

**ILDEFONSO T. PATDU, JR., PETITIONER, VS. COMMISSION ON AUDIT, RESPONDENT.***G.R. No. 218461. September 14, 2021*

Ponente: LOPEZ, J., J.

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Before the Court is a Petition for Certiorari[1] filed under Rule 64, in relation to Rule 65, of the Rules of Court assailing the December 13, 2010 Decision[2] and the April 6, 2015 Resolution[3] of respondent Commission on Audit (COA).

**FACTUAL ANTECEDENTS**

In 1992, the Government of the Republic of the Philippines, through the then Department of Transportation and Communications (DOTC), internationally bid out the construction of the Davao Fishing Port Complex under the National Fishing Development Program (project).[4] The undertaking is of the nature of a foreign-assisted project,[5] being funded by the Overseas Economic Cooperation Fund (OECF),[6] a funding institution in Japan, under the 17[th] Yen Credit Package (PH-126).[7]

Three proponents submitted their bids, namely: (i) Hanil Development Company; (ii) the consortium of C. Itoh, F.F. Cruz and DMC; and (iii) the joint venture of Engineering Equipment, Inc. and J.E. Manalo (EEI/Manalo Joint Venture).[8]

The EEI/Manalo Joint Venture offered the lowest bid at P347,000,005.00.[9] Hence, on December 7, 1992, the Pre-Qualification, Bids and Awards Committee of the DOTC recommended that the contract for the project be awarded to the EEI/Manalo Joint Venture.[10] Subsequently, the DOTC and the EEI/Manalo Joint Venture executed a construction contract dated April 20, 1993, entitled "Construction of Davao Fishing Port Complex for the Nationwide Fishing Ports Development Program (Fishing Ports Package II)" (Construction Contract), with DOTC as project owner and EEI/Manalo Joint Venture as project contractor therein.[11] Under the Construction Contract, EEI/Manalo Joint Venture was obligated to execute, complete and maintain construction works related to the project.[12]

During the period of the Construction Contract, the EEI/Manalo Joint Venture offered to construct the relevant construction works within a shorter period, from 1,096 days as stipulated in the bidding documents to a period of 910 days.[13] In consideration for the early completion of the project, DOTC agreed to pay EEI/Manalo Joint Venture an early completion incentive bonus in the amount of P35,445,070.35 (Incentive Bonus).[14]

During construction, the DOTC issued several variation orders, amounting to P7,450,855.91 (Variation Orders).[15] The only Variation Orders at issue in this petition are the following: (i) Variation Order No. 5, which sought to change the original design of the preparation/landing wharf; (ii) Variation Order No. 7, which sought to change the design of the pavement and landscaping, and construction of certain parts of the drainage/sewerage system, fresh water supply, and masonry works; and (iii) Variation Order No. 8, which sought to change the

quantity and materials of parts of the drainage system, fresh water supply, wharf, and breakwater.[16] Petitioner, as the project engineer, was responsible for reviewing the amounts as stated under Variation Order Nos. 5, 7 and 8.[17]

On June 18, 1997, the COA Auditor assigned to DOTC issued a Notice of Disallowance (ND) No. 97-011-102 (DOTC) (95), disallowing P53,951,955.03 of the project.[18] The disallowance stemmed from the findings of COA's Special Task Force on Flagship Projects (STFFP), which determined that the project's actual cost of P354,450,860.91 manifestly exceeded COA's estimated cost of the project that amounted to P300,498,905.88.

Pursuant to the mandate given to COA to review and evaluate contracts, and to inspect and appraise infrastructure projects,[19] it issued Resolution No. 91-052 dated September 17, 1991, which requires an auditorial review and evaluation of infrastructure contracts awarded as a result of public bidding, to determine its regularity and the reasonableness of the contract price. More specifically, Section 5 of the Resolution provides that "[f]or purposes of determining the reasonableness of the contract price as a technical aspect of the review and evaluation process, the Approved Agency Estimate (AAE) shall serve as a reference value for the formulation of the COA cost estimate." Section 7 provides that "[t]he total contract price should be equal to or less than the total COA estimate plus ten percent (10%) in order to sustain a finding of reasonableness, otherwise, the contract price will be deemed excessive."

Accordingly, upon the STFFP's determination that the project was in excess of P53,951,955.03 over the COA estimated cost (Excess Project Cost), the COA Auditor disallowed such excess amount.[20]

On December 12, 1997, the DOTC requested the Office of the COA Chairman to lift ND No. 97-011-102 (DOTC) (95) dated June 18, 1997.[21] The COA Chairman referred the DOTC request to the COA Auditor for appropriate action which the COA Auditor treated the request as a request for reconsideration.[22]

With respect to the incentive bonus, the COA Auditor determined on May 28, 1998 that the amount of P35,445,070.35 is excessive, and reduced the same to P20,129,354.80.[23] Hence, the COA Auditor disallowed the excess of P15,315,715.55 of the incentive bonus through ND No. 98-004-102 (DOTC) (96).[24]

On July 14, 1999, DOTC filed a motion to dismiss[25] with the Office of the COA Chairman on the ground that foreign-assisted projects of the government are exempt from the requirement of auditorial review as provided in the September 17, 1991 COA Resolution that formed the basis of the COA disallowance. The DOTC cited the exempting clause in the Implementing Rules and Regulations (IRR) of Presidential Decree (P.D.) No. 1594, which provides:

The above notwithstanding, nothing in these implementing rules and regulations shall negate any existing and future commitments with respect to the bidding, award and execution of contracts financed partly or wholly with funds from international financial institutions, as well as from bilateral and other similar sources.[26]

The DOTC then stated that the above exempting clause excluded foreign-assisted projects from P.D. No. 1594 and its IRR. Hence, the September 17, 1991 COA Resolution, which lays down the rule on the reasonableness of the project cost of a contract pursuant to P.D. No. 1594 and its IRR, is not applicable.[27]

On January 31, 2000, the COA Auditor issued a letter entitled "41 Indorsement"[28] to the Director of National Government Audit Office (NGAO) II, recommending the lifting of ND No. 97-011-102 (DOTC) (95) dated June 18, 1997 on the ground that the project is a foreign-assisted or Official Development Assistance (ODA)-funded project of the Philippine Government, and therefore, Philippine procurement law and procedure, specifically P.D. No. 1594 and its IRR, is not applicable.[29] The COA Auditor relied on the clarification issued by the Secretary of Justice in his Opinion[30] dated April 21, 1987 that the exempting clause in the IRR of P.D. No. 1594

effectively excluded foreign-assisted projects from the coverage of P.D. No. 1594 and its IRR, especially on the designation of ceiling in the amounts of contracts.

On July 19, 2001, the NGAO II Director issued a letter entitled "5<sup>th</sup> Indorsement"[31] to the COA Auditor, sustaining the lifting of ND No. 97-011-102 (DOTC) (95) dated June 18, 1997 based on the ground raised by the COA Auditor in the 4<sup>th</sup> Indorsement dated January 31, 2000.

On November 14, 2002, the DOTC requested the lifting of ND No. 98-004-102 (DOTC) (96) dated May 28, 1998 with the COA Auditor,[32] based on the same position taken by the NGAO II Director in the 5<sup>th</sup> Indorsement that was issued in ND No. 97-011-102 (DOTC) (95). The matter was then raised to the COA's Legal and Adjudication Office.

