquidated damages in case of delay in project completion attributed to the fault of the consultant.

"ANSWER: We reiterate in full our previous explanation for this particular observation:

"It is confirmed that there is no contract provision for liquidated damages. However, there is a contract provision for termination for default or for convenience of NHA. Further, considering that the contract has already expired and there has been no record of consultant's faults or delays in the project implementation, the required provision on liquidated damages has become moot and academic."

"With respect to your opinion that the KFW components of the Dagat-Dagatan involve simple design and construction procedures, etc., let this be of record that we are 100% in accord with your observation. However, the hiring of an expatriate consultant is mandated under the Loan Agreement to which NHA must adhere to, unless otherwise authorized." (Underscoring ours)

On February 28, 1991, TSO Director Arthur Dadufalza denied the reconsideration. He opined:

"1. Although not stated in the contract that there is no need for the approval of the DPWH Secretary, Section 3 of Executive Order No. 164 dated May 5, 1987 requires the said approval.

"2. The consultant's responsibility which they mentioned, as specified in the Terms of Reference was general. The output requirements are not specified and there is no PERT/CPM Network Diagram or equivalent program of work, hence, we still believed that there is still no basis for NHA's evaluation of the consultant's accomplishments for purposes of payment.

"3. It was confirmed by NHA that there is really no contract provision for liquidated damages. It so happened that the contract has expired and there has been no record of consultant's fault or delay, thus, the required provision may be considered moot and academic. However, it is recommended that for future projects, the provisions should be specified/stipulated.

"4. The main reason for the disallowance is that there is no more need for a foreign consultant in the final project stage since the remaining work components of the Dagat-Dagatan Project which involved simple design and construction procedure and it being in the finishing stage, required simple advisory services that can be undertaken by NHA or DPWH in-house technical staff or at the most, a local consultant. The findings was further reinforced by the statements of the NEDA in the attached 1st Indorsement dated April 1, 1987 xxx bearing on its no objection to the approval of the original contract:

"xxx xxx xxx."

"The NHA agreed and is 100% in accord with the observation. However, we do not find in the documents/records submitted that NHA has made stronger representation with the KFW for the hiring of a local consultant (or at all) as required by the NEDA." (Underscoring ours)

On May 15, 1991, the COA, in its Decision No. 1895, affirmed Director Dadufalza's findings except as regards the lack of provision for liquidated damages which was considered moot and academic.

NHA filed the instant petition for certiorari where it raises the following issues:

"a. Whether or not the COA acted beyond its constitutionally granted powers by disallowing a duly entered contract, valid, regular, with all the formalities of law.

"b. Corollary to the above, is whether or not COA acted beyond its constitutionally granted powers by disallowing a contract on the basis of its self-proclaimed and considered defects on the contract not otherwise provided for in its sets of regulations promulgated pursuant to the mandate of the Constitution.

"c. Whether or not COA, by virtue of the powers granted to it under the Constitution, substitute its own judgment or disposition in lieu of the decision of the management or governing body of government entities."

The petition lacks merit.

The power of the Commission on Audit to audit and examine government expenditures is enshrined in Section 2 (1), Article IX-D of the 1987 Constitution, viz.:

"Section 2. (1) The Commission on Audit shall have the power, authority, and duty to examine, audit and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivision, agencies, or instrumentalities, including government-owned or controlled corporations with original charters, or on a post audit basis: (a) constitutional bodies, commissions, and offices that have been granted the fiscal autonomy under this Constitution; xxx."

