

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT (PSALM) CORPORATION, REPRESENTED BY IRENE JOY BESIDO-GARCIA, IN HER CAPACITY AS PRESIDENT AND CHIEF EXECUTIVE OFFICER OF PSALM, AN...

G.R. No. 247924. November 16, 2021

Ponente: LAZARO-JAVIER, J.

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LAZARO-JAVIER, J.:

ANTECEDENTS

By Letters[1] dated May 9, 2011, the Power Sector Assets and Liabilities Management (PSALM) Corporation requested the respective concurrences of the Commission on Audit (COA) and the Office of the Government Corporate Counsel (OGCC) to the engagement of Mr. John T. K. Yeap (Mr. Yeap) and Atty. Michael B. Tantoco (Atty. Tantoco) as its legal advisors on the privatization of the generation assets and Independent Power Producer (IPP) contracts of the National Power Corporation (NPC). The proposed engagement was for a period of six (6) months subject to the following terms:

1.

John T. K. Yeap - International legal advisor for the selection and appointment of Independent Power Producer Administrators (IPPAs)

Professional Fee: USD580.00 hourly rate for assumed work input of 175 man hours per month. The estimated monthly rate is USD101,500.00 or a total cap fee of USD609,000.00. Reimbursement of travel expenses and reasonable out-of-pocket expenses not exceeding USD30,000.00

Scope of Services:

1)

preparation, drafting and review of the transaction documents (i.e., Administration Agreements) and providing international legal advisory services regarding the same;

2)

providing international legal advisory services and assistance in resolving international legal issues relating to and arising from, the due diligence phase of the bid process for the appointment of IPPAs;

3)

providing assistance and advice in addressing queries and comments of bidders with respect to the transaction documents;

4)

performing all international legal work, assistance, and advice needed for items (1), (2), and (3) above; and

5)

providing assistance and advice on issues arising during the implementation of the Administration Agreements covering the NPC/PSALM contracted capacities, the management and control of which have been transferred to IPPAs.

2.

Atty. Michael B. Tantoco - Philippine legal advisor for the privatization of generation assets, selection, and appointment of IPPAs and Privatization of Other Disposable Assets

Professional Fee: PhP11,858.94 hourly rate for assumed work input of 90 man hours per month. The estimated monthly rate is PhP1,067,295.60 or a total fee cap of PhP6,403,773.60. Reimbursement of travel expenses and reasonable out-of-pocket expenses not exceeding PhP300,000.00

Scope of services:

1)

providing legal advisory services on Philippine law and preparation, drafting, revision, and review of the bidding procedures, data room, and due diligence procedures for the appointment of IPP Administrators and review of the transaction documents thereof with regard to compliance with Philippine law;

2)

providing legal advisory services on Philippine law and preparation, structuring, drafting, revision, and review of the bidding procedures, data room procedures, asset purchase agreement, land lease agreement, operations and maintenance agreement (if applicable) for the privatization of the generation assets and other disposable assets of PSALM; and,

3)

providing legal advisory services on Philippine law and assistance in resolving all Philippine law legal issues relating to, and arising from the due diligence phase of the bid process for the selection and appointment of IPPAs, privatization of generation assets, and other disposable assets of PSALM.

The letters also stated that: a) the legal services to be provided by these consultants shall not involve handling of cases and representation in court as the same pertain to the OGCC; and b) the engagement of these consultants is necessary to the implementation of PSALM's mandate to privatize under Republic Act No. 9136 (RA 9136) or the Electric Power Industry Reform Act (EPIRA) of 2001.

PSALM further asked that action on its request be released on or before May 30, 2011 as the hiring of the legal advisors was urgently needed.

COA received PSALM's letter request twice: on May 11, 2011,[2] through the resident auditor of COA-PSALM, and on May 13, 2011, through the Office of the COA-Corporate Government Sector (CGS) Cluster B. About the same time, OGCC, too, received PSALM's letter request.

Under Contract Review No. 161 dated May 31, 2011, series of 2011, OGCC found the "contracts to be generally in order and the same may be given due course." It noted that the proposed contracts were substantially similar to those contracts previously submitted for its review. Consequently, the OGCC approved the proposed contracts of engagement and forwarded its concurrence to PSALM.

As for COA, nothing was heard from it on or before May 30, 2011, the date requested by PSALM for COA to take action on its letter request for concurrence. Even then, PSALM waited for another forty-one (41) days but COA still did not respond.

As it was, COA's response was not forthcoming. Nineteen (19) days (from May 13, 2011 to May 30, 2011) initially expired. Then, there was that deafening silence over ninety-one (91) more days (from May 30, 2011 until August 29, 2011). The pit stop stood still for a total of one hundred ten (110) days. It was only then that PSALM finally decided to stop waiting and proceeded with the engagement of Atty. Tantoco and Mr. Yeap effective August 29, 2011. Their contracts were to commence on August 29, 2011.[3]

Meantime, PSALM's request for concurrence remained unacted upon[4] for another three (3) years.

Only on November 6, 2014 did the COA Legal Services Sector--Office of the General Counsel finally dispose of the request through its Legal Retainer Review (LRR) No. 2014-174 of even date.[5]

The COA Legal Services Sector-Office of the General Counsel denied the request because: a) PSALM engaged the consultants, sans COA's prior approval in violation of Memorandum Circular No. 9 dated August 27, 1998 and COA Circular No. 98-002 dated June 9, 1998; and b) under COA Decision No. 2014-136 dated July 18, 2014, a similar request involving the same legal advisors who were engaged sometime in 2010 was also denied for the same reason, albeit, PSALM has yet an unresolved motion for reconsideration thereof.

Back to LRR No. 2014-174,[6] PSALM, too, pursued its motion for reconsideration. It argued that the immediate engagement of the legal advisors was necessary to avert any further delay in the implementation of its privatization projects. COA's concurrence to the engagement of the legal consultants was not even required since these services did not involve court appearances but were merely advisory in nature.

RULING OF THE COMMISSION ON AUDIT

By Decision No. 2017-215[7] dated July 6, 2017, COA denied the motion for reconsideration on the ground that its prior concurrence to the contracts of services was an indispensable requirement under COA Circular Nos. 86-255 and 95-011. Contrary to PSALM's position, the same also covered advisory services. Citing *Polloso v. Gangan*,[8] it denied payment for services rendered based on quantum meruit and ruled that the officers who approved and implemented the contract should themselves pay for the services.

PSALM's motion for reconsideration was denied under Resolution-Decision No. 2019-004[9] dated January 30, 2019.

THE PRESENT PETITION

PSALM now seeks affirmative relief via Rule 65 in relation to Rule 64 of the Rules of Court. It argues that the hiring of the legal advisors was exempt from the coverage of COA Circular Nos. 86-255 and 95-011. For their services allegedly did not involve court appearances but pertained only to providing advice on PSALM's privatization projects. Their highly technical expertise was especially needed on the matters of international public bidding of energy generation, IPP contracts, and other internal business transactions of PSALM to bolster investors' confidence in the Philippine energy sector. To delay the engagement of these experts due to lack of COA's concurrence would have seriously hampered PSALM's privatization projects.

The PSALM officers who authorized payment for the services of the consultants all acted in good faith and only in the pursuit of PSALM's legitimate project as mandated by the EPIRA. They did not derive any personal benefit from the engagement. The payment was solely for the benefit of the public in general as around 70% of the

generation assets were already privatized through the services rendered by the consultants.

On the basis of quantum meruit, the consultants purportedly need not return the payment they received for services they had already rendered, leading to the successful completion of their respective projects.[10]

For its part, the Office of the Solicitor General (OSG),[11] through Associate Solicitor General Gilbert U. Medrano and Senior State Solicitor Sharon E. Millan-Decano,[12] counters that while, by way of exception, government-owned and/or controlled corporations like PSALM are allowed to hire the services of private lawyers, the required concurrences of both the OGCC and COA are mandatory. Citing *Oñate v. COA*,[13] the OSG posits that this requirement must be complied with regardless of whether the legal services to be performed involve an actual legal controversy. In any event, PSALM is estopped from denying that it was already apprised of the need to obtain COA's concurrence as early as March 2010. This, according to the OSG, belies PSALM's claim that awaiting COA's concurrence could delay its privatization projects.

The OSG also objects to the claim of good faith by the approving PSALM officers. Their supposed blatant disregard of the concurrence requirement, not to mention their notice of the previous LRR on the same subject, is inconsistent with good faith. Thus, they are personally liable for payment of the consultants' fees. Too, pursuant to *Polloso v. Gangan*,[14] PSALM's invocation of quantum meruit is unavailing.

In compliance with the Court's Resolution dated December 9, 2020, COA submitted its Memorandum[15] dated May 7, 2021. Essentially, COA posits that -

1)

its prior written concurrence is not a specie of pre-audit because this is obtained prior to the enjoyment or consumption of legal services or the payment of private counsel and without reference to a specific payment;

2)

its written concurrence is mandated in recognition of exceptional circumstances in the hiring of private lawyers;

3)

its written concurrence is sought primarily to determine the reasonableness of rates;

4)

it may deny a request for written concurrence when it has already become *fait accompli*, i.e., the request was submitted after the retainer contract period had expired;

5)

by way of exception, it will not deny such request when it is submitted within reasonable time from engagement when said engagement was compelled due to urgent considerations, or the agency has first sought the concurrence of the OSG or the OGCC;

6)

despite the concurrence of the OSG or the OGCC, it may still deny the retainer agreement when the request for its concurrence is sought after the retainer agreement has already expired or is about to expire, or when the retainer fee is excessive, the lawyer engaged or to be engaged is holding a government position, or the requesting agency failed to submit the required documents for legal retainer review;

7)

on the necessity of the engagement, it defers to the OSG or the OGCC;

8)

to determine the reasonableness of the proposed rates, it considers certain factors such as time and extent of engagement, experience, expertise, and professional standing of the lawyer, customary charges for similar contracts within the region and the IBP chapter where he or she belongs, novelty or difficulty of the case, and other issuances on allowances and other reimbursement expenses;

9)

it acts on requests for concurrence within a reasonable time from submission; and

10)

it observes the periods within which to act on requests provided under Republic Act No. 6713, Presidential Decree No. 1445, and 2019 COA's Revised Rules of Procedure; however, its non-compliance therewith may be justified due to the sheer volume of the requests for concurrence it receives from numerous government agencies or due to the other audit transactions it ought to act upon. It is currently formulating more policy issuances on written concurrence to avoid unnecessary delay in the hiring of a private lawyer and to improve efficiency in government operations.

ISSUES

1)

Is the required prior concurrence of COA a specie of pre-audit? If so, is imposing it as a pre requisite to the validity of the engagement of a private lawyer ultra vires?

2)

Are the contracts of engagement here subject to the concurrence requirement under COA Circulars Nos. 86-255 and 95-011?

3)

Did COA commit grave abuse of discretion when it acted on PSALM's request for engagement of the legal advisors only after three (3) years following its receipt thereof?

4)

Are the approving PSALM officers liable for the payment of the advisors' fees?

OUR RULING

The requirement to secure COA's prior written concurrence to every engagement of private counsel by a government office is an instance of pre-audit.

COA's own definition of pre-audit is exactly what its written concurrence is all about:

5. This Honorable Court defined in *Dela Llana v. Commission on Audit* that a pre-audit is an examination of financial transactions before their consumption or payment. It seeks to determine whether the following conditions are present:

(1)

The proposed expenditure complies with an appropriation law or other specific statutory authority;

(2)

Sufficient funds are available for the purpose;

(3)

The proposed expenditure is not unreasonable or extravagant, and the unexpended balance of appropriations to which it will be charged is sufficient to cover the entire amount of the expenditure; and

(4)

The transaction is approved by the proper authority and the claim is duly supported by authentic underlying evidence.

6. Thus, pre-audit would not only refer to a review of the contract with the lawyer, but would also include the review of the billing and statement of services rendered prior to payment of the same. In effect, the review would be a condition before the government agency can pay the lawyer's billings. This view is consistent with this Honorable Court's pronouncement on pre-audit in *Dela Llana*, to wit:

It could, among others, identify government agency transactions that are suspicious on their face prior to their implementation and prior to the disbursement of funds.[16] (Emphases and underscoring added, citations omitted)

COA distinguishes the written concurrence from a pre-audit simply because there is yet no specific payment or disbursement being made to the lawyer. This, however, is a distinction without any difference. This supposed difference does not distinguish a pre-audit from a written concurrence. It is a minute detail in the overall goal, process, and scheme of a pre-audit.

More important, as above-quoted, a pre-audit is done to identify suspicious transactions on their face so as to avoid the embarrassment and embezzlement or wastage of public funds before implementation and disbursement. This precisely is what the written concurrence is also meant to achieve.

Thus, in No. 7 of its Memorandum, COA admits that the primary purpose of the review for a written concurrence is the determination of the reasonableness of the legal fees of the lawyer and the assurance of consistency in legal policies and practices of State agencies that transcend the parochial interests of individual State agencies and promote the greater good of public interest.

Quite clearly, written concurrence involves a review that encompasses both the processes and goals of a pre-audit. Hence, it is essentially a pre-audit.

Nonetheless, whether a written concurrence amounts to a pre-audit, which we say it is, COA has the mandate to determine whether to require pre-audit or post-audit. This is a constitutional mandate. As held in *Dela Llana v. Commission on Audit*:^[17]

Petitioner's allegations find no support in the aforequoted Constitutional provision. There is nothing in the said provision that requires the COA to conduct a pre-audit of all government transactions and for all government agencies. The only clear reference to a pre-audit requirement is found in Section 2, paragraph 1, which provides that a post-audit is mandated for certain government or private entities with state subsidy or equity and only when the internal control system of an audited entity is inadequate. In such a situation, the COA may adopt measures, including a temporary or special pre-audit, to correct the deficiencies.

Hence, the conduct of a pre-audit is not a mandatory duty that this Court may compel the COA to perform. This discretion on its part is in line with the constitutional pronouncement that the COA has the exclusive authority to define the scope of its audit and examination. When the language of the law is clear and explicit, there is no room for interpretation, only application. Neither can the scope of the provision be unduly enlarged by this Court. (Emphasis supplied)

Here and now, we find no reason to overturn COA's discretion to require pre-audit in the form of a written concurrence to obtaining outside legal services. The rationale for this requirement has been accepted and settled in jurisprudence.[18] We uphold the soundness of this reasoning and the same is reiterated here.

COA has the exclusive jurisdiction to decide when to require or not to require a prior written concurrence though it is an instance of pre-audit.

Justice Alfredo Benjamin S. Caguioa (Justice Caguioa) perceptively discerns that COA has several times disavowed pre-audit for a number of government activities and transactions, and so he argues that the requirement of a prior written concurrence as a form of pre-audit must have also been lifted already.

The history of COA issuances on pre-audit has seen a back-and-forth in its use of pre-audit in performing its mandate. Thus:

In Circular No. 82-195 dated October 26, 1982 (effective December 1, 1982), the COA lifted the pre-audit in government transactions. It reasoned that "the responsibility to take care that such policy is faithfully adhered to rests directly with the chief or head of the government agency concerned. It is also designed to further facilitate or expedite government transactions without impairing their integrity." But COA retained pre-audit activities to select transactions.

On March 31, 1986, the COA Circular No. 86-257 (effective April 15, 1986) reinstituted pre-audit on limited and selective basis to prevent further dissipation of government resources in view of uncovered irregularities and anomalies of grave proportions on transactions entered during the past regime. Selective pre-audit was perceived to be an effective, albeit, temporary remedy against the recurrence of the observed maladies.[19]

On April 2, 1986, COA issued Circular No. 86-255 (effective April 15, 1986) particularly requiring the prior written conformity of the OSG or OGCC as well as the written concurrence of COA to the hiring of private lawyer. The COA frowns upon the persistent hiring of private lawyers in keeping with the retrenchment policy of the administration. It directed the requirement due to unreasonable amounts of retainer fees paid to private lawyers.