The COA's Legal and Adjudication Office denied the request for the lifting of ND No. 98-004-102 (DOTC) (96) dated May 28, 1998 in LAO-N Decision No. 2005-039 dated January 27, 2005 and LAO-N Resolution No. 2005-039A dated November 24, 2005, on the ground that P.D. No. 1594 and its IRR are applicable to the project and that, therefore, the notice of disallowance should be sustained.[33] The Legal and Adjudication Office found that the Construction Contract incorporated the content of the bidding documents for the project, and the bidding documents state that P.D. No. 1594 and its IRR shall be applicable.[34]

DOTC appealed LAO-N Decision No. 2005-039 dated January 27, 2005 and LAO-N Resolution No. 2005-039A dated November 24, 2005 to the COA Proper (COA-CP).

#### Ruling of the COA-CP

In Decision No. 2010-133[35] dated December 13, 2010, the COA-CP denied the appeal of the DOTC, and affirmed ND No. 98-004-102 (DOTC) (96) dated May 28, 1998.[36] In addition, the COA in the same appeal also set aside the 5<sup>th</sup> Indorsement dated July 19, 2001 of the NGAO II Director and reinstated ND No. 97-011-102 (DOTC) (95) dated June 18, 1997. The dispositive portion of the December 13, 2010 COA-CP Decision reads:

WHEREFORE, premises considered, the herein appeal is DENIED. Accordingly, LAO-N Decision No. 2005-039 and LAO-N Resolution No. 2005-039A denying the request to lift ND No. 98-004-102 (DOTC) (96) are hereby AFFIRMED. Likewise, the 5<sup>th</sup> Indorsement dated July 19, 2001 of the Director of then NGAO II lifting ND No. 97-011-102 (DOTC) (95) is hereby SET ASIDE. The decision of the DOTC Department Auditor disallowing the project cost difference/excess is hereby REINSTATED.[37]

In the said Decision, the COA-CP found that the parties themselves voluntarily agreed on the applicability of P.D. No. 1594. Volume 1 of the Bid and Contract Documents which provides that "[t]he provisions of Presidential Decree No. 1594, and its implementing rules and regulations, and other relevant laws and employer regulations shall apply to this bidding and any contract based thereon." [38] The NGAO II Director therefore erroneously lifted ND No. 97-011-102 (DOTC) (95) dated June 18, 1997.

DOTC filed a motion for reconsideration from Decision No. 2010-133 dated December 13, 2010,[39] which the COA denied in Resolution No. 2015-135[40] dated April 6, 2015.

Petitioner Ildefonso Patdu, Jr. (Petitioner), who was held civilly liable under ND No. 97-011-102 (DOTC) (95), thereafter filed the instant petition to assail the December 13, 2010 Decision and April 6, 2015 Resolution of the COA.

#### ISSUES

##### I.

Whether the decision of the NGAO II Director to lift and set aside ND No. 97-011-102 (DOTC) (95) dated

June 18, 1997 had attained finality, and hence, had become immutable and unalterable

II.

Whether ND No. 97-011-102 (DOTC) (95) dated June 18, 1997 and ND No. 98-004-102 (DOTC) (96) should be lifted and set aside

III.

Whether the petitioner should be held liable for the audit disallowance arising from Variation Order Nos. 5, 7 and 8

### COURT'S RULING

At the outset, it must be clarified that the assailed Decision dated December 13, 2010 and the Resolution dated April 6, 2015 rendered by the COA involved two notices of disallowance. Nevertheless, as petitioner was held civilly liable only under ND No. 97-011-102 (DOTC) (95), the resolution of this case shall be limited to the said notice of disallowance. With the two notices of disallowance involving different parties, and without any pronouncement on the liability of petitioner in ND No. 98-004-102 (DOTC) (96), this is not the proper forum for him to assail the COA Decision and Resolution insofar as the latter notice of disallowance is concerned. In the absence of a direct injury suffered by petitioner, he clearly lacks the legal standing to assail the affirmance of ND No. 98-004-102 (DOTC) (96) in this petition.

#### Finality of Lifting of a COA Notice of Disallowance by the COA Director

Petitioner postulates that the lifting of ND No. 97-011-102 (DOTC) (95) dated June 18, 1997 by the NGAO II Director in the 5<sup>th</sup> Indorsement had attained finality and hence, has become immutable and unalterable.[41] Consequently, the COA-CP may no longer reverse and set aside, after almost ten (10) years, the lifting of ND No. 97-011-102 (DOTC) (95) dated June 18, 1997.[42] To support its contention, petitioner cites the doctrine of finality or immutability of judgments.[43]

On the other hand, respondent insists that the NGAO II Director did not elevate the decision for review, and that the State cannot be put in estoppel by the mistakes or errors of its officials or agents.[44] Thus, the NGAO II Director's decision did not attain finality.[45]

We uphold the arguments raised by the petitioner.

In *Civil Service Commission v. Moralde*,[46] We held that:

[t]he doctrine of immutability of judgments applies as much to decisions of agencies exercising quasi-judicial powers as they do to judicial decisions. Jurisprudence is categorical: 'the principle of conclusiveness of prior adjudications is not confined in its operation to the judgments of what are ordinarily known as courts, but extends to all bodies upon which judicial powers had been conferred.'

Moreover, the related doctrine of *res judicata*, which bars a subsequent action when a former identical action has already lapsed into finality, equally applies to decisions rendered by quasi-judicial bodies.[47]

The exercise of quasi-judicial powers by administrative officers or bodies involves the investigation of facts or ascertainment of the existence of facts, holding of hearings, weighing of evidence, and drawing conclusions from them as basis for official action and exercise of discretion in a judicial nature.[48] In this case, the proceeding before the NGAO II Director was in the exercise of quasi-judicial functions as it involves the investigation of

facts concerning (i) the expenditure of funds intended for a government project; (ii) ruling on appeal whether such expenditure is illegal, irregular, unnecessary, excessive, extravagant or unconscionable; and (iii) deciding on appeal whether to disallow such expenditure. Hence, the doctrine of immutability of judgments applies to the decision of the NGAO II Director.

Further, the manner by which a ruling attains finality depends on the peculiar relevant law and/or rules of procedure governing the proceeding before the adjudicating body. For proceedings before the COA, a ruling attains finality in accordance with Section 6, Rule V of the COA Revised Rules of Procedure, which provides:

SECTION 6. Power of Director on Appeal. - The Director may reverse, modify, alter, or affirm the decision or ruling of the Auditor. However, should the Director render a decision reversing, modifying or altering the decision or ruling of the Auditor, the Director shall, within ten (10) days, certify the case and elevate the entire record to the Commission Proper for review and approval.