The Constitution also granted to COA the power to "promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties." [6]

Pursuant to the said constitutional mandate, COA promulgated Circular No. 88-55-A dated September 8, 1985 defining the term "unnecessary" expenditures, viz.:

"The term pertains to expenditures which could not pass the test of prudence or the diligence of a good father of a family, thereby denoting non-responsiveness to the exigencies of the service. Unnecessary expenditures are those not supportive of the implementation of the objectives and mission of the agency relative to the nature of its operation. This would also include incurrence of expenditure not dictated by the demands of good government, and those the utility of which cannot be ascertained at a specific time. An expenditure that is not essential or that which can be dispensed with without loss or damage to property is considered unnecessary. The mission and thrust of the agency incurring the expenditures must be considered in determining whether or not an expenditure is necessary." (Italics ours)

In *Caltex Philippines, Inc. v. COA*, [7] We recognized the authority of COA to disallow irregular, unnecessary, excessive, extravagant or unconscionable (IUEEU) expenditures. We ruled: "Since the COA is responsible for the enforcement of the rules and regulations, it goes without saying that failure to comply with them is a ground for disapproving the payment of the proposed expenditure."

There can be no dispute on the proposition that the continued extension of the services of Engr. Murdoch as a foreign consultant constitutes at the very least an unnecessary expense.

Crystal clear from the records is that the nature of the terminal phase of the Dagat-Dagatan project does not require the expertise of a foreign consultant. As early as April 1, 1987, the necessity of extending the services of Engr. Murdoch has been questioned by NEDA "considering the relatively simple supervision work required for the final stages of the project." [8] This observation was echoed by COA in its post audit review of the First and Second Supplemental Contracts, [9] viz:

"In addition, it is our opinion that the KFW components of the Dagat-Dagatan Project involves simple design and construction procedures, and it being in its finishing stage, requires simple advisory services that can be undertaken by NHA or DPWH in-house technical staff or at the most a local consultant. Hence, the NHA should have made stronger representations with the KFW for the hiring of a local consultant (or none at all) as required by NEDA."

Petitioner itself has taken the position that the services of Engr. Murdoch can be dispensed with and can well be done by Filipinos. In 1987, petitioner's Board already directed its management to make representations with KFW to replace Engr. Murdoch with a Filipino consultant if the project would still be unfinished. Again, in its memorandum dated November 26, 1990, petitioner categorically admitted that the KFW components of the Dagat-dagatan Project involved simple designs and construction procedures which could easily be handled by a

local consultant. Despite all these admissions, petitioner proceeded to extend the unnecessary services of Engr. Murdoch as it consummated the disputed Third Supplemental Contract. The amount of money that was spent for the unnecessary services of Engr. Murdoch speaks for itself.

Petitioner argues that the renewal of the loan agreement with the KFW would have been jeopardized if it did not agree to the extension of the services of Engr. Murdoch. The short answer to this argument is that the imperative necessity to comply with the command of our Constitution prohibiting unnecessary expenses of public funds is beyond compromise. No amount of the almighty dollar can justify anybody, especially foreigners, to mangle the mandates of our fundamental law. The postulates of our Constitution are not mere platitudes which we should honor only in rhetorics but not in reality. In fine, the power to contract a foreign loan does not carry with it the authority to bargain away the ideals of our Constitution.

IN VIEW WHEREOF, the petition for certiorari is dismissed.

SO ORDERED.

Narvasa, C.J., Cruz, Feliciano, Padilla, Bidin, Griño-Aquino, Regalado, Davide, Jr., Romero, Nocon, Bellosillo, Melo, Quiason, and Vitug, JJ., concur.

[1] Rollo, p. 184. DM 12,000,000 (twelve million Deutches Mark) was originally allotted for the project. This was increased to DM16,000,000 in a Supplemental Loan Agreement.

[2] Resolution No. 1231 dated March 13, 1987

[3] Rollo, p. 91.

[4] Performance Evaluation and Review Technique/Critical Path Method.

[5] The Third Supplemental Agreement was approved by the NHA Board under Resolution No. 1621 dated January 10, 1989. Resolution No. 1231 dated March 13, 1987 refers to NHA Board of Directors' approval of the April 10, 1987 original consultancy contract.

[6] Section 2 (2), Article IX-D, 1987 Constitution.

[7] G.R. No. 92585, May 8, 1992, 208 SCRA 726, 746.

[8] Rollo, p. 92.

[9] Rollo, p. 203.

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