On March 21, 1989, COA Circular No. 89-299 (effective April 3, 1989) as amended by Circular No. 89-299A (effective April 3, 1989), again lifted the pre-audit as a pre-requisite to the implementation or prosecution of projects and payment of claims. COA recognized the normalization of the political system and the stabilization of government operations and the need to re-affirm further the concept that fiscal responsibility resides in management as embodied in the Government Auditing Code of the Philippines. However, local government units are excluded from the coverage.

On February 17, 1994, COA Circular No. 94-006 (effective March 1, [1994]) expanded the lifting of pre-audit to cover local government units (LGUs).

Then on May 18, 1995, COA Circular No. 95-006 (effective May 18, 1995) lifted the pre-audit of all financial transactions including those provided in international agreements.

Despite the lifting of pre-audit in all government transactions, on December 4, 1995, COA issued Circular No.

95-011 in view of the decision of the Court in *Municipality of Pililla, Rizal vs. Court of Appeals, et al.*, G.R. No. 105909, promulgated on June 28, 1994. Thus, the COA reiterated that where a government agency is provided by law with a legal officer or office who or which can handle its legal requirements or cases in courts, it may not be allowed to hire the services of private lawyers for a fee, chargeable against public funds, unless exceptional or extraordinary circumstances warrant. In the event that such legal services requirement is justified, the written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel, as the case may be, and the written concurrence of the Commission on Audit shall first be secured before the hiring or employment of a private lawyer or law firm.

On July 1, 2009, in Circular No. 2009-002, COA reinstituted selective pre-audit on government transactions in NGAs, LGUs, GOCCs with original charters with certain transactions. Based on its risk-based audit in risk prone areas in government operations and the marked inadequacy of internal controls as shown in frequency of anomalies uncovered, the COA reinstituted pre-audit to deter observed maladies.

On July 22, 2011, COA Circular No. 2011-002 again lifted the pre-audit of government transactions. COA observed the heightened vigilance of agencies in safeguarding their resources that led to its reassessment of COA Circular No. 2009-002. Thus, it reaffirmed the concept that fiscal responsibility resides with the agency management. Also, it withdrew the pre-audit to accelerate the delivery of public services and facilitate government transactions.

As COA has consistently maintained, however, whenever circumstances warrant, such as where internal control system of a government agency is inadequate, it may reinstitute pre-audit or adopt such other control measures as are necessary and appropriate to protect the funds and property of the government.

Justice Caguioa posits that "... whenever COA believed it necessary to reinstate the pre-audit system, what it did was to issue another circular amending or revoking the withdrawal of pre-audit." [20] From this, he concludes that since COA has not issued a circular amending or revoking the withdrawal of pre-audit, then pre-audit and all its forms including the prior written concurrence is still disallowed.

The argument seems sensible but we have to appreciate this issue from COA's exclusive mandate as the government's only auditing firm that draws its power no less from the Constitution. The best interpreter of what its issuances mean as regards the most efficient and effective methods it will be using for auditing government transactions will of course have to be COA itself. This jurisdiction exclusively belongs to COA.

Further, there is no documented practice that has ripened into a legally binding procedure that COA cannot subject specific transactions to pre-audit or that its general rule disallowing pre-audit cannot be subject to exceptions or that these exceptions can be enunciated and published through only one form, i.e., amending another COA Circular.

The fact remains that COA has seen it wise and sound to continue its practice of requiring prior written concurrence to the obtention of private legal services as an exception to the general rule disallowing pre-audit as expressed in COA Circular No. 2011-002. This Circular did not give rise to legally demandable and enforceable expectations from among government agencies to compel COA not to subject them to pre-audit. Notwithstanding this Circular, COA can require pre-audit whenever it deems wise and cautious to do so.

This policy determination on how to accomplish its mandate is beyond the control of this Court, especially when it is exercised in a reasonable manner. The requirement of a prior written concurrence per se is not an unreasonable audit measure. The latter becomes unreasonable and therefore gravely abusive of discretion when, as in this case, COA unreasonably delayed its action on requests for such concurrences and when COA intruded on aspects of the private legal representation that the government agency has the expertise and mandate to solicit such as the necessity for such hiring.

Notably, the declaration which lifted pre-audit does not preclude COA from re-instituting it selectively whenever in its opinion, the internal control system of an agency is inadequate. This is clearly stated in the saving clause which is invariably present in the pertinent issuances of COA including COA Circular No. 2011-002, viz.:

1.

COA Circular No. 82-299

8.0

RESTORATION OF PRE-AUDIT FUNCTION AND OTHER MEASURES

8.1

Whenever circumstances warrant, such as where the internal control system of a government agency is inadequate, this Commission may reinstitute pre-audit or adopt such other control measures, including temporary or special pre-audit, as are necessary and appropriate to protect the funds and property of the agency.

2.

COA Circular No. 94-006

4.0

GENERAL RULE ON THE AUDIT OF FINANCIAL TRANSACTIONS

4.03

Whenever circumstances warrant, however, such as where the internal control system of a government agency is inadequate, this Commission may reinstitute pre-audit or adopt such other control measures, including temporary or special pre-audit, as are necessary and appropriate to protect the funds and property of the government.

3.

COA Circular No. 95-006

9.0

RESTORATION OF PRE-AUDIT FUNCTION AND OTHER MEASURES

Whenever circumstances warrant, such as where the internal control system of a government agency is inadequate, this Commission may reinstitute pre-audit or adopt such other control measures, including temporary or special pre-audit, as are necessary and appropriate to protect the funds and property of the agency.

4.

COA Circular No. 2011-002

However, whenever circumstances warrant, such as where the internal control system of a government agency is inadequate, this Commission may re-institute pre-audit or adopt such other control measures as are necessary and appropriate to protect the funds and property of the government. Likewise, this Commission shall intensify the evaluation of internal control systems of government agencies to ensure that government resources are safeguarded against loss or wastage, and that government operations are efficient, economical and effective.

Indubitably, COA never relinquished its authority to conduct pre-audit activities. Hence, COA does not need to

issue a separate circular or otherwise amend COA Circular No. 2011-002 in order to "restore" such function. It could simply invoke the saving clause when performing pre-audit in select agencies when warranted.

In fact, COA agreed to the Department of Tourism's request to conduct pre-audit of all its contracts prior to payment.^[21] But COA did not amend COA Circular No. 2011-002 to achieve this end. This only goes to show that COA's exercise of authority to conduct pre-audit on a certain agency does not call for issuance of an amendment to COA Circular 2011-002.

Indeed, requiring a separate issuance to reinstall pre-audit would be redundant with the saving clause in place. What would be the point of the saving clause if COA Circular No. 2011-002 would have to be amended each time said clause would be invoked? Besides, imposing such requirement would place COA Circular No. 2011-002 under constant flux as agencies would be added and subtracted from its coverage ad infinitum, depending on the needs and capacities of each agency at a particular point in time.

Further, exposing the identity of the concerned agency subject of pre-audit and the reason therefor through a general circular may breed discrimination, bias, and disrespect among and between government agencies. Surely, this could not have been what COA envisioned when it crafted the saving clause and issued COA Circular No. 2011-002.

To remove any lingering doubt, COA recently issued Circular No. 2021-003^[22] dated July 16, 2021 entitled:

Exempting Government Agencies and Instrumentalities, Including Government-Owned or Controlled Corporations from the Requirement of Written Concurrence from the Commission on Audit on the Engagement of: (1) Lawyers under Contracts of Service or Job Order Contracts; and (2) Legal Consultants, subject to specific conditions

There, COA enumerates the conditions which would allow agencies or Government-Owned and Controlled Corporations (GOCCs) to hire lawyers or legal consultants without its prior written concurrence, thus:

3.0 COVERAGE

This Circular lays down the conditions on the exemption of national government agencies and GOCCs from the requirement of COA's prior written concurrence under COA Circular Nos. 1986-255, 1995-011 and COA Memorandum No. 2016-010.

4.0 CONDITIONS

4.1 Lawyers under Contract of Service or Job Order Contract.

- a) The engagement is covered by a contract between the government agency and the lawyer, under a Contract of Service or Job Order Contract arrangement, not to exceed one (1) year, renewable at the option of the head of the national government agency or GOCC, but in no case to exceed the term of the head;
- b) The engagement shall have the written approval of the OSG in the case of national government agencies, or the OGCC in the case of GOCCs;
- c) The duties and responsibilities to be assigned to the lawyer are similar to those ordinarily performed by lawyers employed by the government agency or GOCC and holding attorney, legal officer, or other lawyer positions in the plantilla;
- d) The government agency or GOCC does not have any plantilla positions or does not have sufficient plantilla positions to support its current requirement for legal services;
- e) The lawyer meets the minimum eligibility and qualification standards imposed by the Civil Service

Commission (CSC) for comparable positions in government;

f) The compensation of the lawyer shall be the same as the salary of the comparable position in the government agency or GOCC, with no other entitlements except for a premium of up to twenty percent (20%) which may be paid monthly, lump sum, or in tranches (i.e., mid-year and end of the year) as may be stated in the contract. Comparable position is determined based not solely on salary grade but also on the duties and responsibilities of the positions and level of position in the organizational structure or plantilla of the agency. Positions may be considered to be comparable if they belong to the same occupational grouping and the duties and responsibilities of the positions are similar and/or related to each other (CSC Memorandum Circular No. 03, s. 2014); and

g) The lawyer is not employed nor engaged by any private entity or government agency or GOCC for the duration of the contract.

4.2 Legal Consultants

a) The engagement is covered by a contract between the government agency or GOCC and the lawyer, as a legal consultant, specifying the activity/project/program, the nature of the engagement (full time or part time), and for a term not to exceed one (1) year, renewable at the option of the head of the government agency or GOCC if the activity/project/program has not yet been completed, but in no case to exceed the term of the head;

b) The engagement shall have the written approval of the OSG in the case of national government agencies, or the OGCC in the case of GOCCs;

c) The lawyer possesses the relevant expertise in the matter to which he has been engaged, and such expertise cannot be found among the lawyers employed by the government agency or GOCC, or if comparable expertise does exist, is unavailable;

d) The procurement process for the engagement of the lawyer as legal consultant has been complied with;

e) The lawyer is not employed or engaged as a contract of service or job order contract by any other government agency or GOCC, although the lawyer may be engaged as a part-time consultant in up to two (2) government agencies or GOCCs; and

f) The consultancy fee of the lawyer, including other remunerations and allowances, does not exceed Fifty Thousand Pesos (P50,000) per month.[23]

Verily, Contracts of Service or Job Order Contracts pending review by COA and those that may thereafter be executed under the same conditions specified in the new Circular are no longer subject to COA's prior concurrence.

The partial lifting of this requirement is obviously meant to avoid unnecessary delay, to address urgent need for legal services, and improve efficiency in government operations.[24] Notably, the new Circular affirms the position that prior to its issuance, the requirement of COA's concurrence in the engagement of lawyers and legal consultants was never withdrawn and in fact is beyond the coverage of previous circulars lifting pre-audit. Truly, COA's prior written concurrence has always been the rule. The engagement of lawyers and legal consultant has always been separate and distinct from those activities where pre-audit has been lifted.

Circular No. 2021-003 stresses that the rationale for the concurrence requirement was to ensure the reasonableness of the amount of legal fees to be paid. Such review prior to engagement prevents the possible dissipation of public funds. If agencies were given the free hand to hire lawyers or legal consultants and the fees paid would later on be found exorbitant and excessive but only during post audit, the government will be

burdened with running after these private lawyers to recover the fees already paid. This would prove difficult if not downright impossible considering that these private lawyers or legal consultants could be stationed anywhere within or outside the country. Without practical means to compel them to return the amount they received, it would be the agency which engaged their services, the government itself, which would end up shouldering the unwarranted expense. Thus, before it reaches that point, COA should already step in and determine whether such engagement of legal service was reasonable in the first place. Surely, the same rationale underlies the issuance of COA Circular Nos. 86-255 and 95-011.

We clarify though that the contracts of engagement here do not fall within the purview of the new Circular. For one, these contracts are no longer pending review with COA; for another, the amounts involved are way more than the limit or limits specified in the new Circular.

The contracts of engagement are subject to the concurrence requirement under COA Circular Nos. 86-255 and 95-011

PSALM asserts that the hiring of the legal advisors is not subject to the concurrence requirement under COA Circulars Nos. 86-255 and 95-011 because the latter were engaged only to render advisory services on the preparation, drafting, and review of transaction documents pertinent to the privatization of generation assets and IPP contracts, to name a few. These services did not involve representation in judicial or quasi-judicial proceedings.

PSALM's interpretation is erroneous.

In *Alejandrino v. COA*,^[25] the Court, in no uncertain terms, decreed that while GOCCs, by way of exception, are allowed to hire external lawyers, they should comply with the three (3) indispensable conditions prior to such engagement: (1) a private counsel can only be hired in exceptional cases; (2) the GOCC must first secure the written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel, as the case may be; and (3) COA's written concurrence must also be secured.

In *Polloso v. Gangan*,^[26] the Court clarified that the concurrence requirement under COA Circular No. 86-255 should be secured not only prior to the engagement but also for all types of legal services, and not only those involving an actual legal controversy or court litigation:

In the main, petitioner posits that the phrase "handling of legal cases" should be construed to mean as conduct of cases or handling of court cases or litigation and not to other legal matters, such as legal documentation, negotiations, counseling or right of way matters.

To test the accuracy of such an interpretation, an examination of the subject COA Circular is in order:

SUBJECT: Inhibition against employment by government agencies and instrumentalities, including government-owned or controlled corporations, of private lawyers to handle their legal cases.

It has come to the attention of this Commission that notwithstanding restrictions or prohibitions on the matter under existing laws, certain government agencies, instrumentalities, and government-owned and/or controlled corporations, notably government banking and financing institutions, persist in hiring or employing private lawyers or law practitioners to render legal services for them and/or to handle their legal cases in consideration of fixed retainer fees, at times in unreasonable amounts, paid from public funds. In keeping with the retrenchment policy of the present administration, this Commission frowns upon such a practice.

Accordingly, it is hereby directed that, henceforth, the payment out of public funds of retainer fees to private law practitioners who are so hired or employed without the prior written conformity and acquiescence of the Office of the Solicitor General or the Government Corporate Counsel, as the case may be, as well as the written concurrence of the Commission on Audit shall be disallowed in audit and the same shall be a personal liability of the officials concerned.

What can be gleaned from a reading of the above circular is that government agencies and instrumentalities are restricted in their hiring of private lawyers to render legal services or handle their cases. No public funds will be disbursed for the payment to private lawyers unless prior to the hiring of said lawyer, there is a written conformity and acquiescence from the Solicitor General or the Government Corporate Counsel.

Contrary to the view espoused by petitioner, the prohibition covers the hiring of private lawyers to render any form of legal service. It makes no distinction as to whether or not the legal services to be performed involve an actual legal controversy or court litigation. Petitioner insists that the prohibition pertains only to "handling of legal cases," perhaps because this is what is stated in the title of the circular. To rely on the title of the circular would go against a basic rule in statutory construction that a particular clause should not be studied as a detached and isolated expression, but the whole and every part of the statute must be considered in fixing the meaning of any of its part. x x x (Emphases supplied)

Oñate[27] also held:

COA Circular No. 95-011 stresses that public funds shall not be utilized for the payment of services of a private legal counsel or law firm to represent government agencies in court or to render legal services for them. Despite this, the same circular provides that in the event that such legal services cannot be avoided or is justified under extraordinary or exceptional circumstances, the written conformity and acquiescence of the OSG or the Office of the Government Corporate Counsel (OGCC), as the case may be, and the written concurrence of the COA shall first be secured before the hiring or employment of a private lawyer or law firm. The prohibition covers the hiring of private lawyers to render any form of legal service - whether or not the legal services to be performed involve an actual legal controversy or court litigation. The purpose is to curtail the unauthorized and unnecessary disbursement of public funds to private lawyers for services rendered to the government, which is in line with the COA's constitutional mandate 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.

So must it be.

COA committed grave abuse of discretion when it acted on PSALM's request for engagement of the legal advisors only after three (3) years following receipt thereof.