Based on this provision, it is only in cases where the NGAO II Director reverses, modifies, or alters the decision or ruling of the Auditor that the decision should be elevated to the COA-CP for automatic review. Conversely, when the NGAO II Director affirms or sustains the ruling of the Auditor, further elevation and review are unnecessary. Thus, as pointed out by Senior Associate Justice Estela Perlas-Bernabe (Justice Perlas-Bernabe) during the deliberations of this case, the affirmance, when not anymore appealed by an aggrieved party in accordance with the COA rules, will simply lapse into finality. The reason for the automatic review provision is palpable: the COA-CP is tasked to resolve the seeming conflict between the Auditor's and the Director's rulings to arrive at a proper conclusion on an audit case. However, if no conflict exists, then there is no need for the COA-CP to automatically review the matter since both the Auditor and Director are already in agreement.

In this case, the Auditor lifted the original disallowance, and this decision was sustained by the NGAO II Director. Thus, in the final analysis, both the Auditor and Director were in agreement on the lifting of the disallowance, which negates the application of Section 6, Rule V of the 1997 COA Rules of Procedure.

The EEI/Manalo Joint Venture, as one of the persons held liable for the disallowed amount, wrote the Letter dated December 12, 1997 to the COA Auditor assailing the issuance of ND No. 97-011-102 (DOTC) (95). Treating the letter as a request for reconsideration, the COA Auditor eventually recommended the total lifting of the disallowance through a 4th Indorsement dated January 31, 2000. In turn, this recommendation was sustained in full by the NGAO II Director in a 5th Indorsement dated July 19, 2001.[49]

Given that the NGAO II Director decided to sustain the lifting of the disallowance, petitioner correctly pointed out that the elevation of the NGAO II Director's ruling to the COA-CP was not required under Section 6, Rule V of the 1997 COA Rules of Procedure. Hence, since the NGAO II Director's decision to sustain the Auditor's recommended lifting of disallowance was not anymore subjected to an appeal, the same had already lapsed into finality. As such, the conditions for the automatic review provision under the COA Rules was not validly met. Consequently, COA gravely abused its discretion in reinstating the same.

Likewise, We share the observation of Justice Perlas-Bernabe that the COA's reinstatement of the notice of disallowance came after the lapse of an inordinate period of almost ten (10) years. While the decision of the NGAO II Director was issued on July 19, 2001, the reinstatement of the COA was made only on December 13, 2010. Undoubtedly, it would be clearly unjust to resurrect a money claim against petitioner when an unreasonable length of time had already passed.

Accordingly, We rule that the lifting of ND No. 97-011-102 (DOTC) (95) dated June 18, 1997 by the NGAO II Director in the 5<sup>th</sup> Indorsement is final, immutable and unalterable. As such, COA should not have included the said notice of disallowance when it resolved the appeal of DOTC concerning the disallowance covered by ND No.

98-004-102 (DOTC) (96). Simply because the resolution of the two notices of disallowance was premised on the same issue concerning the interpretation of the applicability of P.D. No. 1594 to foreign-assisted projects, should not authorize the automatic application of a later issuance now carrying a different interpretation, to reverse a previous issuance. This is especially true in this case when the previous issuance involving ND No. 97-011-102 (DOTC) (95), with petitioner relying on the NGAO II Director's ruling that P.D. No. 1594 is not applicable to foreign--assisted projects, has already attained finality. Considerations of due process dictates that petitioner should not be hailed back to a proceeding that has already absolved him of liability because of a sudden change in the interpretation of a law, more so, when made in a proceeding involving a different notice of disallowance. As held in *Social Security System v. Isip*:<sup>[50]</sup>

When a final judgment is executory, it becomes immutable and unalterable. It may no longer be modified in any respect either by the court which rendered it or even by this Court. The doctrine is founded on considerations of public policy and sound practice that, at the risk of occasional errors, judgments must become final at some definite point in time.

Hence, the COA-CP is precluded from issuing Decision No. 2010-133 dated December 13, 2010 and Resolution No. 2015-135 dated April 6, 2015, insofar as it reinstated and affirmed ND No. 97-011-102 (DOTC) (95) dated June 18, 1997.

There is no malice, bad faith or negligence in the issuance of Variation Order Nos. 5, 7 and 8

We hasten to point out that while main reason for the issuance of the two notices of disallowance concerns the interpretation of the applicability of P.D. No. 1594 to foreign-assisted projects, we must exercise judicial restraint in issuing a ruling thereon, for two reasons: Firstly, the interpretation given by the COA NGAO Director II has already attained finality insofar as ND No. 97-011-102 (DOTC) (95) is concerned. This already constitutes the law of the case and could no longer be the subject of an appeal. Secondly, we could not rule on the different interpretation subsequently adopted by the COA in ND No. 98-004-102 (DOTC) (96) considering that the instant case was brought by petitioner, whose legal standing in court extends only insofar as ND No. 97-011-102 (DOTC) (95) is concerned.

Nonetheless, even if We examine the assailed COA Decision and Resolution concerning ND No. 97-011-102 (DOTC) (95) and apply the provisions of P.D. No. 1594, petitioner would still be absolved from liability. During the construction of the project, the DOTC issued Variation Orders in the total amount of P7,450,855.91.<sup>[51]</sup> This increased the total actual amount of the project,<sup>[52]</sup> as follows:

Original Project Cost

P347,000,005

Add: Cost on Variation Orders

7,450,855

Total Project Cost

P354,450,860

The COA only allowed a project cost of P300,498,905.87. Thus, the Excess Project Cost, as per COA's finding, is P53,951,954.13,[53] computed as follows:

Total Project Cost

P354,450,860.00

Ad: COA-Allowed Project Cost

300,498,905.87

Excess Project Cost

P53,951,954.13

It must be pointed out that the excess on the cost of the Variation Orders is only a portion of the aforementioned Excess Project Cost. With specific reference to the Variation Orders, the COA found that these are excessive by an amount of P5,210,744.29,[54] computed as follows:

Cost on Variation Orders

P7,450,855.00

Less: COA-Allowed Cost on Variation Orders

2,240,110.71

Excess Cost on Variation Orders

P5,210,744.29

The Variation Orders found to be in excess of the COA-allowed cost are as follows: (i) Variation Order No. 5, which sought to change the original design of the preparation/landing wharf; (ii) Variation Order No. 7, which sought to change the design of the pavement and landscaping, and construction of certain parts of the drainage/sewerage system, fresh water supply, and masonry works; and (iii) Variation Order No. 8, which sought to change the quantity and materials of parts of the drainage system, fresh water supply, wharf, and breakwater.[55] The other Variation Orders were not raised in issue in this petition.

Here, petitioner, as the project engineer, was responsible for reviewing the amounts of variation orders in Variation Order Nos. 5, 7 and 8. We quote the April 6, 2015 COA Resolution, thus:

It can be gleaned from the above computation that the amounts of the variation orders reviewed by Mr. Patdu as Project Engineer were part of the total project cost, a portion of which was found excessive and disallowed in audit. Mr. Patdu failed to diligently review the variation orders which resulted in the overpricing of the project[.] However, his liability shall only be on the excess costs for the variation orders he reviewed, in the

total amount of [P]5,210,744.29.[56]

Petitioner explains that Variation Order Nos. 5, 7 and 8, which he reviewed as the Project Engineer of the project, were necessary and are reasonable.[57]

We agree.

It bears pointing out that variation orders per se in government infrastructure contracts are not automatically invalid. In the IRR of P.D. No. 1594, variation orders involve the "increase/decrease in quantities or reclassification of items [x x x] usually due to change of plans, design or alignment to suit actual field conditions, or as a result of great disparity between the preconstruction plans used for purposes of bidding and the 'as staked plans' or construction drawings prepared after a joint survey by the contractor and the government after award of the contract." [58] The IRR of P.D. No. 1954 provides detailed requirements and standards for the execution, implementation, and payment of variation orders. Relevantly, this provision on variation orders has been reiterated in the 2016 Revised Implementing Rules and Regulations of the Government Procurement Reform Act, which recognizes variation orders as:

x x x those orders issued by the procuring entity to cover any increase/decrease in quantities, including the introduction of new work items that are not included in the original contract or reclassification of work items that are either due to change of plans, design or alignment to suit actual field conditions resulting in disparity between the preconstruction plans used for purposes of bidding and the 'as staked plans' or construction drawings prepared after a joint survey by the contractor and the Government after award of the contract, provided that the cumulative amount of the positive or additive Variation Order does not exceed ten percent (10%) of the original contract price.[59]

In short, variation orders are necessary adjustments to construction projects, and as long as they are within the general scope of the project and are compliant with the relevant audit and procurement rules, they are permissible.

In this case, the variation orders at issue sought to introduce adjustments to construction works relating to the fishing port, specifically adjustments in the design of the preparation/landing wharf, the design of the pavement and landscaping, construction of certain parts of the drainage/sewerage system, fresh water supply, and masonry works, and change in the quantity and materials of parts of the drainage system, fresh water supply, wharf, and breakwater. The relevance of these additional adjustments to the project is not in question. The respondent likewise did not dispute that these adjustments are within the general scope of the project. What is merely at issue is the excess cost of such variation orders, based on the COA estimate of the appropriate and justifiable cost of such orders.

In this case, petitioner justified the necessity of issuing the Variation Orders, as follows:

6.46.1. Variation Order No. 5 Mobilization / Demobilization cost for dredging equipment was included in the aforementioned variation order because there is a new item of work, dredging, which is not included in the original contract and there is a need to bring in said equipment to the project site, hence the cost of mobilization/demobilization.

6.46.2. Variation Order No. 7 - The original contract calls for the use of Concrete Asphalt for Roadway and Parking Area. Due to the absence of supply of concrete asphalt in the area, the Contractor in his desire not to delay the project, offered to use PCCP instead at the same cost as Concrete Asphalt. The said substitution resulted to an increase in the thickness of the pavement and a decrease in the thickness of the sub-base. This off-setting resulted to a cost difference of P10,902,431.33 in favour of the government.

6.46.3. Variation Order No. 7E - Construction of Deepwell, the cost of deepwell for Variation Order No. 3 cannot be adopted because they vary in depth. Deepwell for V.O. #3 is 42 meters deep, while for V.O. #7E, it

is 75 meters deep.

6.46.4. Variation Order No. 8 - The discrepancy between the quantity take-off and the B0Q resulted to an overestimate of quantities in V.O. No. 8, however, this [sic] quantities were rectified in the Final Quantification.[60]

Notably, these justifications were favorably considered by the Auditor when he recommended the lifting of (ND) No. 97-011-102 (DOTC) (95).[61]

With respect to the civil liability imposed for the excess cost of the variation orders, Sections 38[[62] and 43[63] of the Administrative Code,[64] as interpreted in prevailing case law,[65] provides that the civil liability of approving/authorizing public officers for disallowances issued by the COA will only arise upon a clear showing of bad faith, malice, or gross negligence. Otherwise, such officers are presumed to have acted within the regular performance of their official functions and in good faith, and hence, are not accountable for the return of disallowed amounts.

In disallowances involving unlawful or irregular government contracts, the parameters on determining the civil liability of approving/authorizing officers are reflected under Rules 2 (a) and (b) of the recently established guidelines in *Torreta v. Commission on Audit*: [66]

Accordingly, we hereby adopt the proposed guidelines on return of disallowed amounts in cases involving unlawful/irregular government contracts submitted by herein Justice Perlas-Bernabe, to wit:

1. If a Notice of Disallowance is set aside by the Court, no return shall be required from any of the persons held liable therein.
2. If a Notice of Disallowance is upheld, the rules on return are as follows:
  - a. Approving and certifying officers who acted in good faith, in the regular performance of official functions, and with the diligence of a good father of the family are not civilly liable to return consistent with Section 38 of the Administrative Code of 1987.
  - b. Pursuant to Section 43 of the Administrative Code of 1987, approving and certifying officers who are clearly shown to have acted with bad faith, malice, or gross negligence, are solidarily liable together with the recipients for the return of the disallowed amount.
  - c. The civil liability for the disallowed amount may be reduced by the amounts due to the recipient based on the application of the principle of quantum meruit on a case to case basis.
  - d. These rules are without prejudice to the application of the more specific provisions of law, COA rules and regulations, and accounting principles depending on the nature of the government contract involved.[67]

Herein, as pointed by Justice Perlas-Bernabe, during the deliberations of this case, apart from the statement that "[petitioner] failed to diligently review VO Nos. 5, 7, and 8 which resulted in the overpricing of the project as computed by the [COA-STFFP]," there was nothing in COA's ruling that specifies any acts or omissions of petitioner amounting to bad faith, malice, or gross negligence relative to his participation on the project.[68] Indeed, in *Daplas v. Department of Finance*, [69] We ruled that "[a]n act done in good faith, which constitutes only an error of judgment and for no ulterior motives and/or purposes [x x x] is merely Simple Negligence." Accordingly, the lack of specific factual determination on the petitioner's bad faith, malice, or gross negligence is fatal to the COA's finding of his civil liability.

Moreover, petitioner justified the necessity of the Variation Orders by identifying the technical adjustments and rectifications made during the course of the project, which resulted in additional project costs.[70] These were not rebutted by the respondent in its Comment.

Perforce, in view of the foregoing, petitioner's civil liability in ND No. 97-011-102 (DOTC) (95) should not be reinstated.

ACCORDINGLY, the instant petition is PARTIALLY GRANTED. The December 13, 2010 Decision and April 6, 2015 Resolution No. 2015-135 of the Commission on Audit are REVERSED and SET ASIDE insofar as ND No. 97-011-102 (DOTC) (95) is concerned. Notice of Disallowance No. 97-011-102 (DOTC) (95) is hereby LIFTED.

**SO ORDERED.**

Gesmundo, C. J., Leonen, Caguioa, Hernando, Carandang, Lazaro-Javier, Inting, Zalameda, M. Lopez, Gaerlan, and Rosario, JJ., concur.

Perlas-Bernabe, J., Please see Concurring Opinion.

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[1] Rollo, pp. 3-24.

[2] Penned by Chairman Reynaldo A. Villar, with Commissioners Juanito G. Espino, Jr. and Evelyn R. San Buenaventura, concurring; id. at 28-35.

[3] Id. at 36-43.

[4] Id. at 5.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id. at 66-69.

[12] Id.

[13] Id. at 5.

[14] Id. at 7.

[15] Id. at 5.

[16] Id. at 6.

[17] Id. at 41.

[18] Id. at 70.