In its letter-request for concurrence, PSALM specifically informed COA that the latter's concurrence was needed on or before May 30, 2011 because of the strict timelines imposed under the EPIRA, thus:

As we are reviving the bidding processes for the Naga Complex IPPA and preparing the process for the selection and appointment of IPPAs for Casecnan Power Plant to reach the 70% privatization requirements for open access, as well as preparing the privatization of Power Barges 101, 102, 103 and 104[,] we hope that you will grant our request for concurrence on or before 30 May 2011 inasmuch as the hiring of the said advisors are urgently needed for the abovementioned activities.[28]

Records show that the PSALM-COA resident auditor received the letter-request on May 11, 2011 while the COA-CGS Cluster B, on May 13, 2011.

But when the May 30, 2011 deadline came, only OGCC's concurrence was in sight, COA's was not. Even then, PSALM waited for another ninety-one (91) days or until August 29, 2011 before finally deciding to proceed with the engagement of the legal advisors.

It was only sometime in June 2012 when PSALM finally heard from the COA Legal Services Office. The latter asked for documents pertinent to PSALM's over a year-old request for concurrence. In response, PSALM submitted the required documents through the COA-Cluster 3 Director on September 16, 2013. This COA office then took five (5) more months just to transmit the documents to the COA Legal Services Office. The latter spent another eight (8) months to finally render a decision on PSALM's request.

In all, more than three (3) years had passed before COA rendered its official action through its assailed LRR No. 2014-174 dated November 6, 2014, stating:

In a Memorandum dated June 20, 2012, Director Sheila U. Villa, Adjudication and Legal Services Office (ALSO), this Commission, requested the PSALM to submit documentary requirements for evaluation in the review of the contracts. PSALM submitted the documents to the Director, Cluster 3, CGS only on September 16, 2013 which this Office received on February 13, 2014.

x x x x

In Legal Retainer Review (LRR) No. 2011-004 dated January 12, 2011, PSALM's request for concurrence of this Commission to engage the services of Mr. Yeap (from April 5, 2010 to October 5, 2010 and from May 18, 2010 to November 18, 2010) and Atty. Tantoco (from February 4, 2010 to August 3, 2010 and from April 5, 2010 to October 5, 2010), among other lawyers, was denied since PSALM did not obtain the written concurrence by this Commission prior to this hiring, as required in Memorandum Circular No. 9 dated August 27, 1998 and COA Circular No. 98-002 dated June 9, 1998. Likewise, PSALM's request for reconsideration was denied by the Commission Proper (CP) in COA Decision No. 2014-136 dated July 18, 2014. CP directed that the payments under the Contracts for Legal Services be disallowed in audit. The Motion for Reconsideration dated September 2, 2014 of COA Decision No. 2014-136 is under review by this Commission.

The same situation is obtaining in the present request - PSALM has engaged the services of Mr. Yeap and Atty. Tantoco without this Commission's prior concurrence. As early as March 2010, PSALM was even advised by the OGCC to refer future contracts for its review prior to their execution.

Jurisprudence is against sustaining this instant request. In *Salalima vs. Guingona, Jr.*, 257 SCRA 55, and *Santayana vs. Alampay*, 454 SCRA 1, the Supreme Court declared as irregular the hiring of private lawyers if made without the prior written conformity of the Solicitor General or the OGCC, as the case may be, and the written concurrence of the Commission on Audit. In *Phividec Industrial Authority vs. Capitol Steel Corporation*, 414 SCRA 327, the High Court found the Court of Appeals correct in ordering the dismissal without prejudice, of the case represented by a private lawyer whose employment was without the written conformity of the OGCC and this Commission, as his representation therein was without authority.

These rulings were cited in said LRR No. 2011-004.

In view of the foregoing, the within request for concurrence is hereby DENIED.[29]

COA's inordinate delay is imprinted all over the records. The tables cannot be turned now on PSALM. For PSALM complied with the procedure to secure COA's concurrence, but the latter, for a total of more than three (3) years failed to act.

COA has not admitted its fault, much less, provided any real and justifiable reason why after making PSALM wait for over three (3) years, it denied PSALM's request for concurrence. The denial did not even claim that

PSALM's engagement of the legal advisors was unnecessary or that the selection of the legal advisors was not in accord with the procurement process or that the fees paid them were excessive or exorbitant.

COA denied written concurrence because PSALM had not obtained such concurrence. This reasoning begs the issue. This is precisely why we cannot adhere to COA's denial of PSALM's request. On this score, COA's basis for the denial, the absence of the concurrence requirement prior to the engagement of the legal advisors, should clearly be excused. COA's unjustified refusal and delay to perform its obligation to review, evaluate, and render its concurrence prevented PSALM from securing the required concurrence. Thus, there was no fault on the part of PSALM as the fault lies with COA.

As pointed out by COA itself, the Commission Proper has original jurisdiction over requests for concurrence in the hiring of legal retainers by government agencies. Pursuant to Section 3 of Rule VIII of the 2009 Revised Rules of Procedure of the COA (RRPC), however, COA has delegated to the General Counsel the authority to evaluate and issue the corresponding concurrence or denial whose decisions are deemed those of the Commission itself.[30]

Here, we reckon with the singular period of sixty (60) days within which COA ought to resolve any case brought before it.[31]

One. Section 49 of Presidential Decree No. 1445 provides:

Section 49. Period for rendering decisions of the Commission. The Commission shall decide any case brought before it within sixty days from the date of its submission for resolution. If the account or claim involved in the case needs reference to other persons or offices, or to a party interested, the period shall be counted from the time the last comment necessary to a proper decision is received by it. (Emphasis supplied)

Two. Section 4, Rule X of COA's 2009 Revised Rules of Procedure states:

Section 4. Period for Rendering Decision. - Any case brought to the Commission Proper shall be decided within sixty (60) days from the date it is submitted for decision or resolution, in accordance with Section 4, Rule III hereof.

Based on these provisions, COA is mandated not only by law but by its own procedural rules to evaluate a request for concurrence of retainer contract of private lawyers specifically within sixty (60) days from submission of the request for concurrence. We, nonetheless, recognize that the period within which COA has to complete its pre-audit for the prior written concurrence is a policy determination over which we have no jurisdiction to review unless done with grave abuse of discretion, as in this case.

Here, COA took a whopping four hundred four (404) days from receipt of the request to make an initial evaluation thereof, and thereafter, to request additional documents from PSALM. From the latter's submission of the documents, COA used up another four hundred sixteen (416) days before it finally issued a resolution of denial, citing as ground its lack of prior concurrence which, as shown, was the end result of its own inordinate delay or inaction.

In its Memorandum, COA admits that it could not and does not always observe the sixty (60)-day period under PD 1445 and the 2009 Revised Rules of Procedure in view of the sheer volume of requests it receives every year given the number of clientele it serves, which is just one of the many functions it performs. It also receives an influx of various requests for money claims, relief of accountability, and appeals.

But we do not find COA's delayed action on the subject request to be reasonable and justified. We also reject

COA's reasoning as a justification for delays in other situations. For if we simply accept this reasoning and justify any other delays in past and future cases, either pending or soon to be initiated with this Court, nothing will prevent this faux pas from occurring over and over again. For this reason, we now have to intervene by reasonable measures that the law itself has imposed as will be more lengthily discussed below.

COA's inordinate delay on PSALM's request for concurrence amounted to grave abuse of discretion as it violates PSALM's right to a speedy disposition of its case under Section 16, Article III of the Constitution viz.:

Section 16. All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.

This constitutional right is not limited to the accused in criminal proceedings but extends to all parties in all cases, be it civil or administrative in nature, as well as all proceedings, either judicial or quasi-judicial. In this accord, any party to a case may demand expeditious action from all officials who are tasked with the administration of justice.

In *Navarro v. Commission on Audit*,^[32] the Court En Banc ruled that COA was guilty of inordinate delay when it took more than seven (7) years from the issuance of the Audit Observation Memorandum to render a decision, viz.:

Section 16, Article III of the 1987 Constitution guarantees that all persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial and administrative bodies. This constitutional right is not only afforded to the accused in criminal proceedings but extends to all parties in all cases pending before judicial, quasi-judicial and administrative bodies - any party to a case can demand expeditious action from all officials who are tasked with the administration of justice.

Nevertheless, the right to a speedy disposition of cases is not an iron clad rule such that it is a flexible concept dependent on the facts and circumstances of a particular case. Thus, it is doctrinal that in determining whether the right to speedy disposition of cases, the following factors are considered and weighed: (1) length of delay; (2) the reasons for the delay; (3) the assertion or failure to assert such right by the accused; and (4) the prejudice caused by the delay.

In the present case, it is undisputed that it took more than seven years from the time AOM No. Dep Ed RO13-2009-003 was issued on February 17, 2009, until the COA promulgated its November 9, 2016 Decision against petitioners. Particularly, it took more than five years from the time the case was elevated to the COA for automatic review before a decision was rendered on November 9, 2016. Thus, the length of delay is not in doubt.

In responding to petitioners' claim of denial of the right to speedy disposition of cases, the COA merely brushed it aside and claimed that they failed to show that the delay was vexatious or oppressive. It must be remembered, however, that it is incumbent upon the State to prove that the delay was reasonable, or that the delay was not attributable to it. In other words, it is not for the party to establish that the delay was capricious or oppressive as it is the government's burden to attest that the delay was reasonable under the circumstances or that the private party caused the delay. Here, the COA miserably failed to establish that the delay of more than seven years was reasonable or that petitioners caused the same. It erroneously shifted the burden to petitioners.

In addition, the right to speedy disposition of cases serves to ensure that citizens are free from anxiety and unnecessary expenses brought about by protracted litigations. In the present case, the ND holds petitioners solidarily liable to refund the P18,298,789.50 covering the disallowed purchase of reference materials. Surely, the substantial amount involved is a Sword of Damocles hovering over petitioners' heads subjecting them to constant distress and worry. As such, the COA should have been more circumspect in observing petitioners' rights to speedy disposition of cases and not to set it aside trivially. It should have addressed the allegations of

delay more concretely and assuage petitioners' concerns that the delay was not due to vexation, oppression or caprice, or that the cause of delay was not attributable to COA.

Indeed, the evasion of a positive duty, virtual refusal to discharge a duty enjoined by law or performing an act tainted with caprice or despotism equates to grave abuse of discretion, amounting to excess or lack of jurisdiction.[33]

In another vein, the purpose of requiring the concurrences of COA and GOCC is to curtail the unauthorized and unnecessary disbursement of public funds to private lawyers for services rendered to the government, which is in line with COA's constitutional mandate 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.[34]

Here, COA has not presented any valid reason for denying its concurrence, albeit it was too late in the day, other than the supposed lapse on the part of PSALM to secure its concurrence. There was no ruling on the merits; COA did not determine the necessity of hiring an external counsel and the reasonableness of the proposed rates based on the novelty or difficulty of the case and the extent of the engagement when it issued its denial. In other words, there was no finding that PSALM's payment to Mr. John T. K. Yeap and Atty. Michael B. Tantoco for their services constituted irregular, unnecessary, excessive, extravagant, or unconscionable expenditures or uses of government funds and properties.

In any event, PSALM cannot be faulted when it proceeded to engage the services of the legal advisors even without COA's concurrence. For sure, PSALM could not have ended up in serious breach of its mandate to privatize.

As correctly asserted by PSALM, the transfer of IPP contracts, for which the expertise of the legal advisors was sought, was the only unfulfilled condition under Section 31 of the EPIRA which decreed that the implementation of open access and retail competition should take place within three (3) years from approval of the EPIRA in 2001.[35] Notably, when PSALM sought COA's concurrence in 2011, PSALM was already in delay in the implementation of the law. It was even 2% short of the 70% EPIRA threshold requirement.[36] PSALM, was therefore, left with no feasible choice but to do a judgment call in accordance with its best lights possible by proceeding with the engagement of the legal advisors on the preparation, drafting, and review of transaction documents relative to the privatization of generation assets and IPP contracts, among others.

The selection and appointment of IPP Administrators to manage the NPC contracted energy output was the first of its kind especially in our jurisdiction where NPC had, for so long a time, the monopoly of the generation sector. Hence, there was the real need to engage those highly technical and legal advisors equipped with international experience. Without them, the full implementation of the EPIRA would not have been possible.

True, in *Alejandrino v. COA*,[37] *Almadovar v. Pulido-Tan*,[38] *Phividec Industrial Authority v. Capitol Steel Corporation*,[39] and *Oñate v. COA*,[40] we declared as unauthorized the hiring of private lawyers without the prior concurrence of OGCC or COA. But the circumstances in those cases and here are substantially different. While in those cases, the government agencies totally ignored the concurrence requirement when they hired the private lawyers, here, PSALM sought COA's concurrence long before the actual engagement of the legal advisors, and it was COA's inordinate delay or inaction that led to the absence of its concurrence to this eventual engagement.

To reiterate, PSALM sought the concurrences of both the OGCC and COA way before it actually engaged the services of the legal advisors. Only the OGCC promptly acted and gave its concurrence. Even after more than sixty (60) days from receipt of PSALM's request, and another ninety-one (91) days, COA's concurrence never

came in sight. PSALM was, therefore, painted into a corner to do a judgment call to avert any further delay in the implementation of the EPIRA within the mandated three (3)-year deadline. The purpose was two pronged: to ensure a regime of fair and free competition in the power sector, and to achieve the quality, reliability, security, and affordability of electric power supply.[41] For pursuing this greater government objective despite COA's inordinate inaction or delay, PSALM should not be faulted.

The PSALM officers who approved the legal advisors' contracts should not be held personally liable for payment of the latter's fees.

It is a matter of record that the legal advisors here had satisfactorily completed and rendered their services under the contract of engagement for the benefit of the government. They had no obligation to return what had been paid them. They are rightfully entitled to receive the legal fees they had fully worked for. Justice and equity dictate that they receive the corresponding compensation on the basis of their actual and existing rights under their respective contracts of engagement. From the moment of perfection of the contract, the parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage, and law. The contract has the force of law between the parties and they are expected to abide in good faith by their respective contractual commitments.[42]

The approving and implementing PSALM officers should not be held personally liable for payment of the professional fees owing to the legal advisors. The latter's expertise and services substantially contributed to boosting the government's privatization of 70% of our generation assets with the end in view of improving the quality of power supply in the entire country.

We have ruled that a public official may be liable in his personal capacity for whatever damage he may have caused by his act done with malice and in bad faith or beyond the scope of his authority or jurisdiction.[43] Given the situation obtaining here, however, no bad faith or malice could be attributed to the concerned PSALM officers who prioritized the best interest of the government when they pursued the engagement of the legal advisors. They were solely motivated by the desire to accomplish the EPIRA mandate and achieve the greater good for the government. Thus, personal liability should not attach to them.[44]

Bad faith entails a dishonest purpose or a moral obliquity and conscious doing of a wrong, a breach of a sworn duty through some motive or intent or ill will and partakes of fraud.[45] Here, no such bad faith can be imputed to PSALM officers who allowed the processing of contracts and payment to the legal advisors.

REMEDIAL MEASURES

As stated, Circular No. 2021-003 provides the conditions[46] when to exempt agencies and GOCCs from COA's prior concurrence for engagement of lawyers and legal consultants. If any of these conditions are not met, COA's prior concurrence shall be required. When so required, the Court lays down the following remedial measures which COA may adopt to prevent precedents of denial of concurrence due to inordinate delay or inaction:

Following the period of sixty (60) days prescribed under Section 49 of Presidential Decree No. 1445 and Section 4, Rule X of COA's 2009 Revised Rules of Procedure, the Court reiterates that government agencies needing to hire private counsel locally or abroad for any form of legal services must submit to COA their respective requests for concurrence not later than sixty (60) calendar days prior to the estimated date of engagement or retainer, attaching thereto the written conformity or acquiescence of the OGCC. This procedure will apply when the engagement of lawyer and legal consultant would not fall in the requirements where COA's concurrence is

exempted.