[19] See Section 7(6), Chapter 3, Subtitle B, Title I, Book V, Administrative Code of 1987.

[20] Id.

[21] Id. at 83-97.

[22] Id. at 97-100.

[23] Id.

[24] Id.

[25] Id. at 88.

[26] Second paragraph, clause 1, Section VI of the IRR of P.D. No. 1594.

[27] Supra.

[28] Rollo, p. 7.

[29] Id.

[30] Id. at 90-91.

[31] Id. at 92-94.

[32] Id. at 95-96.

[33] Id.

[34] Id. at 99-100.

[35] Id. at 28-34.

[36] Id. at 34.

[37] Id.

[38] Id. at 32.

[39] Id. at 44-61.

[40] Id. at 36-43.

[41] Id. at 10-15.

[42] Id.

[43] Id.

[44] Id. at 8-13.

[45] Id.

[46] 838 Phil. 840, 856 (2018).

[47] *Brillantes v. Castro*, 99 Phil. 497, 503 (1956).

[48] *The Special Audit Team, Commission on Audit v. Court of Appeals and Government Service Insurance System*, 709 Phil. 167, 183 (2013).

[49] Rollo, p. 93.

[50] 549 Phil. 112, 116 (2007).

[51] Rollo, p. 5.

[52] Id. at 41.

[53] Id.

[54] Id.

[55] Id. at 6.

[56] Id. at 41.

[57] Id. at 15-23.

[58] Section III.CI.I.I, IRR of P.D. No. 1594.

[59] Annex E (Contract Implementation Guidelines for the Procurement of Infrastructure Projects), 2016 Revised Implementing Rules and Regulations of the Government Procurement Reform Act.

[60] Rollo, p. 22 (citing the letter dated December 12, 1997).

[61] Id. at 43.

[62] Section 38. Liability of Superior Officers. - (1) A public officer shall not be civilly liable for acts done in the performance of his official duties, unless there is a clear showing of bad faith, malice or gross

[63] Section 43. Liability for Illegal Expenditures. - expenditure or obligation authorized or incurred in violation of the provisions of this Code or of the and special provisions contained in the annual General or other Appropriations Act shall be void. Every payment made in violation of said provisions shall be illegal and every official or employee authorizing or making such payment, or part therein, and every person receiving such payment shall be jointly and severally liable to the Government for the full amount so paid or received.

[64] Executive Order No. entitled "Instituting the 'Administrative Code of 1987'" (August 3, 1988).

[65] See *Madera v. Commission on Audit*, G.R. No. 244128, September 8, 2020.

[66] G.R. No. 242925, November 10, 2020.

[67] Id., emphases supplied.

[68] *Reflections*, p. 11.

[69] 808 Phil. 763, 774 (2017).

[70] Rollo, p. 30.

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## CONCURRING OPINION

**PERLAS-BERNABE, J.:**

I concur.

Petitioner Ildefonso T. Patdu, Jr. (Patdu, Jr.) filed the instant petition assailing the Decision<sup>[1]</sup> dated December 13, 2010 in Decision No. 2010-133 and the Resolution dated April 6, 2015<sup>[2]</sup> in Decision No. 2015-135 of respondent Commission on Audit (COA), which among others: (a) reinstated the Notice of Disallowance (ND) No. 97-011-102 (DOTC) (95) dated June 18, 1997 (ND 95) disallowing the excessive costs of construction of the Davao Fishing Port Complex (the Project) in the total amount of P53,951,955.03<sup>[3]</sup> for violating the rule on

unreasonable excessiveness of government infrastructure contracts pursuant to Presidential Decree (PD) No. 1594 and its implementing rules and regulations (IRR); and (b) held Patdu, Jr., among other persons, civilly liable for the portion of P5,210,744.29 corresponding to the Variation Orders (VO) he reviewed that were found to be infirm.[4]

Pertinent portions of the disputed ND and assailed COA rulings read:

ND No. 97-011-102 (DOTC) (95) dated June 18, 1997[5]

PAYEE

AMOUNT DISALLOWED

PERSONS LIABLE

FACT AND/OR REASONS FOR DISALLOWANCE

EEI/JE Manalo

Construction Joint Venture

P53,951,955.03

PBAC for the award of the contract.

1. Jose R. Valdecanas

- Chairman

2. Cesar T. Valbuena

- Member

3. Wilfredo M. Trinidad

- Member

4. Florencio T. Aricheta

- Member

5. The Consultant:

PCI/Basic which prepared the agency estimate.

6. Dir. Samuel C. Custodio

- Project Director

7. Ildefonso Patdu

- Project Manager.

Responsible for the review of variation orders.

8. EEI/JE Manalo

construction Joint Venture

Excess amount after re-evaluation of PMO justification on the result of COA technical review of the contract for the construction of Davao Fishing Port.

COA Decision No. 2010-133 dated December 13, 2010

WHEREFORE, premises considered, the herein appeal is DENIED. Accordingly, LAO-N Decision No. 2005-039 and LAO-N Resolution No. 2005-039A denying the request to lift ND No. 98-004-102 (DOTC) (96) are hereby AFFIRMED. Likewise, the 5[th] Indorsement dated July 19, 2001 of the Director of then NGAO II lifting ND No. 97-011-102 (DOTC) (95) is hereby SET ASIDE. The decision of the DOTC Department Auditor disallowing the project cost difference/excess is hereby REINSTATED.

The incumbent Auditor is directed to inform the Management and the persons liable of the reinstated disallowance.[6] (Underscoring supplied)

COA Decision No. 2015-135 dated April 6, 2015

Consequently, the liability of Mr. Ildefonso T. Patdu, Jr. under ND No. 97-011-102 (DOTC) (95) is hereby AFFIRMED. However, Mr. Patdu should only be held liable for the excessive costs in the variation orders he reviewed, specifically, Variation Order Nos. 5, 7 and 8, in the total amount of [P]5,210,744.29.

The rest of the persons liable under ND Nos. 97-011-102 (DOTC) (95) dated June 18, 1997 and 98-004-102 (DOTC) (96) dated May 28, 1998, and COA Decision No. 2010-133 dated December 13, 2010, shall remain to be liable therefor.[7] (Emphasis and underscoring supplied)

Notably, records show that the subject matter of the assailed rulings actually pertains to the appeal of the Notice of Disallowance (ND) No. 98-004-103 (DOTC) (96) (ND 96) which similarly relates to irregularities concerning the Davao Fishing Port Complex project but involves a different transaction and a different set of parties.[8] In this regard, it should be highlighted that petitioner was not a party to ND 96 and thus, was not originally privy to the appeal before the COA Proper, which was brought by parties held civilly liable under the said disallowance. As may be gathered from the assailed COA rulings, the reinstatement of ND 95 - and along with it, Patdu, Jr.'s liability thereunder - was made only as a side incident in the appeal of ND 96.[9]

In his petition before the Court, Patdu, Jr. essentially argues that the lifting of ND 95 by the Director of the National Government Audit Office II (NGAO Director) through the 5<sup>th</sup> Indorsement dated July 19, 2001 had already attained finality. Thus, he posits that the COA gravely abused its discretion in reinstating the said disallowance following the doctrine of finality or immutability of judgments.[10] However, notwithstanding the fact that Patdu Jr.'s interest is limited to ND 95, he nevertheless prayed for the lifting and setting aside of both ND 95 and ND 96 in the prayer of his petition. The COA, on the other hand, primarily asserts that it is given wide latitude by the Constitution in terms of its audit functions.[11]

At the onset, it is well to note that, since he was not an aggrieved party insofar as ND 96 is concerned, Patdu Jr. lacks the requisite standing to question the same before the Court.[12] "Necessarily, the person availing of a judicial remedy must show that he possesses a legal interest or right to it, otherwise, the issue presented would be purely hypothetical and academic." [13] Hence, the ponencia is correct in limiting its ruling only to issues concerning ND 95.

The doctrine of immutability of judgments applies in the instant case.

Well-settled is the rule that once a judgment has become final and executory, it may no longer be modified in any respect. In *Heirs of Gabule v. Jumud*, [14] the Court held that:

It is a hornbook rule that once a judgment has become final and executory, it may no longer be modified in any respect, even if the modification is meant to correct an erroneous conclusion of fact or law, and regardless of whether the modification is attempted to be made by the court rendering it or by the highest court of the land, as what remains to be done is the purely ministerial enforcement or execution of the judgment. This is known as the doctrine of immutability of judgments. x x x.[15]

Notably, the doctrine of immutability or finality of judgments is not a mere technical rule of procedure sourced solely from the Rules of Court, but is primarily a general principle borne from substantive considerations. Corollary to the well-enshrined policy that litigation must end at some point,[16] it ensures a winning party's right to reap the benefits of the finality of a favorable judgment. As held in numerous cases on the subject:[17]

In staying its own hand in disturbing final judgments, this Court emphasized that the immutability of final judgments is not a matter of mere technicality, "but of substance and merit." In *Peña v. Government Service Insurance System*:

[I]t is axiomatic that final and executory judgments can no longer be attacked by any of the parties or be modified, directly or indirectly, even by the highest court of the land. Just as the losing party has the right to file an appeal within the prescribed period, so also the winning party has the correlative right to enjoy the finality of the resolution of the case.

x x x x

The rule on finality of decisions, orders or resolutions of a judicial, quasi-judicial or administrative body is "not a question of technicality but of substance and merit," [as its] underlying consideration [is] ... protect[ing] ... the winning party[']s substantive rights] ... Nothing is more settled in law than that a decision that has acquired finality becomes immutable and unalterable and may no longer be modified in any respect even if the modification is meant to correct erroneous conclusions of fact or law and whether it will be made by the court that rendered it or by the highest court of the land.[18] (Emphases and underscoring supplied)

In the instant case, the ponencia correctly holds that the doctrine of immutability of judgments is applicable to the decision of the NGAO Director.[19] As the Court has categorically declared in past cases, the said doctrine equally applies to judgments rendered by quasi-judicial bodies.[20] Verily, the interest of the winning party to reap the benefits of a judgment remains the same whether in the context of a judicial or an administrative proceeding.

The COA gravely abused its discretion in reinstating ND 95, which lifting should already be deemed final and immutable.

The foregoing general premises notwithstanding, it is important to highlight that the manner by which a ruling attains finality remains to be governed by the applicable laws or rules of procedure of the pertinent adjudicating body.

For judicial cases in which the Rules of Court apply, Rule 36 (Judgments, Final Orders and Entry Thereof) in relation to Rule 39 (Execution, Satisfaction, and Effect of Judgments) are the primary governing rules with respect to the attainment of finality. On the other hand, for COA cases, a ruling attains finality based on the COA's own rules of procedure. Specifically, Section 6, Rule V of the 1997 COA Revised Rules of Procedure[21] (COA Rules), which was in effect during the pendency of the case, provides:

Section 6. Power of Director on Appeal. - The Director may reverse, modify, alter, or affirm the decision or ruling of the Auditor. However, should the Director render a decision reversing, modifying or altering the decision or ruling of the Auditor, the Director shall, within ten (10) days, certify the case and elevate the entire record to the Commission Proper for review and approval.

As may be gleaned from the above-cited provision, it is only in cases where the NGAO Director reverses, modifies, or alters the decision or ruling of the Auditor that the decision should be elevated to the COA Proper for automatic review. Conversely, when the NGAO Director affirms or sustains the ruling of the Auditor, further elevation and review are unnecessary. As such, the affirmance, when not anymore appealed by an aggrieved party in accordance with the COA rules, will simply lapse into finality. The reason for the automatic review provision is palpable: the COA Proper is tasked to resolve the seeming conflict between the Auditor and Director's rulings to arrive at a proper conclusion on an audit case. However, if no conflict exists, then there is no need for the COA

Proper to automatically review the matter since both the Auditor and Director are already in agreement.

In this case, the NGAO Director sustained the COA Auditor's 4<sup>th</sup> Indorsement dated January 31, 2000 recommending the lifting of the disallowance. Considering that the NGAO Director's decision was not appealed, the same had already lapsed into finality. Notably, this is, in fact, the thrust of Patdu, Jr.'s petition before this Court:

6.4. It must be recalled that the Auditor favorably considered Mr. Custodio's Motion for Reconsideration of ND No. 97-011-102 (DOTC) (95). Guided by Sec. 7, Rule IV, 1997 Revised Rules of Procedure of the COA, the Auditor elevated his decision lifting the audit disallowance to the Director, NGAO II, for automatic review. Through his 4<sup>th</sup> Indorsement, the Auditor recommended to the Director the lifting of the audit disallowance.

6.5. On review, NGAO II Director Tobias P. Lozada sustained the decision of the Auditor to lift ND No. 97-011 102 (DOTC) (95). The pertinent portion of his decision contained in a 5<sup>th</sup> Indorsement dated July 19, 2001 reads:

Premises considered, pursuant to the Revised CSE Manual, this Office sustains the DOTC Auditor's decision lifting the disallowance under ND No. 97-011-102 (DOTC) dated June 18, 1997 in the amount of [P]53,951,955.03.

6.6. It can be readily seen from the Decision of the Director, NGAO II, that the latter did not reverse, modify or alter the decision or ruling of the Auditor. Of pertinence to the said decision of the Director is Section 6, Rule V, 1997 Revised Rules of Procedure of the COA, relating to Appeal from Auditor to Director. Sec. 6 of the Rules reads:

RULE V

APPEAL FROM AUDITOR TO DIRECTOR

x x x x

Section 6. Power of Director on Appeal. - The Director may reverse, modify, alter, or affirm the decision or ruling of the Auditor. However, should the Director render a decision reversing, modifying or altering the decision or ruling of the Auditor, the Director shall, within ten (10) days, certify the case and elevate the entire record to the Commission Proper for review and approval.

6.7. From the foregoing provision, it is crystal clear that it is only when the Director reverses, modifies or alters the decision or ruling of the Auditor that the rule on automatic review by the Commission Proper sets in. If the Director affirms the decision or recommendation of the Auditor as in the present case, the rule on automatic review does not apply.

6.8. Considering that the Director affirmed the decision or ruling of the Auditor to lift ND No. 97-011-102 (DOTC) (95), the rule on automatic review provided under Section 6, Rule V of the 1997 Revised Rules of Procedure of the COA did not set in. Accordingly, Director Lozada was correct in not elevating the matter to the Commission Proper for Automatic Review.