The request shall already include all the details and documents necessary to evaluate the planned engagement or retainer - the amount of compensation, the reasonableness of the compensation, the reasons for choosing the legal contractors, the undertakings or terms of reference of the legal contractors, the availability or non-availability of others in the relevant field, assurance of consistency in legal policies and practices among the instrumentalities of the State and certitude and predictability in matters of legal import, among others.

From submission of the request, COA has sixty (60) calendar days from the date of its receipt of the request to either deny or affirm the request. In case of a denial, the reasons therefor should be indicated.

Should the period of sixty (60) calendar days expire, sans any action from COA, the request is deemed approved.

In exceptional cases, COA may allow a government agency or GOCC to seek the concurrence of COA less than sixty (60) calendar days prior to the planned engagement or retainer. The government agency should state specific reasons to justify its exceptional request on the matter.

The foregoing guidelines apply as well when the conformity or acquiescence is to come from the OSG.

To recapitulate, COA regulations require first the conformity of the OGCC or the OSG prior to COA's concurrence. This sequencing of the requisite approvals must only signify that the prior determination or assertion by the OGCC or the OSG pertaining, among others, to the amount of compensation, the reasonableness of the compensation, the reasons for choosing the legal contractors, the undertakings or terms of reference of the legal contractors, the availability or non-availability of others in the relevant field, assurance of consistency in legal policies and practices among the instrumentalities of the State and certitude and predictability in matters of legal import, in other words, the necessity and/or expediency of the hiring of providers of legal services - is entitled to, and accorded great respect by, COA itself as the final concurring agency.

What this respect essentially means is that the OSG or the OGCC need not be correct in its determination and assertion but need only be reasonable. This, in turn must reflect that the reasoning paths of the OSG or the OGCC are content-wise justifiable (i.e., whether the decision of the OSG or the OGCC to hire a private counsel falls within a defensible range of possible acceptable outcomes) and as a matter of form, transparent and intelligible. For COA's affirmative action, it may consider the following factors:

- Compliance with matters falling within COA's expertise - compliance with the appropriations law, sufficiency of funds, especially the unexpended balance of appropriations, for the hiring, and approval by proper authorities; and
- Reasonableness (justifiable, transparent, and intelligible) in terms of the amount of compensation, the reasons for choosing the legal contractors, the undertakings or terms of reference of the legal contractors, the availability or non-availability of others in the relevant field, and assurance of consistency in legal policies and practices among the instrumentalities of the State and certitude and predictability in matters of legal import.

Indisputably, the OSG and the OGCC are the primary government agencies which deal with and know these matters by heart. The same are within their expertise and mandate, hence, within their primary jurisdiction.^[47] So long as the government agency and the OSG or the OGCC are able to justify the hiring and to articulate the reason or reasons for doing so in a transparent and intelligible manner, it is presumed that their conformity or acquiescence to the engagement is reasonable.

To repeat, the foregoing guidelines are not black-letter law but are matters of best practice or factors that underlie an analysis on the present subject. In any event, the Court is holding on the commitment of COA that is currently "formulating more policy issuances on the written concurrence to avoid unnecessary delay in the hiring of a

private lawyer, and to improve efficiency in government operations."

ACCORDINGLY, the petition is GRANTED. COA Decision No. 2017-215 dated July 6, 2017 and Resolution-Decision No. 2019-004 dated January 30, 2019 are NULLIFIED.

The Commission on Audit is directed to allow payment to Mr. John T. K. Yeap and Atty. Michael B. Tantoco of the total compensation due them.

SO ORDERED.

Gesmundo, C.J., Hernando, Carandang, Inting, Zalameda, Gaerlan, Rosario, J. Lopez, and Dimaampao, JJ., concur.

Perlas-Bernabe, J., While on official leave, I left my vote and submitted a Separate Concurring Opinion in this case.

Leonen, J., see Separate Concurring and Dissenting Opinion.

Caguioa, J., See Concurring and Dissenting Opinion.

M. Lopez, J., on leave.

[1] Rollo, pp. 39-41-A.

[2] Id. at 6, 39.

[3] Id. at 44-68.

[4] Id. at 69. Signed for the Commission by Assistant Commissioner and General Counsel Elizabeth S. Zosa.

[5] Rollo, pp. 69-71.

[6] Id. at 72-77.

[7] Id. at 30-33.

[8] 390 Phil. 1101, 1112 (2000).

[9] Rollo, pp. 35-37.

[10] Id. at 15-17.

[11] Id. at 98-111.

[12] Now, Assistant Solicitor General.

[13] 789 Phil 260, 266 (2016).

[14] Supra note 8.

[15] Rollo, pp. 155-176.

[16] Id. at 157-158.

[17] 681 Phil. 186, 197 (2012).

[18] *Gonzales v. Chavez*, 282 Phil. 858, 879-880, 890-891 (1992).

The rationale x x x is not difficult to comprehend. Sound government operations require consistency in legal

policies and practices among the instrumentalities of the State. x x x [A]n official learned in the law and skilled in advocacy could best plan and coordinate the strategies and moves of the legal battles of the different arms of the government. Surely, the economy factor, too, must have weighed heavily in arriving at such a decision.

x x x x

Sound management policies require that the government's approach to legal problems and policies formulated on legal issues be harmonized and coordinated by a specific agency. The government owes it to its officials and their respective offices, the political units at different levels, the public and the various sectors, local and international, that have dealings with it, to assure them of a degree of certitude and predictability in matters of legal import.

From the historical and statutory perspectives x x x it is beyond cavil that it is the Solicitor General who has been conferred the singular honor and privilege of being the "principal law officer and legal defender of the Government." One would be hard put to name a single legal group or law firm that can match the expertise, experience, resources, staff and prestige of the OSG which were painstakingly built up for almost a century.

[19] See Rationale in COA Circular No. 89-299.

[20] Concurring and Dissenting Opinion, J. Caguioa, p. 11.

[21] See <https://www.pna.gov.ph/articles/1038693>

[22] <https://www.coa.gov.ph/index.php/2013-06-19-13-06-41/1-circulars/category/9178-cy-2021>

[23] COA Circular No. 2021-003 (2021).

[24] <https://www.coa.gov.ph/index.php/2013-06-19-13-06-41/1-circulars/category/9178-cy-2021>

[25] G.R. No. 245400, November 12, 2019.

[26] Supra note 8, at 1108-1109.

[27] Supra note 13, at 266.

[28] Rollo, p. 41-A.

[29] Id. at 69-71.

[30] Id. at 36.

[31] https://www.coa.gov.ph/phocadownload/userupload/transparency/citizen_charter/COA_Citizens_Charte_Dec_2019.pdf

[32] G.R. No. 238676, November 19, 2019.

[33] *Miralles v. COA*, 818 Phil. 380, 389-390 (2017).

[34] *Oñate v. COA*, supra note 13, at 266.

[35] Section 31 of RA 9136 provides:

Section 31. Retail Competition and Open Access. - Retail competition and open access on distribution wires shall be implemented not later than three (3) years upon the effectivity of this Act subject to compliance with the following conditions precedent:

(a)

Establishment of the wholesale electricity spot market;

(b)

Approval of unbundled transmission and distribution retail wheeling charges;

(c)

Initial implementation of the cross-subsidy removal scheme;

(d)

Privatization of at least [seventy percent (70%)] of the total capacity of generating assets of NPC in Luzon and Visayas; and

(e)

Transfer of the management and control of at least seventy percent (70%) of the total energy output of power plants under contract with NPC to the IPP Administrators. (Emphasis supplied)

[36] Rollo, p. 10.

[37] Supra note 25.

[38] 773 Phil. 165 (2015).

[39] 460 Phil. 493 (2003).

[40] Supra note 13.

[41] Declaration of Policy, Section 2, RA 9136.

[42] See *Government Service Insurance System v. Province of Tarlac*, 462 Phil. 471, 479 (2003).

[43] *Alejandrino v. Commission on Audit*, supra note 23; *Orocio v. COA*, 287 Phil. 1045, 1066 (1992).

[44] *Alejandrino v. Commission on Audit*, supra note 23.

[45] See *Collantes v. Marcelo*, 556 Phil. 794, 806 (2007).

[46] See 4.0 of Circular No. 2021-003.

[47] See e.g., *Cordillera Global Network v. Paje*, G.R. No. 215988, April 10, 2019: The doctrine of primary jurisdiction articulates that "courts will hold off from determining a controversy involving a question within the jurisdiction of an administrative agency, particularly when its resolution demands the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact."

SEPARATE CONCURRING OPINION

PERLAS-BERNABE, J.:

I concur in the result. As correctly ruled by the ponencia, respondent Commission on Audit (COA) gravely abused its discretion when it incurred inordinate delay in resolving petitioner Power Sector Assets and Liabilities Management Corporation's (PSALM) request for written concurrence to engage private counsels, and thereafter, in denying the same on the sole ground that the latter proceeded with such engagement without first securing its written concurrence. Nevertheless, I express reservations against the ponencia with respect to the following: (a) its

classification of the written concurrence requirement as an instance of pre-audit;^[1] and (b) its statement that the written concurrence from the Office of the Solicitor General (OSG)/Office of the Government Corporate Counsel (OGCC) should be first obtained before the COA's written concurrence is requested.^[2]

I.

For context, the written concurrence requirement was first embodied in COA Circular No. 86-255,^[3] as reiterated in COA Circular No. 95-011.^[4] In essence, the COA's written concurrence is required before public funds are expended for the payment of legal fees to private practitioners engaged to represent government agencies or government owned or controlled corporations (GOCCs). At its core, the requirement is a fiscal austerity measure meant to curb the unnecessary, unreasonable, and sometimes, excessive legal fees paid to private practitioners,^[5] considering that legal services may, as a general rule, be readily procured by government agencies from statutorily mandated counsels such as the OSG and OGCC.^[6] Recognizing, however, that in exceptional and extraordinary circumstances, adequate representation by private practitioners may be necessary and vital, the COA allows the engagement of said practitioners as an exception, provided that its written concurrence "shall first be secured before the hiring or employment of a private lawyer or law firm." The rule also requires "the prior written conformity and acquiescence of the [OSG] or the [OGCC], as the case may be." No order of procuring these written requirements has been prescribed; what is provided, however, is that both must be obtained since non-compliance results in the disallowance of the payment of public funds.^[7]

II.

In this case, it is clear that PSALM's hiring of private counsels in connection with the privatization of the generation assets and Independent Power Producer contracts of the National Power Corporation is covered by the written concurrence requirement.^[8] However, as in every government instrumentality, the COA must exercise its authority to grant or deny such requests without caprice or arbitrariness. Pursuant to Section 49^[9] of Presidential Decree No. 1445, in relation to Section 4, Rule X^[10] of its own 2009 Revised Rules of Procedure, the COA, as a general rule, should resolve such requests within a period of sixty (60) calendar days from receipt. To avoid all suspicion of bias or arbitrariness, the COA should be the first to respect and obey its own rules.^[11]

However, the COA, in this case, unjustifiably breached its own rules. As mentioned, the ponencia properly observed that PSALM's request for written concurrence was resolved with inordinate delay. In particular, "COA took a whopping four hundred four (404) days from receipt of the request to make an initial evaluation thereof, and thereafter, to request additional documents from PSALM. From the latter's submission of the documents, COA used up another four hundred sixteen (416) days before it finally issued a resolution of denial, citing as ground its lack of prior concurrence, which, as shown, was the end result of its own inordinate delay or inaction."^[12] Indeed, to exacerbate its delay, the COA denied PSALM's request on the sole ground that it failed to comply with the written concurrence requirement. But PSALM's failure to procure such requirement was caused by no other than the COA's own fault. PSALM made a timely request and there was nothing more it could have done. It was thus incumbent upon the COA to not have only acted on the request within its own prescribed period to resolve, but it should not have also denied the request based on this sole ground, which, after all, was attributable to its own bureaucratic dereliction. Indeed, this unfair, capricious, and whimsical exercise of authority clearly smacks of grave abuse of discretion which warrants the grant of the present certiorari petition.

III.

However, notwithstanding the correctness of its resulting disposition, I disagree with the ponencia's categorical classification of the COA's written concurrence requirement as an instance of pre-audit. In the ponencia, it was declared that:[13]

The requirement to secure COA's prior written concurrence to every engagement of private counsel by a government office is an instance of pre-audit.

COA's own definition of pre-audit is exactly what its written concurrence is all about:

5. This Honorable Court defined in *Dela Llana v. Commission on Audit* that a pre-audit is an examination of financial transactions before their consumption or payment. It seeks to determine whether the following conditions are present:

(1)

The proposed expenditure complies with an appropriation law or other specific statutory authority;

(2)

Sufficient funds are available for the purpose;

(3)

The proposed expenditure is not unreasonable or extravagant, and the unexpended balance of appropriations to which it will be charged is sufficient to cover the entire amount of the expenditure; and

(4)

The transaction is approved by the proper authority and the claim is duly supported by authentic underlying evidence.

6. Thus, pre-audit would not only refer to a review of the contract with the lawyer, but would also include the review of the billing and statement of services rendered prior to payment of the same. In effect, the review could be a condition before the agency can pay the lawyer's billings. This is consistent with the Honorable Court's pronouncement on pre-audit in *Dela Llana*, to wit:

It could, among others, identify government agency transactions that are suspicious on their face prior to their implementation and prior to the disbursement of funds.

COA distinguishes the written concurrence from a pre-audit simply because there is yet no specific payment or disbursement being made to the lawyer. This, however, is a distinction without any difference. This supposed difference does not distinguish a pre-audit from a written concurrence. It is a minute detail in the overall goal, process, and scheme of a pre-audit.

More important, as above-quoted, a pre-audit is done to identify suspicious transactions on their face so as to avoid the embarrassment and embezzlement or wastage of public funds before implementation and disbursement. This precisely is what the written concurrence is also meant to achieve.

Thus, in No. 7 of its Memorandum, COA admits that the primary purpose of the review for a written concurrence is the determination of the reasonableness of the legal fees of the lawyer and the assurance of consistency in legal policies and practices of State agencies that transcend the parochial interests of individual State agencies and

promote the greater good of public interest.

Quite clearly, written concurrence involves a review that encompasses both the processes and goals of a pre-audit. Hence, it is essentially a pre-audit.

Nonetheless, whether a written concurrence amounts to a pre-audit, which we say it is, COA has the mandate to determine whether to require pre-audit or post-audit. This is a constitutional mandate. As held in *Dela Llana v. Commission on Audit*:

Petitioner's allegations find no support in the aforequoted Constitutional provision. There is nothing in the said provision that requires the COA to conduct a pre-audit of all government transactions and for all government agencies. The only clear reference to a pre-audit requirement is found in Section 2, paragraph 1, which provides that a post-audit is mandated for certain government or private entities with state subsidy or equity and only when the internal control system of an audited entity is inadequate. In such a situation, the COA may adopt measures, including a temporary or special pre-audit, to correct the deficiencies.

Hence, the conduct of a pre-audit is not a mandatory duty that this Court may compel the COA to perform. This discretion on its part is in line with the constitutional pronouncement that the COA has the exclusive authority to define the scope of its audit and examination. When the language of the law is clear and explicit, there is no room for interpretation, only application. Neither can the scope of the provision be unduly enlarged by this Court.

Here and now, we find no reason to overturn COA's discretion to require pre-audit in the form of a written concurrence to obtaining outside legal services. The rationale for this requirement has been accepted and settled in jurisprudence. We uphold the soundness of this reasoning and the same is reiterated here.[14]

In contrast to the ponencia, the COA, however, expressly stated that "its prior written concurrence is not a specie of pre-audit because this is obtained prior to the enjoyment or consumption of legal services or the payment of private counsel and without reference to a specific payment." [15]

In my opinion, the COA's characterization and attribution of its audit affairs should be given primacy. Indeed, Section 2 (1), Article IX-D of the 1987 Constitution exclusively confers unto the COA "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 subdivisions, agencies, or instrumentalities, including government-owned or controlled corporations with original charters." Corollary to the COA's audit power, Section 2(2) of Article IX-D vests the COA with exclusive authority over the following:

Sec. 2 (2). The Commission shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and 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. (Emphasis supplied)

The fact that the COA itself declared that the written concurrence requirement is not a form of pre-audit should be given due deference by the Court. The ponencia itself even recognizes this by stating that the "[t]he best interpreter of what its issuances mean as regards the most efficient and effective methods it will be using for auditing government transactions will of course have to be COA itself. This jurisdiction exclusively belongs to COA." [16]

While the purpose of the written concurrence requirement appears to guard against the undue wastage of public funds, and hence, may be associated with the concept of pre-audit,[17] an examination of COA Circular No.