6.9. It must be accentuated that decision of the NGAO II Director sustaining and affirming the decision of the Auditor to lift ND No. 97-011-102 (DOTC) (95) remained uncontested for almost 10 years. This being so, it has attained finality. Consequently, it became immutable and unalterable.[22] (Emphases and underscoring supplied)

Patdu, Jr.'s foregoing contention is consistent with what appears on record. As the records show, the contractor, i.e., EEI/JE Manalo Construction Joint Venture, wrote a Letter dated December 12, 1997 to the COA Auditor assailing the issuance of ND 95. As stated, the COA Auditor treated the letter as a request for reconsideration and eventually recommended the total lifting of the disallowance through a 4<sup>th</sup> Indorsement dated January 31, 2000.

The NGAO Director, in turn, sustained in full this recommendation in a 5<sup>th</sup> Indorsement<sup>[23]</sup> dated July 19, 2001, which reads in relevant part:

In a 4<sup>th</sup> Indorsement dated January 31, 2000, the DOTC Auditor recommended the total lifting of the disallowance amount to P53,951,955.03

x x x x

In accordance with the Revised Manual on CSB, the lifting of the ND's should be concurred in by the Director of the issuing Auditor.

x x x x

Premises considered, pursuant to the Revised CSB Manual, this Office sustains DOTC Auditor's decision lifting the disallowance under ND No. 97-011-102 (DOTC) dated June 18, 1997 in the amount of P53,951,955.03.<sup>[24]</sup> (Emphases supplied)

Based on the foregoing disposition, Patdu, Jr. correctly averred that the elevation of the NGAO ruling to the COA Proper was not required under Section 6, Rule V of the COA Rules. Hence, as the same was not anymore appealed, the NGAO Director's decision had lapsed into finality.

At this juncture, it is noteworthy to also highlight that the COA Proper's reinstatement came after the lapse of an inordinate period of almost ten (10) years. To recall, while the decision of the NGAO Director was issued way back on July 19, 2001, the reinstatement by the COA Proper was made only on December 13, 2010. Undoubtedly, aside from its impropriety, the COA Proper's course of action is riddled with inordinate delay.

For its part, the COA, in its Comment,<sup>[25]</sup> merely traverses this issue by asserting that it is given wide latitude by the Constitution in terms of its audit functions. However, the COA should be reminded that while it does enjoy wide latitude in conducting its audit, it should also not arbitrarily apply its own rules to the undue prejudice of the public. It should be stressed that, in past cases,<sup>[26]</sup> the Court had already exhorted quasi-judicial tribunals to "be the first to respect and obey its own rules, if only to provide the proper example to those appearing before it and to avoid all suspicion of bias or arbitrariness in its proceedings."<sup>[27]</sup>

Given the circumstances of this case where automatic review is not warranted under the COA Rules and further considering the lapse of almost ten (10) long years from the time Patdu, Jr. was led on to believe that the disallowance had already been lifted, it would be the height of injustice to sustain the COA's blanket assertion of its authority to audit without any reasonable or fair regard to the application of its own rules to the parties before it. As the records itself bear out, the lifting of ND 95 had already lapsed into finality and, hence, should not have been revived by the COA Proper based on its own caprice and whim. Accordingly, the COA committed grave abuse of discretion in reinstating the same.

At any rate, Patdu, Jr.'s civil liability for the disallowance remains suspect based on prevailing jurisprudence.

At any rate, even if one were to discount the issue of finality, Patdu, Jr. should not be held civilly liable under prevailing jurisprudence.

Under Section 38,<sup>[28]</sup> Chapter 9, Book I and Section 43,<sup>[29]</sup> Chapter 5, Book VI of the Administrative Code,<sup>[30]</sup> as interpreted in prevailing case law,<sup>[31]</sup> the civil liability of approving/authorizing public officers for disallowances issued by the COA will only arise upon a clear showing of bad faith, malice, or gross negligence.

Otherwise, such officers are presumed to have acted within the regular performance of their official functions and in good faith, and hence, are not accountable for the return of disallowed amounts.

In disallowance cases involving government contracts, the foregoing precepts are reflected under Rules 2 (a) and (b) of the guidelines recently established in *Torreta v. COA*,<sup>[32]</sup> to wit:

Accordingly, we hereby adopt the proposed guidelines on return of disallowed amounts in cases involving unlawful/irregular government contracts submitted by herein Justice Perlas-Bernabe, to wit:

- If a Notice of Disallowance is set aside by the Court, no return shall be required from any of the persons held liable therein.

If a Notice of Disallowance is upheld, the rules on return are as follows:

- Approving and certifying officers who acted in good faith, in the regular performance of official functions, and with the diligence of a good father of the family are not civilly liable to return consistent with Section 38 of the Administrative Code of 1987.

- Pursuant to Section 43 of the Administrative Code of 1987, approving and certifying officers who are clearly shown to have acted with bad faith, malice, or gross negligence, are solidarily liable together with the recipients for the return of the disallowed amount.

- The civil liability for the disallowed amount may be reduced by the amounts due to the recipient based on the application of the principle of quantum meruit on a case to case basis.

- These rules are without prejudice to the application of the more specific provisions of law, COA rules and regulations, and accounting principles depending on the nature of the government contract involved. (Emphases and underscoring supplied)

In holding Patdu, Jr. civilly liable for the disallowance, the COA Proper in this case advanced the following ratiocination:

Mr. Patdu was included among the persons liable under ND No. 97-011-102 (DOTC) (95) for reviewing the variation orders. Based on Decision No. 2010-133 dated December 13, 2010, the project cost was found to be excessive by [P]53,951,954.13, computed as follows:

x x x x

It can be gleaned from the above computation that the amounts of the variation orders reviewed by Mr. Patdu as Project Engineer were part of the total project cost, a portion of which was found excessive and disallowed in audit. Mr. Patdu failed to diligently review the variation orders which resulted in the overpricing of the project as computed by the COA-STTFP. However, his liability shall only be on the excess costs for the variation orders he reviewed, in the total amount of [P]5,210,744.29.<sup>[33]</sup> (Emphases and underscoring supplied)

However, apart from the statement that "[petitioner] failed to diligently review [VO Nos. 5, 7, and 8] which resulted in the overpricing of the project as computed by the COA-[Special Task Force on Flagship Project (STTFP)]," the COA Proper's ruling was silent with respect to Patdu, Jr.'s bad faith, malice, or gross negligence relative to his participation in the project.

More significantly, contrary to the COA Proper's action, Patdu, Jr. amply justified his participation with respect to the questioned VOs relative to the Davao Fishing Port Complex project:

6.45. The construction of the project was already underway when petitioner reviewed the "variations orders". Significantly, these orders were recommended by the consultants during the construction stage as they were

necessary in the implementation of the project.

6.46. It must be recalled that in his letter dated December 12, 1997, Mr. Custodio presented the justifications on these Variation Orders, to wit:

6.46.1. Variation Order No. 5 - Mobilization / Demobilization cost (or dredging equipment was included in the aforementioned variation order because there is a new item of work, i.e., dredging, which is not included in the original contract and there is a need to bring in said equipment to the project site, hence the cost of mobilization/demobilization.