2009-002,[18] however, shows that the COA has defined with specific parameters its process of pre-audit. In Item 3.0 thereof, the scope of pre-audit was confined to certain transactions only. Item 4.0 states the "specific scope of pre-audit activities." Item 8.0 further demonstrates how the COA signifies its evidence of pre-audit and the administrative process it entails. These specific parameters as to what the COA considers as its pre-audit process must be respected by this Court.

Notably, in COA Circular 2011-002,[19] the pre-audit stated in COA Circular No. 2009-002 was withdrawn. Nevertheless, it states that "whenever circumstances warrant, such as where the internal control system of a government agency is inadequate, this Commission may re-institute pre-audit or adopt such other control measures as are necessary and appropriate to protect the funds and property of the government."

Very recently, the COA issued Circular No. 2021-003 dated July 16, 2021, which, as adverted to, lays down the conditions for the exemption from the requirement of the COA's prior written concurrence. However, this recent Circular should no longer be factored in the resolution of the instant petition due to, among others, its inexistence at the time the COA had already committed grave abuse of discretion in this case.

By large, a perusal of these COA circulars will show that none of them expressly recognize that the written concurrence requirement is a form of pre-audit. Accordingly, the Court should be cautious not to interfere with the COA's mandate since after all, the present case can be resolved without the need of any categorical statement holding that the written concurrence requirement is a form of pre-audit.

IV.

Finally, guided by the same virtue of deference, the ponencia should not have established a new rule with respect to the process of securing the COA's written concurrence. In the ponencia, a new rule was formulated with respect to the sequence of procuring concurrences:[20]

The COA regulations require first the conformity of the OGCC or the OSG prior to COA's concurrence. This sequencing of the requisite approvals must only signify that the prior determination or assertion of by the OGCC or the OSG pertaining, among others, to the amount of compensation, the reasonableness of the compensation, the reasons for choosing the legal contractors, the undertakings or terms of reference of the legal contractors, the availability or non-availability of others in the relevant field, assurance of consistency in legal policies and practices among the instrumentalities of the State and certitude and predictability in matters of legal import, in other words, the necessity and/or expediency of the hiring of providers of legal services - is entitled to and accorded great respect by COA itself as the final concurring agency.

What this respect essentially means is that the OSG or the OGCC need not be correct in its determination and assertion but need only be reasonable. This in turn must reflect that the reasoning paths of the OSG or the OGCC are content-wise justifiable (i.e., whether the decision of the OSG or the OGCC to hire a private counsel falls within a defensible range of possible acceptable outcomes) and as a matter of form, transparent and intelligible. Where these characteristics are present, COA must presume regularity in the hiring of outside legal support. This entails that COA must give its prior written concurrence where the OSG or the OGCC has shown affirmatively:

- Compliance with matters falling within COA's expertise - compliance with the appropriations law, sufficiency of funds, especially the unexpended balance of appropriations, for the hiring, and approval by proper authorities; and
- Reasonableness (justifiable, transparent, and intelligible) in terms of the amount of compensation, the reasons for choosing the legal contractors, the undertakings or terms of reference of the legal contractors, the availability or non-availability of others in the relevant field, and assurance of consistency in legal policies and

practices among the instrumentalities of the State and certitude and predictability in matters of legal import.

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However, contrary to the ponencia's observation, the pertinent rules and regulations governing the written concurrence requirement merely state that the written conformity of the OGCC/OSG) and the written concurrence of the COA must be secured before government agencies may hire private counsel. No order of preference or sequence has been therein stated. What the rules only state is that these conformities be obtained for the engagement of private counsel. Hence, it is entirely possible that the COA's written concurrence be first secured before that of the OGCC/OSG; it is also possible that these requirements be simultaneously procured in the interest of time.

Accordingly, I VOTE to GRANT the petition but discounting the ponencia's above extraneous statements which I find to be inappropriate in this case.

[1] Ponencia, pp. 8-10.

[2] Id. at 28-29.

[3] The pertinent portion of COA Circular No. 86-255 reads:

Accordingly, it is hereby directed that, henceforth, the payment out of public funds of retainer fees to private law practitioners who are so hired or employed without the prior written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel, as the case may be, as well as the written concurrence of the Commission on Audit shall be disallowed in audit and the same shall be a personal liability of the officials concerned. (Emphasis and underscoring supplied)

[4] Pertinent portions of COA Circular No. 95-011 read:

Accordingly and pursuant to this Commission's exclusive authority to promulgate accounting and auditing rules and regulations, including for the prevention and disallowance of irregular, unnecessary, excessive, extravagant and/or unconscionable expenditure or uses of public funds and property (Sec. 2-2, Art. IX-D, Constitution), public funds shall not be utilized for payment of the services of a private legal counsel or law firm to represent government agencies in court or to render legal services for them. In the event that such legal services cannot be avoided or is justified under extraordinary or exceptional circumstances, the written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel, as the case may be, and the written concurrence of the Commission on Audit shall first be secured before the hiring or employment of a private lawyer or law firm. (Emphasis and underscoring supplied)

[5] See *Phividec Industrial Authority v. Capitol Steel Corporation*, 460 Phil. 493, 503-504 (2003).

[6] Section 10, Chapter 3, Book IV, Title III of the Administrative Code reads:

Sec. 10. Office of the Government Corporate Counsel. - The Office of Government Corporate Counsel (OGCC) shall act as the principal law office of all government-owned or controlled corporations, their subsidiaries, other corporate off-springs and government acquired assert corporations and shall exercise control and supervision over all legal departments or divisions maintained separately and such powers and functions as are now or may hereafter be provided by law. In the exercise of such control and supervision, the Government Corporate Counsel shall promulgate rules and regulations to effectively implement the objectives of this Office. (Emphasis supplied)

[7] See *Polloso v. Hon. Gangan*, 390 Phil. 1101 (2000); *Phividec Industrial Authority v. Capitol Steel Corporation*, 460 Phil. 493 (2003); *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission*

on Audit, 750 Phil. 258 (2015); Oñate v. Commission on Audit, 789 Phil. 260 (2016); and Alejandrino v. Commission on Audit, G.R. No. 245400, November 12, 2019.

[8] See ponencia, pp. 14-18.

[9] Section 49 of PD 1445 provides:

Section 49. Period for rendering decisions of the Commission. The Commission shall decide any case brought before it within sixty days from the date of its submission for resolution. If the account or claim involved in the case needs reference to other persons or offices, or to a party interested, the period shall be counted from the time the last comment necessary to a proper decision is received by it.

[10] Section 4, Rule X of COA's 2009 Revised Rules of Procedure reads:

Section 4. Period for Rendering Decision. - Any case brought to the Commission Proper shall be decided within sixty (60) days from the date it is submitted for decision or resolution, in accordance with Section 4, Rule III hereof.

[11] See Agbayani v. Commission on Elections, 264 Phil. 861, 868 (1990).

[12] See ponencia, p. 22.

[13] Id. at 8-10.

[14] Ponencia, pp. 7-9.

[15] See COA's Memorandum dated May 7, 2021, rollo, pp. 155-176.

[16] See ponencia, p. 11.

[17] See Oñate v. Commission on Audit, 786 Phil. 260 (2016). See also COA Circular No. 81-162 entitled "DELINEATING THE DUTIES AND RESPONSIBILITIES OF THE HEAD AND THE ASSISTANT HEAD OF THE AUDITING UNIT WITH RESPECT TO THE PRE-AUDIT AND POST-AUDIT OF ACCOUNTS" dated July 1, 1981, which defines "pre-audit" as "the examination of financial transactions before consummation."

[18] Entitled "REINSTITUTING SELECTIVE PRE-AUDIT ON GOVERNMENT TRANSACTIONS" dated May 18, 2009.

[19] Entitled "LIFTING OF PRE-AUDIT OF GOVERNMENT TRANSACTIONS" dated July 22, 2011.

[20] Ponencia, pp. 28-29.

CONCURRING AND DISSENTING OPINION

LEONEN, J.:

Public respondent Commission on Audit committed grave abuse of discretion in delaying to resolve petitioner Power Sector Assets and Liabilities Management Corporation's request for written concurrence to engage private counsels, and in later denying petitioner's request to engage the private counsels for this lack of written concurrence.

I

As the guardian of public funds, the Commission on Audit has broad powers over all accounts pertaining to government revenues and uses of public funds and property, including the exclusive authority to "define the scope of its audit and examination"; to "establish the techniques and methods required" for the review; and 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." [1]

In line with this mandate, the Commission on Audit issued in 1986 Circular No. 86-255, [2] which was amended first on December 4, 1995, [3] and further amended on June 9, 1998. [4] It prohibits the hiring of private lawyers by government-owned and controlled corporations to render any form of legal service, without distinction as to whether the legal services would involve an actual legal controversy or court litigation. [5] Its purpose is "to curtail the unauthorized and unnecessary disbursement of public funds to private lawyers for services rendered to the government." [6]

This means government-owned and controlled corporations must refer all their legal matters to the Office of the Government Corporate Counsel, per the Administrative Code of 1987: [7]

Section 10. Office of the Government Corporate Counsel. — The Office of the Government Corporate Counsel (OGCC) shall act as the principal law office of all government-owned or controlled corporations, their subsidiaries, other corporate off-springs and government acquired asset corporations and shall exercise control and supervision over all legal departments or divisions maintained separately and such powers and functions as are now or may hereafter be provided by law. In the exercise of such control and supervision, the Government Corporate Counsel shall promulgate rules and regulations to effectively implement the objectives of the Office. [8]

Lawyers of the Office of the Government Corporate Counsel are "expected to be imbued with a deeper sense of fidelity to the government's cause and more attuned to the need to preserve the confidentiality of sensitive information." [9]

However, Circular No. 86-255 has also carved out an exception. Government-owned and controlled corporations can hire the legal services of a private lawyer or law firm if it "cannot be avoided" or in "extraordinary or exceptional circumstances":

Accordingly and pursuant to this Commission's exclusive authority to promulgate accounting and auditing rules and regulations, including for the prevention and disallowance of irregular, unnecessary, excessive, extravagant and/or unconscionable expenditure or uses of public funds and property (Sec. 2-2, Art. IX-D, Constitution[.]) public funds shall not be utilized for payment of the services of a private legal counsel or law firm to represent government agencies and instrumentalities, including government-owned or controlled corporations and local government units in court or to render legal services for them. In the event that such legal services cannot be avoided or is justified under extraordinary or exceptional circumstances for government agencies and instrumentalities, including government-owned or controlled corporations, the written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel, as the case may be, and the written concurrence of the Commission on Audit shall first be secured before the hiring or employment of a private lawyer or law firm. [10] (Emphasis supplied)

This is reinforced by Office of the President Memorandum Circular No. 9, dated August 27, 1998, which provides that the hiring of a private lawyer or law firm can be done only "in exceptional cases":

SECTION 1. All legal matters pertaining to government-owned or controlled corporations, their subsidiaries,

other corporate offsprings and government acquired asset corporations (GOCCs) shall be exclusively referred to and handled by the Office of the Government Corporate Counsel (OGCC).

GOCCs are thereby enjoined from referring their cases and legal matters to the Office of the Solicitor General unless their respective charters expressly name the Office of the Solicitor General (OSG) as their legal counsel.

However, under exceptional circumstances, the OSG may represent the GOCC concerned, Provided: This is authorized by the President; or by the head of the office concerned and approved by the President.

SECTION 2. All pending cases of GOCCs being handled by the OSG, and all pending requests for opinions and contract reviews which have been referred by said GOCCs to the OSG, may be retained and acted upon by the OSG; but the latter shall inform the OGCC of the said pending cases, requests for opinions and contract reviews, if any, to ensure proper monitoring and coordination.

SECTION 3. GOCCs are likewise enjoined to refrain from hiring private lawyers or law firms to handle their cases and legal matters. But in exceptional cases, the written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel, as the case may be, and the written concurrence of the Commission on Audit shall first be secured before the hiring or employment of a private lawyer or law firm. (Emphasis supplied)

Thus, before a government-owned and controlled corporation can hire a private lawyer or firm, both Circular No. 86-255, as amended, and Memorandum Circular No. 9 require that it obtain: first, the written conformity and acquiescence of the Government Corporate Counsel or the Solicitor General; and second, the written concurrence of the Commission on Audit. The rules specifically require a prior written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel and the written concurrence of the Commission on Audit.[11] The former is required to determine the necessity of engagement; the latter, to determine the reasonableness of the rates.[12]

II.

Circular No. 86-255, as amended, specifically applies in the hiring of private lawyers or law firms, rather than the various and separate circulars on pre-audit. I do not agree that it is a specie of pre-audit. This interpretation is congruent to the rule of statutory construction that where two statutes are of equal theoretical application to a particular case, the one specially designed for it should prevail.[13]

The Commission on Audit's written concurrence under Circular No. 86-255, as amended, is required solely to check on the reasonableness of the rates, while a pre-audit seeks to determine the presence of the following conditions: "(1) the proposed expenditure complies with an appropriation law or other specific statutory authority; (2) sufficient funds are available for the purpose; (3) the proposed expenditure is not unreasonable or extravagant, and the unexpended balance of appropriations to which it will be charged is sufficient to cover the entire amount of the expenditure; and (4) the transaction is approved by the proper authority and the claim is duly supported by authentic underlying evidence." [14]

Nonetheless, the Commission on Audit's mandate is to audit the disbursement of public funds, be it through pre-audit or post-audit. Even if its written concurrence were considered as pre-audit, petitioner in this case sought its concurrence in May 2011,[15] when pre-audit was still allowed:

The COA later issued Circular No. 94-006 on 17 February 1994 and Circular No. 95-006 on 18 May 1995. Both circulars clarified and expanded the total lifting of pre-audit activities on all financial transactions of NGAs, GOCCs, and LGUs. The remaining audit activities performed by COA auditors would no longer be pre-requisites to the implementation or prosecution of projects, perfection of contracts, payment of claims, and/or approval of applications filed with the agencies.

It also issued COA Circular No. 89-299, as amended by Circular No. 89-299A, which in Section 3.2 provides:
3.2 Whenever circumstances warrant, however, such as where the internal control system of a government agency is inadequate, This Commission may reinstitute pre-audit or adopt such other control measures, including temporary or special pre-audit, as are necessary and appropriate to protect the funds and property of the agency.