6.46.2. Variation Order No. 7 - The original contract calls for the use of Concrete Asphalt (or Roadway and Parking Area). Due to the absence of supply of concrete asphalt in the area, the Contractor in his desire not to delay the project, offered to use PCCP instead at the same cost as Concrete Asphalt. The said substitution resulted to an increase in the thickness of the pavement and a decrease in the thickness of the sub-base. This off-setting resulted to a cost difference of P10,902,431.33 in favour of the government.

6.46.3. Variation Order No. 7E - Construction of Deepwell, the cost of deepwell for Variation Order No. 3 can not be adopted because they vary in depth. Deepwell for V.O. #3 is 42 meters deep, while for V.O. #7E, it is 75 meters deep.

6.46.4. Variation Order No. 8 - The discrepancy between the quantity take-off and the BOO resulted to an overestimate of quantities in V.O. No. 8, however, these quantities were rectified in the Final Quantification.

6.47. Apparently, these justifications were favourably considered by the Auditor when he recommended the lifting of (ND) No. 97-011-102 (DOTC) (95) which included the audit disallowances on these variations orders.

6.48. Significantly, the justifications were not refuted by the STFFP. There was nothing from the records to dispute the justification that Variation Order No. 5 included an item of work that was included in the original contract. Since this was a new item of work that requires the use of equipment, it is imperative to mobilize these equipment to the project site. Obviously, they will be demobilized after the completion of the variation order. There was also nothing to show that the equipment mobilized for the original contract included the same equipment used for the new item of work covered by Variation Order No. 5.

6.49. As has been explained in the December 12, 1997 letter of Mr. Custodio, the contractor used Portland Cement Concrete Pavement instead of concrete asphalt because of the absence of supply of the latter in the area. It was not disputed either that indeed Portland Cement Concrete Pavement was used Roadway and Parking Area. Difference in thickness alone will not sustain the audit disallowance covered by Variation Order No. 7 simply because the use of Portland Cement Concrete Pavement on one hand, and the use of concrete asphalt on the other hand, involved different scope of work and different cost.[34] (Emphases and underscoring supplied)

Evidently, his justifications pertain to technical adjustments/rectifications made during the course of the Project, which resulted in additional costs to the government. To note, the foregoing contentions were not rebutted by the COA in its Comment.

Case law explains that for negligence to be characterized as gross, the breach of duty must be flagrant or palpable, otherwise a mere error of judgment only amounts to simple negligence, which is compatible with the defense of good faith:

Negligence is the omission of the diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time, and of the place. In the case of public officials, there is negligence when there is a breach of duty or failure to perform the obligation, and there is gross negligence when a breach of duty is flagrant and palpable. An act done in good faith, which constitutes only an error of judgment and for no ulterior motives and/or purposes, as in the present case, is merely Simple Negligence.[35]

Hence, considering the prevailing jurisprudential parameters on civil liability and taking into account Patdu, Jr.'s un rebutted defenses in his petition, the imposition of civil liability on the latter's part cannot be maintained.

In any event, as afore-discussed, since the 5[th] Indorsement dated July 19, 2001 issued by the NGAO Director had sustained the COA Auditor's decision recommending the lifting of ND 95, the same was not required to be elevated to the COA Proper. Such decision, therefore, had already lapsed into finality. Consequently, Patdu, Jr.'s petition should be granted in part.

Accordingly, I vote to PARTIALLY GRANT the petition. The Decision dated December 13, 2010 in Decision No. 2010-133 and the Resolution dated April 6, 2015 in Decision No. 2015-135 of the Commission on Audit are REVERSED and SET ASIDE insofar as Notice of Disallowance (ND) No. 97-011-102 (DOTC) (95) dated June 18, 1997 is concerned. The Notice of Disallowance (ND) No. 97-011-102 (DOTC) (95) is hereby LIFTED.

---

[1] Rollo, pp. 28-35. Signed by Chairman Reynaldo A. Villar and Commissioners Juanito G. Espino, Jr. and Evelyn R. San Buenaventura.

[2] Id. at 36-43. Signed by Commissioners Heidi L. Mendoza and Jose A. Fabia.

[3] "P53,951,954.02" in the dispositive portion of April 6, 2015 Resolution; id. at 42.

[4] See id. at 40-42.

[5] Id. at 70; emphasis supplied.

[6] Id. at 34.

[7] Id. at 42.

[8] See id. at 31-34.

[9] See id.

[10] See id. at 10-15.

[11] See Comment dated December 17, 2015; id. at 122-123.

[12] See Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association, Inc., 802 Phil. 116 (2016).

[13] Id. at 151-152.

[14] See G.R. No. 211755, October 7, 2020.

[15] Id., citing One Shipping Corporation v. Peñafiel, 751 Phil. 204, 210 (2015).

[16] See Zarate v. Director of Lands, 39 Phil. 747, 749 (1919).

[17] See Civil Service Commission v. Moralde, 838 Phil. 840 (2018); Torres v. Philippine Amusement and Gaming Corp., 677 Phil. 672 (2011); Fua, Jr. v. COA, 622 Phil. 368 (2009); and Peña v. Government Service Insurance System, 533 Phil. 670 (2006).

[18] Civil Service Commission v. Moralde, id. at 855, citing Peña v. Government Service Insurance System, id. at 683-690.

[19] Ponencia, p. 8.

[20] See *Civil Service Commission v. Moralde*, *supra* at 856.

[21] Approved January 1997.

[22] Rollo, pp. 11-12.

[23] *Id.* at 92-94.

[24] *Id.* at 93-94.

[25] Dated December 17, 2015. *Id.* at 114-126.

[26] See *Basarte v. Commission on Elections*, 551 Phil. 76, 84-85 (2007), citing *Agbayani v. Commission on Elections*, 264 Phil. 861, 868 (1990). See also *Republic v. Sandiganbayan*, 328 Phil. 210 (1996).

[27] *Agbayani v. Commission on Elections*, *id.*

[28] Which reads:

Section 38. Liability of Superior Officers. - (1) A public officer shall not be civilly liable for acts done in the performance of his official duties, unless there is a clear showing of bad faith, malice or gross negligence.

x x x x (Emphases and underscoring supplied)

[29] Which reads:

Section 43. Liability for Illegal Expenditures. - Every expenditure or obligation authorized or incurred in violation of the provisions of this Code or of the general and special provisions contained in the annual General or other Appropriations Act shall be void. Every payment made in violation of said provisions shall be illegal and every official or employee authorizing or making such payment, or taking part therein, and every person receiving such payment shall be jointly and severally liable to the Government for the full amount so paid or received.

x x x x (Emphases and underscoring supplied)

[30] Executive Order No. 292, entitled "Instituting the 'Administrative Code of 1987'" (August 3, 1988).

[31] See *Madera v. COA*, G.R. No. 244128, September 8, 2020.

[32] See G.R. No. 242925, November 10, 2020.

[33] Rollo, p. 41.

[34] *Id.* at 22-23.

[35] *Daplas v. Department of Finance*, 808 Phil. 763, 774 (2017).

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