On 18 May 2009, COA issued Circular No. 2009-002, which reinstituted the selective pre-audit of government transactions in view of the rising incidents of irregular, illegal, wasteful and anomalous disbursements of huge amounts of public funds and disposals of public property. Two years later, or on 22 July 2011, COA issued Circular No. 2011-002, which lifted the pre-audit of government transactions implemented by Circular No. 2009-002. In its assessment, subsequent developments had shown heightened vigilance of government agencies in safeguarding their resources.[16]

III

The prior written conformity and acquiescence of the Government Corporate Counsel or the Solicitor General and the written concurrence of the Commission on Audit are absolute requirements. Partial compliance or honest mistake due to ignorance of the law can never be a valid defense.[17] When either requirement is lacking, the engagement of the private lawyer or law firm is deemed unauthorized.[18]

In *PHIVIDECA Industrial Authority v. Capitol Steel Corporation*,[19] this Court upheld the dismissal of the case due to the private lawyer's lack of authority to file the case, since the prior written concurrences of both the Office of the Government Corporate Counsel or the Solicitor General and the Commission on Audit were not yet secured before the private lawyer was hired:

It is also apparent that petitioners failed to comply with the requirements laid down by the COA in its Circular No. 86-255. The Circular requires the prior written concurrences of the OGCC or the Solicitor General and the COA before GOCCs may hire private counsels. It must be noted though that the COA Circular is not decisive in the disposition of this case. It cannot by any measure grant or disallow the authority for GOCCs to hire private counsels. The function pertains to the executive branch. Its mandate is to audit the disbursement of public funds. As regards the payment of funds belonging to GOCCs to lawyers retained by them, COA Circular 86-255 is the governing regulation.[20] (Emphasis supplied, citation omitted)

In *Polloso v. Gangan*,[21] a government-owned and controlled corporation hired a private counsel to provide legal services without the prior conformity and acquiescence of the Office of the Solicitor General or the Government Corporate Counsel, and the written concurrence of the Commission on Audit. Thus, this Court held that the Commission on Audit correctly disallowed the payment of fees to the private counsel, as "[i]t is only in special cases where these government entities may engage the services of private lawyers because of their expertise in certain fields." [22]

In *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission on Audit*,[23] this Court held that the Board of Directors' act of contracting the private law firm's legal services without the prior approval of the Office of the Government Corporate Counsel and the Commission on Audit was clearly unauthorized. It explained:

The cases that the private counsel was asked to manage are not beyond the range of reasonable competence expected from the Office of the Government Corporate Counsel. Certainly, the issues do not appear to be complex or of substantial national interest to merit additional counsel. Even so, there was no showing that the delays in the approval also were due to circumstances not attributable to petitioner nor was there a clear showing that there was unreasonable delay in any action of the approving authorities. Rather, it appears that the procurement of the proper authorizations was mere afterthought.[24]

Here, petitioner is a government-owned and controlled corporation created under Section 49[25] of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 (EPIRA). In hiring the private counsels, petitioner cannot claim exemption from the coverage of Circular No. 86-255, as amended, which specifically prohibits government-owned and controlled corporations from hiring private lawyers to render any form of legal service, without distinction on the kind of legal service.[26]

Even petitioner sought the concurrences of the Commission on Audit and the Office of the Government Corporate Counsel before engaging private counsels as legal advisors on the privatization of the generation assets and contracts of the National Power Corporation,[27] in line with Circular No. 86-255[28] and Memorandum Circular No. 9.[29] The Commission on Audit received the letter on May 11, 2011, through petitioner's resident auditor, and on May 13, 2011, through Commission on Audit Corporate Sector Cluster B.[30]

Under Contract Review No. 161 dated May 31, 2011, the Office of the Government Corporate Counsel found the "contracts to be generally in order and the same may be given due course." [31] Yet, petitioner did not hear from the Commission on Audit by May 30, 2011, the date it requested for the Commission to act on its request.[32] Petitioner waited for the Commission's reply until August 29, 2011, and only then did it finally engage the private counsels without the concurrence. Three years later, on November 6, 2014, the Commission issued Legal Retainer Review No. 2014-174 denying petitioner's request for concurrence, because: (a) petitioner engaged the consultants without the Commission on Audit's prior approval; and (b) the Commission on Audit had also earlier denied a similar request involving the same legal advisors who were engaged back in 2010 for the same reason.[33]

It is undisputed that the necessary written concurrence from the Commission on Audit is absent when petitioner employed the legal services of the private counsels. However, it was the Commission on Audit, the approving authority itself, that caused unreasonable delay that led to the required written concurrence not being obtained.

Under the Constitution, the Commission on Audit "may promulgate its own rules concerning pleadings and practice before it or before any of its offices[.]" as long as these rules "shall not diminish, increase, or modify substantive rights." [34] Based on this wording, greater than the power (as gleaned from the permissive word "may") of the Commission on Audit to promulgate rules concerning pleadings and practice is its mandate (as gleaned from the mandatory word "shall") to promulgate rules which shall not diminish, increase, or modify substantive rights.

Therefore, the Commission on Audit shall hold it inviolable that "[a]ll persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies." [35] "This constitutional right is not only afforded to the accused in criminal proceedings but extends to all parties in all cases pending before judicial, quasi-judicial and administrative bodies — any party to a case can demand expeditious action from all officials who are tasked with the administration of justice." [36]

In determining if the right to speedy disposition of cases is violated, the following circumstances are considered and weighed: "(1) length of delay; (2) the reasons for the delay; (3) the assertion or failure to assert such right by the accused; and (4) the prejudice caused by the delay." [37]

In *Navarro v. Commission on Audit*, [38] this Court ruled that the petitioners suffered inordinate delay as the Commission on Audit resolved their case only after seven years and nine months had lapsed:

In the present case, it is undisputed that it took more than seven years from the time AOM No. DepEdRO13-2009-003 was issued on February 17, 2009, until the COA promulgated its November 9, 2016 Decision against petitioners. Particularly, it took more than five years from the time the case was elevated to

the COA for automatic review before a decision was rendered on November 9, 2016. Thus, the length of delay is not in doubt.

In responding to petitioners' claim of denial of the right to speedy disposition of cases, the COA merely brushed it aside and claimed that they failed to show that the delay was vexatious or oppressive. It must be remembered, however, that it is incumbent upon the State to prove that the delay was reasonable, or that the delay was not attributable to it. In other words, it is not for the party to establish that the delay was capricious or oppressive as it is the government's burden to attest that the delay was reasonable under the circumstances or that the private party caused the delay. Here, the COA miserably failed to establish that the delay of more than seven years was reasonable or that petitioners caused the same. It erroneously shifted the burden to petitioners.

In addition, the right to speedy disposition of cases serves to ensure that citizens are free from anxiety and unnecessary expenses brought about by protracted litigations. In the present case, the ND holds petitioners solidarily liable to refund the P18,298,789.50 covering the disallowed purchase of reference materials. Surely, the substantial amount involved is a Sword of Damocles hovering over petitioners' heads subjecting them to constant distress and worry. As such, the COA should have been more circumspect in observing petitioners' rights to speedy disposition of cases and not to set it aside trivially. It should have addressed the allegations of delay more concretely and assuage petitioners' concerns that the delay was not due to vexation, oppression or caprice, or that the cause of delay was not attributable to COA.[39] (Emphasis supplied, citations omitted)

Here, the Commission on Audit states in its Memorandum that its written concurrence is mandated in recognition of exceptional circumstances in the hiring of private lawyers primarily to determine the reasonableness of rates.[40] It says that it "will not deny such request when it is submitted within reasonable time from engagement" or if the agency has first sought the Solicitor General's or the Government Corporate Counsel's concurrence.[41] It accounts for exceptional circumstances such as urgency,[42] and it claims to observe the periods within which to act on requests as provided under Republic Act No. 6713, Presidential Decree No. 1445, and its own 2009 Revised Rules of Procedure. It says that its noncompliance may be justified due to the sheer volume of the requests for concurrence it receives from numerous government agencies or due to the other audit transactions it ought to act on.[43]

Contrary to its own statement, the Commission on Audit denied petitioner's request for written concurrence despite petitioner having submitted the request "within reasonable time from engagement when said engagement was compelled due to urgent considerations,"[44] and having obtained the concurrence of Office of the Government Corporate Counsel. Petitioner even specifically informed the Commission that its concurrence was needed on or before May 30, 2011 because of the strict timelines imposed under the EPIRA:

As we are reviving the bidding processes for the Naga Complex IPPA and preparing the process for the selection and appointment of IPPAs for Casecnan Power Plant to reach the 70% privatization requirements for open access, as well as preparing the privatization of Power Barges 101, 102, 103 and 104[,] we hope that you will grant our request for concurrence on or before 30 May 2011 inasmuch as the hiring of the said advisors are urgently needed for the abovementioned activities.[45] (Emphasis in the original)

Moreover, inconsistent with its statement in its Memorandum, the Commission on Audit failed to comply with Republic Act No. 6713, Presidential Decree No. 1445, and its own Revised Rules of Procedure as to the period within which to act on the request for written concurrence. It denied the request for concurrence three years after it had been sought, without even determining the reasonableness of the proposed rates.

The Commission on Audit is constitutionally mandated to "decide by a majority vote of all its Members any case or matter brought before it within sixty days from the date of its submission for decision or resolution." [46] Section 49 of Presidential Decree No. 1445 states: "[t]he Commission shall decide any case brought before it within sixty days from the date of its submission for resolution." The Commission on Audit's 2009 Revised Rules

of Procedure further provides:

RULE III

SECTION 4. Quorum and Voting. — The Commission Proper shall decide by a majority vote of all its members any case or matter brought before it within sixty (60) days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief or memorandum required by these Rules or by the Commission Proper.

....

RULE X

SECTION 4. Period for Rendering Decision. — Any case brought to the Commission Proper shall be decided within sixty (60) days from the date it is submitted for decision or resolution, in accordance with Section 4, Rule III hereof.

As the Commission on Audit has been given complete discretion in the exercise of its constitutional duty, this Court generally sustains its decisions. Only when it acts with grave abuse of discretion amounting to lack or excess of jurisdiction will we grant a petition assailing its actions.[47] "There is grave abuse of discretion when there is an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law or to act in contemplation of law as when the judgment rendered is not based on law and evidence but on caprice, whim and despotism." [48]

For its unjustified delay in resolving petitioner's request for written concurrence to engage private counsels, and then later denying petitioner's request to engage the private counsels for its own lack of written concurrence, the Commission on Audit committed grave abuse of discretion amounting to lack or excess of jurisdiction.

ACCORDINGLY, I vote to GRANT the Petition.

[1] CONST., art. IX-D, sec. 2.

[2] As amended by COA Circular No. 95-011 (1995) and COA Circular No. 98-002 (1998).

[3] COA Circular No. 95-011 (1995).

[4] COA Circular No. 98-002 (1998).

[5] COA Circular No. 86-255 (1986).

[6] *Polloso v. Gangan*, 390 Phil. 1101, 1111 (2000) [Per J. Kapunan, En Banc].

[7] *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission on Audit*, 750 Phil. 258 (2015) [Per J. Leonen, En Banc].

[8] ADM. CODE, Book IV, Title III, Ch. 3, sec. 10, par. 1.

[9] *PHIVIDECA Industrial Authority v. Capitol Steel Corporation*, 460 Phil. 493, 504 (2003) [Per J. Tinga, Second Division].

[10] *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission on Audit*, 750 Phil. 258, 278 (2015) [Per J. Leonen, En Banc] citing COA Circular No. 86-255 (1986), as amended by COA Circular No. 95-011 (1995) and COA Circular No. 98-002 (1998).

[11] See *Salalima v. Guingona, Jr.*, 326 Phil. 847 (1996) [Per J. Davide, Jr., En Banc].

[12] Rollo, p. 169.

[13] *Santayana v. Atty. Alampay*, 494 Phil. 1 (2005), [Per J. Sandoval-Gutierrez, Third Division].

[14] *Dela Llana v. Commission on Audit*, 681 Phil. 186, 196 (2012) [Per J. Sereno, En Banc].

[15] Ponencia, p. 4.

[16] *Id.* at 190-191.

[17] *Oñate v. Commission on Audit*, 789 Phil. 260 (2016), [Per J. Peralta, En Banc].

[18] *Almadovar v. Commission on Audit*, 773 Phil. 165 (2015) [Per J. Mendoza, En Banc]; *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission on Audit*, 750 Phil. 258 (2015) [Per J. Leonen, En Banc].

[19] 460 Phil. 493 (2003) [Per J. Tinga, Second Division].

[20] *Id.* at 505-506.

[21] 390 Phil. 1101 (2000) [Per J. Kapunan, En Banc].

[22] *Id.* at 1112.

[23] 750 Phil. 258 (2015) [Per J. Leonen, En Banc].

[24] *Id.*

[25] Republic Act No. 9136 (2001), sec. 49 states:

Section 49. Creation of Power Sector Assets and Liabilities Management Corporation. — There is hereby created a government-owned and -controlled corporation to be known as the "Power Sector Assets and Liabilities Management Corporation", hereinafter referred to as the "PSALM Corp.", which shall take ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets. All outstanding obligations of the NPC arising from loans, issuances of bonds, securities and other instruments of indebtedness shall be transferred to and assumed by the PSALM Corp. within one hundred eighty (180) days from the approval of this Act.

[26] *Polloso v. Gangan*, 390 Phil. 1101 (2000), [Per J. Kapunan, En Banc].

[27] Ponencia, p. 2.

[28] As amended by Commission on Audit Circular No. 95-011 dated December 4, 1995 and Commission on Audit Circular No. 98-002 dated June 9, 1998.

[29] Ponencia, p. 2.

[30] *Id.* at 4.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] CONST., art. IX-A, sec. 6.

[35] CONST., art. III, sec. 16.

[36] Navarro v. Commission on Audit, G.R. No. 238676, November 19, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65985>> [Per J. J.C. Reyes, Jr., En Banc].

[37] Id.

[38] Id.

[39] Id.

[40] Ponencia, p. 7 citing COA Memorandum.

[41] Id.

[42] Id.

[43] Id.

[44] Id.

[45] Id. at 20 citing rollo, p. 41-A.

[46] CONST., art. IX-A, sec. 7.

[47] Technical Education and Skills Development Authority v. Commission on Audit, 729 Phil. 60 (2014) [Per J. Carpio, En Banc].

[48] Id. at 72-73.

CONCURRING AND DISSENTING OPINION

CAGUIOA, J.:

I concur in the result that the Petition should be granted. However, I cannot join the ponencia: (1) in holding that the Commission on Audit (COA) can determine whether to require pre-audit despite having lifted the same; and (2) in setting a period of 60 calendar days prior to the intended engagement for agencies to submit requests for concurrence and a period of 60 calendar days from receipt for the COA to resolve legal retainer reviews.

The ponencia finds that the prior written concurrence from the COA when it comes to the hiring of private counsel is an instance of pre-audit.[1] Nonetheless, the ponencia states that the COA's Office of the General Counsel (OGC) has the mandate to determine whether to require pre-audit or post-audit as this is a constitutional mandate.[2] As remedial measures, the ponencia adds that government agencies should file their requests for concurrence not later than 60 calendar days prior to the estimated date of engagement or retainer, and that the COA should resolve them within a period of 60 calendar days from its receipt.[3]

I write separately to submit my observations on the proper limits of the prior COA concurrence requirement in the engagement of private counsel. In particular, I respectfully disagree with the ponencia's treatment of a prior written concurrence as a valid situation in which the COA decided to impose pre-audit, primarily because the COA had already lifted all pre-audit activities through its own issuances. To top it all, there has yet to be a circular from the COA reinstating the pre-audit system for all government transactions since its issuance of COA Circular No. 2011-002,[4] which fully implemented the post-audit system.

Moreover, I diverge from the holding that the 60-day period provided under Presidential Decree (PD) No. 1445[5]

and COA's 2009 Revised Rules of Procedure[6] (COA Revised Rules of Procedure) is applicable when it comes to the engagement of private counsel.

Facts of the case

In a letter dated May 9, 2011, Power Sector Assets and Liabilities Management Corporation (PSALM) sought the concurrence of the COA and the Office of the Government Corporate Counsel (OGCC) to the engagement of two legal advisors on the privatization of the generation assets and Independent Power Producer (IPP) contracts of the National Power Corporation (NPC). The engagement of consultants was in connection with the implementation of PSALM's privatization mandate under the Electric Power Industry Reform Act[7] (EPIRA). PSALM requested that the action on its request be released on or before May 30, 2011 as the hiring of said legal advisors was urgently needed to conform to the strict timelines imposed under the EPIRA.

Only the OGCC's concurrence was received by PSALM before the requested deadline of May 30, 2011; the request to the COA was not acted upon. PSALM proceeded with the engagement of the legal advisors some three months later. It was only three years later in 2014 that the COA took official action denying the request for concurrence since PSALM engaged the services of the two legal advisors without its prior concurrence. The COA ruled that its prior concurrence was an indispensable requirement under COA Circular Nos. 86-255[8] and 95-011.[9]

The Court has the power to determine whether the requirement of prior COA concurrence is an instance of pre-audit

Senior Associate Justice Estela M. Perlas-Bernabe (Justice Bernabe) expressed reservations about dictating to the COA that the written concurrence requirement is an instance of pre-audit contrary to the COA's position in its Memorandum that it is not. Justice Bernabe explains that such jurisdiction belongs exclusively to the COA as it is given the exclusive authority to define the scope of its audit.[10]

There is no doubt that COA Circular Nos. 86-255 and 95-011 were issued pursuant to the COA's exclusive authority to define the scope of its audit and promulgate accounting and auditing rules. However, while the COA has such exclusive authority, this does not preclude the Court from examining or determining whether a particular transaction is an instance of pre-audit or not. In fact, in *Villanueva v. COA*[11] (*Villanueva*), the Court had the occasion to determine whether a COA auditor conducted a pre-audit at the time of the subject public bidding in 1994. In *Villanueva*, petitioners challenged the COA's ruling that the role of the COA representative in public bidding is merely as a witness, arguing that this would make government representatives tasked with protecting government interests mere automatons. The COA, through the Office of the Solicitor General (OSG), countered that the resident auditor, as representative of the COA, serves only as an "observer" who can only perform post-audit functions and is not permitted to participate or be actively involved in the bidding process, as this would be tantamount to exercising pre-audit functions. Ruling in COA's favor, the Court in *Villanueva* defined what a pre-audit is, emphasized that pre-audit had already been lifted, and concluded that the COA auditor was not conducting pre-audit at the time:

x x x COA Circular No. 78-87 dated 06 September 1978 x x x requires the attendance of an auditor or his duly authorized representative in the opening of bids. The scope of the functions of the auditor during the opening of bids is clearly delineated by the said circular[.] x x x

x x x x

As respondent COA obviously relied on the foregoing circular in affirming SAO Report No. 95-31 of the Special Audit Team finding that the responsibility for determining whether there has been an overprice in the items up for bid pertains to the members of the PBAC and not the COA auditor, it cannot be said that respondent COA acted in grave abuse of its discretion. In *Danville Maritime v. Commission on Audit*, where the petitioner thereat likewise argued that the bidding conducted was valid as the COA representative who was then present made no objections to the same, we ruled that "the role of the COA representative at the time of the bidding was only as a witness to insure documentary integrity, i.e., by ensuring that every document is properly identified and/or marked and that the records of the bidding are securely kept."

Moreover, it must be kept in mind that as early as 1989, COA had already passed COA Circular No. 89-299 lifting the pre-audit of government transactions. A pre-audit is an examination of financial transactions before their consumption or payment. A pre-audit seeks to determine that: "(1) The proposed expenditure complies with an appropriation law or other specific statutory authority; (2) Sufficient funds are available for the purpose; (3) The proposed expenditure is not unreasonable or extravagant and the unexpended balance of appropriations where it will be charged to is sufficient to cover the entire amount thereof; and (4) The transaction is approved by proper authority and the claim is duly supported by authentic underlying evidences."

Applying the foregoing to the facts before us, it can be safely said that at the time of the subject public bidding in 1994, the COA auditor was not conducting a pre-audit. Her presence thereat, as correctly pointed out by respondent, was merely as a witness to ensure documentary integrity.[12]

In this lights, the Court then has the power to determine whether the requirement of obtaining the COA's prior concurrence to the engagement of private counsel is an instance of pre-audit. Furthermore, under Section 7, Article IX-A of the Constitution, a decision, order, or ruling of the COA may be brought to this Court on certiorari:

Sec. 7. x x x Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court on certiorari by the aggrieved party within thirty days from receipt of a copy thereof.[13]

The Constitution limits the permissible scope of inquiry over judgments or resolutions of the COA only to errors of jurisdiction or those rendered with grave abuse of discretion.[14] The Court explained this in *Veloso v. COA*: [15]

It is the general policy of the Court to sustain the decisions of administrative authorities, especially one which is constitutionally-created not only on the basis of the doctrine of separation of powers but also for their presumed expertise in the laws they are entrusted to enforce. Findings of administrative agencies are accorded not only respect but also finality when the decision and order are not tainted with unfairness or arbitrariness that would amount to grave abuse of discretion. It is only when the COA has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, that this Court entertains a petition questioning its rulings. There is grave abuse of discretion when there is an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law or to act in contemplation of law as when the judgment rendered is not based on law and evidence but on caprice, whim and despotism.[16]

The present Petition challenges the COA's Decision, which was anchored on COA Circular Nos. 86-255 and 95-011. According to the COA, its concurrence is an indispensable requirement to the hiring of private counsel. Thus, the Court must determine whether the COA's Decision was tainted with grave abuse of discretion. In deciding this case, the Court should not therefore be prevented from determining whether the COA's prior written concurrence constitutes pre-audit. The COA's exclusive authority to define the scope of its audit does not remove or denigrate the Court's power to review its judgments or resolutions, especially if it is tainted with grave abuse of

discretion. As explained below, I believe that the COA committed grave abuse of discretion by relying solely on COA Circular Nos. 86-255 and 95-011 without taking into account its fully implemented post-audit system.

Prior COA concurrence is a species of pre-audit

In compliance with the Court's Resolution dated December 9, 2020, the COA, through the OSG, submits that the COA's prior written concurrence to the hiring of private counsel under COA Circular No. 86-255, as amended, is not a species of pre-audit.[17]

I do not agree with the OSG's position. My stance is that prior written concurrence is, and cannot be considered anything other than, a species of pre-audit. A pre-audit is an examination of financial transactions before their consummation or payment.[18] It seeks to determine whether the following conditions are present:

- (1) the proposed expenditure complies with an appropriation law or other specific statutory authority;
- (2) sufficient funds are available for the purpose;
- (3) the proposed expenditure is not unreasonable or extravagant, and the unexpended balance of appropriations to which it will be charged is sufficient to cover the entire amount of the expenditure; and
- (4) the transaction is approved by the proper authority and the claim is duly supported by authentic underlying evidence.[19]

Applying the foregoing to the concurrence requirement, the COA's prior written concurrence before the engagement of private counsel is essentially a pre-audit.

First, despite asserting that its prior written concurrence does not amount to pre-audit, the COA itself admits in its Memorandum that the primary purpose of securing its written concurrence is to determine the reasonableness of the legal fees of the private counsel.[20] This supports my position that the written concurrence falls under the purview of the pre-audit system. When government agencies seek the COA's concurrence, the COA reviews the letter-request to determine if the legal fees to be paid are excessive, extravagant, or unreasonable, which is a pre-requisite to the hiring of private counsel. Consequently, if the COA finds the payment to private counsel to be unreasonable or excessive, it would not give its written concurrence to the government agency concerned.[21]

Second, as astutely observed by the ponente, a pre-audit is done to identify suspicious transactions on their face to avoid the wastage of public funds before their disbursement, and this is what the written concurrence is also meant to achieve.[22] Certainly, the requirement of written concurrence and pre-audit share an identical purpose, i.e., to avoid irregular, illegal, wasteful, and anomalous disbursements of huge amounts of public funds before their payment or disbursement.[23]

Third, in an attempt to show that its prior written concurrence is not a species of pre-audit, the COA states that such has no reference to any specific payment or disbursement to the private counsel.[24] Conversely, this is precisely what a pre-audit system is all about — reviewing the government transaction before payment. The determination of the reasonableness of the legal fees is fundamentally an examination of financial transactions before their consummation or payment. That the COA has the latitude to subject the payment to the private counsel to another instance of pre-audit after billing does not preclude its legal retainer review from being considered to be what it essentially is: a pre-audit.

In fine, therefore, the requirement of securing the COA's prior written concurrence before the engagement of

private counsel comes within the purview of what a pre-audit system is.

Prior COA concurrence is not required with the lifting of pre-audit activities

The ponencia maintains that the contracts were subject to the concurrence requirement under COA Circular Nos. 86-255 and 95-011, but the COA committed grave abuse of discretion when it acted on PSALM's request for engagement of the legal advisors only after three years following its receipt thereof.[25]

I disagree. I maintain that COA Circular Nos. 86-255 and 95-011 have effectively been rendered *functus officio* by subsequent COA issuances. Thus, prior COA concurrence should no longer have been required.

I submit that the necessity of engaging private counsel rests primarily upon the determination of the OSG and the OGCC — as statutory counsel of national government agencies and government-owned and/or controlled corporations (GOCC) — who are in the best position to understand the requirements of a particular litigation or matter for which the engagement of private counsel is sought. Specifically, for the engagement of private counsel by GOCCs, Rule 9, Section 9.2.1 of the 2006 OGCC Rules[26] pertinently provides:

Sec. 9.2. Exception to general prohibition. — Notwithstanding the foregoing prohibition stated in Section 9.1 above, the GOCC may engage private counsel in exceptional cases upon prior approval of the OGCC and with the written concurrence of the Commission on Audit (COA).

9.2.1 Considerations in hiring private lawyers. — In determining whether or not to approve such hiring, the Government Corporate Counsel may consider the following circumstances, in addition to the nature of the case, among others:

- a) the absence of a legal department or legal officer when the exigencies of service so requires;
- b) the venue is in a distant province and the hiring of a local lawyer in that province would entail less expenses than in sending an OGCC lawyer to handle the case;
- c) the nature of the case requires immediate attention;
- d) the expertise or capability of the proposed private counsel in a particular field is well known or respected, and the hiring of the same will facilitate the completion of the negotiation or termination of proceedings thereof; and
- e) in highly exceptional cases as may be determined by the Government Corporate Counsel.

To stress, the determination of whether the engagement of private counsel is necessary is beyond the competence and authority of the COA. The only reasonable explanation for the requirement of prior written concurrence under COA Circular Nos. 86-255 and 95-011 is that its participation is essentially a pre-audit, which was consistent with the then prevailing practice of subjecting most public expenditures to the COA's pre-audit.

An examination of the timeline of relevant COA issuances leading up to the lifting of pre-audit activities and full implementation of post-audit in 2011 provides the proper and correct context to the requirement of prior written concurrence.

In 1982, the COA issued COA Circular No. 82-195[27] which stated that financial transactions of the government shall no longer be subject to pre-audit by the COA, with certain exceptions. Remarkably, this COA Circular No. 82- 195 stated that pre-audit activities shall continue to be performed on the "review and evaluation of consultancy contracts" but not as pre-requisites to payment of claims.[28]

In 1986, the COA issued COA Circular No. 86-257 which reinstituted the pre-audit activities on a limited and selective basis in view of the subsequent events demonstrating that the elimination of the pre-audit system was contributory to irregular, illegal, wasteful and anomalous disbursements of huge amounts of public funds. In that same year, the COA issued Circular No. 86-255 requiring the prior written conformity of the OSG or OGCC as well as the written concurrence of the COA to the hiring of private counsel, otherwise, the payment of retainer fees would be disallowed in audit.

After three years, COA Circular No. 89-299,[29] as amended by COA Circular No. 89-299A,[30] again lifted the pre-audit as a pre-requisite to the implementation or prosecution of projects and payment of claims. This Circular covered the financial transactions, irrespective of amount, of all agencies of the National Government Agencies (NGAs) and all GOCCs. Instead, those financial transactions of the government agencies were subjected to post-audit by the COA.[31]

The COA subsequently issued COA Circular No. 94-006[32] in 1994 which expanded the lifting of pre-audit to cover local government units (LGUs) and COA Circular No. 95-006[33] in May 1995 which lifted the pre-audit of all financial transactions without exception. In December 1995, COA Circular No. 95-011 was issued which provides that the written conformity and acquiescence of the OSG or the OGCC and the written concurrence of the COA shall first be secured before the hiring or employment of a private counsel or law firm under extraordinary or exceptional circumstances.

EPIRA created PSALM in 2001 which took ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets.[34]

Subsequently, through the issuance of COA Circular No. 2009-002, the COA reinstituted selective pre-audit on government transactions in NGAs, LGUs, GOCCs with original charters for certain transactions mentioned therein. Annex A of this Circular listed the covered government agencies among which are Philippine National Oil Company, NPC, and National Transmission Commission. PSALM is not included in the list.

In a letter dated May 9, 2011, PSALM requested the OGCC and COA concurrences. Only the OGCC acquiesced to the hiring of the legal advisors before the requested deadline. On July 22, 2011, COA Circular No. 2011-002 again lifted the pre-audit of government transactions.[35] After three years, the COA denied PSALM's request for concurrence.

Based on the timeline, with PSALM not being included in the list of government agencies in COA Circular No. 2009-002 whose transactions were subject to pre-audit, it can be seen that it is still governed by COA Circular No. 95-006 which lifted pre-audit activities. Particularly, COA Circular No. 95-006 enumerated the pre-audit activities which were lifted including the "review and evaluation of government contracts for auditing, accounting and related services." [36] Aside from this, COA Circular No. 95-006 mentioned that pre-audit of all financial transactions such as "consultancy and other related services" were lifted and shall be subject to post-audit.[37] The mere fact of stating that these transactions would no longer be subject to pre-audit had effectively erased any doubt on whether prior COA concurrence is still required when it comes to the hiring of private counsel.

Moreover, and in any event, COA Circular Nos. 86-255 and 95-011 requiring prior COA concurrence were effectively rendered *functus officio* when the COA changed course on July 22, 2011 in COA Circular No. 2011-002, which lifted the pre-audit of government transactions to accelerate the delivery of public services and ensure facilitation of government transactions.[38] The reason for the lifting of pre-audit activities was stated concisely by former COA Chairman Grace Pulido-Tan: "We have [been] receiving concerns from agencies that auditors are looking for this and that documents. Nauuntol ang mga proyekto x x x." [39] To date, Circular No. 2011-002 remains valid.[40]

At the risk of belaboring the point, COA Circular No. 86-255, as amended, which requires the COA's prior written concurrence, is a species of pre-audit. This holding, coupled with the COA's admission in its Memorandum that COA Circular No. 2011-002 is still in effect and has not been amended or revoked,[41] confirms my view that COA Circular Nos. 86-255 and 95-011 were rendered *functus officio* with the lifting of all pre-audit activities and the full implementation of the post-audit system. Indeed, this Court had already recognized in Villanueva that as early as 1989, the COA had already passed COA Circular No. 89-299 lifting the pre-audit of government transactions.

As well, COA Circular No. 2011-002, which lifted all pre-audit activities that were then performed on financial transactions, was issued in accordance with the COA's constitutional mandate that it has the exclusive authority to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations.[42]

Even more, if the COA saw the need to revert to a system of pre-audit, it could have done so by issuing another circular amending or revoking COA Circular No. 2011-002. This is in relation to the COA's exclusive authority to define the scope of its audit and examination, where it may reinstitute the pre-audit system when necessary. For instance, before 1982, the COA conducted pre-audit on government transactions. Nonetheless, as previously stated, pre-audit was lifted with the issuance of COA Circular No. 82-195. Over the years, the COA issued circulars[43] that reinstated pre-audit activities on a limited and selective basis and subsequently lifted them. That said, whenever COA believed it necessary to reinstate the pre-audit system, what it did was to issue another circular amending or revoking the withdrawal of pre-audit.

On this point, the ponencia disagrees and asserts that requiring a separate issuance to reinstall pre-audit would be redundant with the "saving clause" in place under COA Circular No. 2011-002.[44]

While the ponencia correctly cites COA Circular No. 2011-002, which provides that COA may reinstitute pre-audit whenever circumstances warrant, the ponencia fails to mention that the same Circular categorically states that all transactions submitted or pending pre-audit as of July 22, 2011 shall no longer be pre-audited.[45]

It is likewise necessary to point out that COA Circular No. 95-006, which lifted pre-audit activities, also had the same provision, viz.:

4.03 Whenever circumstances warrant, however, such as where the internal control system of a government agency is inadequate, this Commission may reinstitute pre-audit or adopt such other control measures, including temporary or special pre-audit, as are necessary and appropriate to protect the funds and property of the government.

Notwithstanding such "saving clause" in COA Circular No. 95-006, the COA found it necessary to issue COA Circular No. 2009-002, which reinstituted selective pre-audit on government transactions. In effect, if an amendment is not needed, why would the COA issue COA Circular No. 2009-002 reverting to selective pre-audit? This only goes to show that whenever selective pre-audit is reinstituted, the COA has issued another Circular amending, revoking, or modifying the previous circular which lifted pre-audit.[46]

For sure, the COA's practice of still requiring its written concurrence contradicts what its most recent circular states — that the COA lifted all pre-audit activities. Thus, requiring the COA's prior written concurrence to the hiring of private counsel should no longer be necessary, as this amounts to pre-audit, which the COA had long lifted.

To stress, there has yet to be a circular from the COA reverting to pre-audit system for all government transactions since the issuance of COA Circular No. 2011-002. This COA Circular No. 2011-002 has yet to be

amended or revoked by a subsequent circular. Thus, by its own issuances, the COA already lifted all pre-audit activities, which include the requirement of written concurrence for the engagement of private counsel.

In view of the foregoing, I submit that the COA's prior concurrence should no longer be required once the statutory government counsel acquiesces to the engagement of private counsel.

Notably, in this case, the OGCC gave its concurrence to the engagement of private counsel. What is more, at the time the COA denied PSALM's request for concurrence in 2014, all pre-audit activities had already been lifted through COA's own Circular No. 2011-002.[47] In its Decision, the COA asserted that its concurrence was an indispensable requirement prior to the hiring of legal advisors.[48] This, to me, is an act of grave abuse of discretion as there is no valid basis for ignoring its own issuance through COA Circular No. 2011-002 lifting all pre-audit activities. To be sure, allowing the COA to continue invoking COA Circular Nos. 86-255 and 95-011 would frustrate and reject its objectives in COA Circular No. 2011-002 to accelerate the delivery of public services and ensure facilitation of government transactions. To say that the lack of the COA's concurrence can defeat an otherwise necessary and lawful engagement of private counsel is to diminish, denigrate, if not totally undermine, both the OSG or OGCC's competence as counsel and the agency or GOCC's right and responsibility to protect governmental interest.

With the acquiescence of the OGCC to PSALM's request for the hiring of the legal advisors, the COA's prior concurrence to their hiring was no longer required. By issuing COA Circular No. 86-255, the COA's objective was to curb the hiring of private lawyers in consideration of fixed retainer fees, at times in unreasonable amounts, paid from public funds. One cannot, I believe, fairly characterize such rationale as requiring from the COA a prior written concurrence for the necessity of hiring of private counsel, lest a disallowance automatically issues.

Even assuming that the COA can insist on the continued effectivity of COA Circular Nos. 86-255 and 95-011 as an exercise of its determination to conduct pre-audit, it must necessarily be limited to the reasonableness of the legal fees to be paid to the private counsel. This much is apparently admitted by the COA when it stated in its Memorandum that "[it] respectfully informs the [Court] that it is currently working on revisions to existing policies which would seek to limit the Legal Retainer Review to the reasonableness of the rates, since the acquiescence of the OSG or OGCC would cover the question of necessity of the engagement." [49]

COA Circular No. 2021-003

On July 16, 2021, COA Circular No. 2021-003[50] was issued by the COA outlining the guidelines for exempting NGAs and GOCCs from the requirement to obtain the COA's prior written concurrence to the hiring of private counsel. COA Circular No. 2021-003 was issued "to avoid unnecessary delay in the hiring of a private lawyer or legal retainer x x x and improve efficiency in government operations." [51]

COA Circular No. 2021-003, however, did not totally remove the prior written concurrence requirement. Certain conditions[52] must be met to claim an exemption from the requirement of COA's prior written concurrence. Nevertheless, even if the conditions are met, this does not preclude the COA from conducting post-audit over the disbursements made to the private counsel. COA Circular No. 2021-003 categorically states:

Notwithstanding the exemption from the requirement of COA's written concurrence, any disbursements made to the private lawyer engaged by the national government agency or GOCC, shall still be subject to post-audit based on existing rules and regulations of the Commission and to applicable rules and regulations issued by the CSC and other government agencies. (Emphasis supplied)

Based on the afore-quoted provision, the COA, in effect, implies that its prior written concurrence amounts to a pre-audit. This must be the case, given that the COA acknowledged that should its concurrence be not required,

any disbursement made to the private counsel would be subject to post-audit. For instance, one of the conditions outlined in COA Circular No. 2021-003 to claim an exemption from the requirement of prior written concurrence is that "[t]he consultancy fee of the lawyer, including other remunerations and allowances, does not exceed [Php50,000.00] per month."^[53] Consequently, if this condition is met, along with the other enumerated guidelines, prior written concurrence is not required. As clearly stated in the COA's latest issuance, the purpose of the written concurrence which is to determine the reasonableness of the amount of legal fees,^[54] is essentially a form of pre-audit.

Conversely, if any of the conditions outlined in COA Circular No. 2021-003 is not met, e.g., the amount of legal fees is beyond the limit of Php50,000.00 per month, then the COA's prior written concurrence should still not be required to be secured, as this amounts to pre-audit. In any case, COA's audit jurisdiction is preserved with the post-audit of the payment to private counsel. The role of the COA is not to resolve whether government agencies should hire a private counsel. Rather, its task is to determine, prevent, and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds.^[55]

This power, authority, and duty of the COA is not lost in cases where the legal fees paid to private counsel are deemed irregular or excessive, as these fees are necessarily subjected to post-audit. Indeed, the COA states in its Memorandum that it may disallow in audit the payment to private counsel on post-audit if the auditor finds, among other things, that the private counsel was overpaid.^[56] This means that even in the absence of COA Circular Nos. 86-255 and 95-011, the COA still has the power and duty to disallow the unnecessary, extravagant, or excessive payment of legal fees.

A question now arises as to the effect of COA Circular No. 2021-003 to the present case. The ponencia clarifies that the contracts of engagement here are not covered by COA Circular No. 2021-003 for two reasons. First, the contracts are no longer pending review with COA. Second, they failed to comply with the condition limiting legal fees to Php50,000.00 per month.^[57]

For a completely different reason, I agree that COA Circular No. 2021- 003 does not apply here. Again, not being one of the GOCCs covered by COA Circular No. 2009-002 which reinstated selective pre-audit, I thus reiterate my discussion above that PSALM is governed by COA Circular No. 95-006 which lifted pre-audit without exception. Moreover, even if COA Circular No. 2011-002 is applied, the same conclusion would still be reached because when the COA denied the request for concurrence in 2014, all pre-audit activities had already been lifted.

Additionally, I cannot completely agree with the ponencia's holding that the COA's issuance of COA Circular No. 2021-003 establishes that prior written concurrence had always been the rule.^[58] The ponencia disregarded the fact that transactions submitted or pending pre-audit as of July 22, 2011,^[59] which includes PSALM's request for the COA's prior written concurrence, was held to no longer be subject to pre-audit. Hence, it is not accurate to assert that the requirement of prior written concurrence had always been the rule, as the existence of COA Circular No. 2011-002 negates this statement.

The 60-day period provided under PD No. 1445 and the COA Revised Rules of Procedure is not applicable

In view of my position that prior COA concurrence is no longer required, I cannot join the rule laid down by the ponencia, which it said the COA may adopt, requiring the submission to the COA of the request for concurrence not later than 60 calendar days prior to the estimated date of engagement or retainer, attaching thereto the written conformity or acquiescence of the OGCC.^[60] The ponencia continues that the COA must act on it within 60

calendar days from the date of its receipt.[61] Even further, the ponencia adds that if the period of 60 calendar days were to expire without any action from the COA, then the request should be deemed approved.[62]

The ponencia concludes that these remedial measures are "matters of best practice or factors that underlie an analysis of the present subject." [63]

I disagree with this postulation. I find the reliance on the 60-day period for submitting and acting on the request for concurrence completely misplaced.

Section 49 of PD No. 1445 as well as Section 4, Rule X of the COA Revised Rules of Procedure set out the period within which the COA shall render decisions brought before it:

Sec. 49. Period for Rendering Decisions of the Commission. — The Commission shall decide any case brought before it within sixty days from the date of its submission for resolution. If the account or claim involved in the case needs reference to other persons or offices, or to a party interested, the period shall be counted from the time the last comment necessary to a proper decision is received by it.

x x x x

Sec. 4. Period for Rendering Decision. — Any case brought to the Commission Proper shall be decided within sixty (60) days from the date it is submitted for decision or resolution, in accordance with Section 4, Rule III hereof. (Emphasis supplied)

The 60-day period in PD No. 1445 and in the COA Revised Rules of Procedure starts from the date a case is submitted for decision or resolution. And under Section 4, Rule III of the COA Revised Rules of Procedure, a case is deemed submitted for decision or resolution "upon the filing of the last pleading, brief or memorandum." [64]

In assessing to what case or matter the 60-day period applies, a distinction between a request for concurrence in the hiring of legal advisors and money claims is the point of reference.

While it is the Commission Proper which has original jurisdiction over request for concurrence in the hiring of legal advisors and money claims[65] — there is a difference between the two. When a government agency requests for concurrence from the COA, what it files is not a pleading, brief, or memorandum but a letter-request. Such request for concurrence shall be filed with the OGC which shall approve or deny the same in behalf of the COA.[66] On the other hand, what is filed in a money claim is a petition.[67] As to the application of the 60-day period, this distinction makes all the difference.

While it is the Commission Proper which has original jurisdiction over request for concurrence in the hiring of legal advisors,[68] it bears to stress that the period within which the COA shall act on the letter-request is not provided for in PD No. 1445 or in its Revised Rules of Procedure. In contrast, money claims over which the Commission Proper also has original jurisdiction,[69] it is a petition that is filed before the COA which must unquestionably act upon it within 60 days.[70] This being so, the 60-day period does not come into play when only a letter-request for concurrence is filed.

Equally telling, the COA states in its Memorandum that it is covered by the 15-day period under Section 5(a)[71] of Republic Act (RA) No. 6713[72] and the 60-day period under PD No. 1445 and the COA Revised Rules of Procedure.[73] Yet, in response to this Court's question on whether the COA has set a clear and specific timeline (a) within which government agencies should obtain its prior written concurrence and (b) within which it should act on the requests, the COA's response does not provide a specific time frame. It is thus not clear whether requests for concurrence should be filed and resolved within the 15-day period prescribed by RA No. 6713 or the 60-day period prescribed by PD No. 1445 and the COA Revised Rules of Procedure.

Furthermore, if the Court subscribes to the ponencia's proposed measures, it would essentially be an act of judicial legislation as this Court would be pre-empting the power of Congress to enact laws. The Court's function is to apply or interpret the laws, particularly where gaps exist or where ambiguities becloud issues, but this Court should not arrogate unto itself the task of legislating.[74]

In the case of *Corpuz v. People*,[75] which involved the question of whether the Court can adjust the period of imprisonment for crimes against property which period is based on the value of the property, and which valuation had been set way back in the 1930s, it was noted that the Court cannot modify the range of penalties because that would constitute judicial legislation:

x x x [T]he Court should give Congress a chance to perform its primordial duty of lawmaking. The Court should not preempt Congress and usurp its inherent powers of making and enacting laws. While it may be the most expeditious approach, a short cut by judicial fiat is a dangerous proposition, lest the Court dare trespass on prohibited judicial legislation.[76]

More importantly, aside from engaging in judicial legislation, the remedial measures proposed by the ponencia would violate the COA's authority to promulgate its own rules of procedure under Article IX-A, Section 6 and Article IX-D, Section 2(2) of the 1987 Constitution which read:

Sec. 6. Each Commission en banc may promulgate its own rules concerning pleadings and practice before it or before any of its offices. Such rules however shall not diminish, increase, or modify substantive rights.

x x x x

Sec. 2. x x x

(2) The Commission shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and 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. (Emphasis supplied)

The 1987 Constitution has made the COA the guardian of public funds, vesting it with broad powers over all accounts pertaining to government revenue and expenditures and the uses of public funds and property including the exclusive authority to define the scope of its audit and examination, establish the techniques and methods for such review, and promulgate accounting and auditing rules and regulations.[77]

The Court cannot impose conditions not otherwise provided for by PD No. 1445 and the COA Revised Rules of Procedure. To repeat, there is nothing in PD No. 1445 or in the COA Revised Rules of Procedure that specifies a period for filing requests for concurrence and for the COA to rule on them within 60 calendar days. That the 60-day period is culled from PD No. 1445 and the COA Revised Rules of Procedure cannot be taken to mean that requests for concurrence should be filed and acted upon within the same time frame as money claims. While the ponencia's proposed remedial measures are laudable, this Court cannot adopt them without engaging in judicial legislation. More, the Court would be violating the exclusive authority of the COA to promulgate its own rules of procedure under the Constitution.

At any rate, the 60-day period is not applicable considering that COA Circular Nos. 86-255 and 95-011 were rendered *functus officio* with the lifting of all pre-audit activities in 2011.

The proposed period to submit and resolve a request for written concurrence cannot be likened to the Rules on Return the Court laid down in *Madera v. COA*[78] (*Madera*). To recall, the Court explicitly stated in *Madera*:

Indeed, the Court recognizes that the jurisprudence regarding the refund of disallowed amounts by the COA is evolving, at times conflicting, and is primarily dealt with on a case-to-case basis. The discussions made in this petition, however, have made it apparent that there is now a need to harmonize the various rulings of the Court. For this reason, the Court takes this opportunity to lay down the rules that would be applied henceforth in determining the liability to return disallowed amounts, guided by applicable laws and rules as well as the current state of jurisprudence.[79]

It is clear from the foregoing that what Madera did was to harmonize conflicting rulings of the Court and set guideposts for the Court to follow in resolving future disallowance cases — it was not directed to the COA or to parties that may appear before it.

For the COA to take its cue from how the Court resolves disallowance cases is an altogether different matter from the Court laying down periods and conditions for COA to follow anent requests brought before it. In the same manner that I submit that the COA must defer to the statutory government counsel's determination of the necessity of engaging private counsel, this Court must also stay its hand before setting periods and conditions to submit and resolve requests for concurrence in violation of the COA's constitutional authority to promulgate its own rules of procedure. If the proposed remedial measures are merely recommendatory, as the ponencia suggests, then the Court should defer to the COA as to what period it deems appropriate in resolving requests for concurrence. This is especially appropriate given that the COA already manifested that it is "currently formulating more policy issuances on the written concurrence to avoid unnecessary delay in the hiring of a private lawyer[.]"[80]

In fine, I concur with the ponencia in holding the COA in grave abuse of discretion in denying the request for concurrence to the engagement of private counsel by PSALM, after a three-year delay and without determining the reasonableness of the expenses the engagement would entail.

However, I maintain that the COA abused its discretion in invoking COA Circular Nos. 86-255 and 95-011 to require its prior concurrence to the hiring of private counsel — which runs counter to the full implementation of its own later COA Circular No. 2011-002 that negated these requirements. Again, COA Circular Nos. 86-255 and 95-011 were rendered functus officio through the COA's own initiative in fully implementing post-audit. I also maintain that the 60-day period is not applicable when it comes to the engagement of private counsel.

[1] Ponencia, pp. 8-10.

[2] Id. at 11-12.

[3] Id. at 27-29.

[4] Re: Lifting of Pre-Audit of Government Transactions, July 22, 2011.

[5] ORDAINING AND INSTITUTING A GOVERNMENT AUDITING CODE OF THE PHILIPPINES, otherwise known as the "GOVERNMENT AUDITING CODE OF THE PHILIPPINES."

[6] The 2009 Revised Rules of Procedure of the Commission on Audit, September 15, 2009.

[7] Republic Act No. 9136, June 8, 2001.

[8] Re: Inhibition Against Employment by Government Agencies and Instrumentalities, Including Government-Owned and/or Controlled Corporations, of Private Lawyers to Handle Their Legal Cases, April 2, 1986.

[9] Re: Prohibition Against Employment by Government Agencies and Instrumentalities, Including

Government-Owned or Controlled Corporations, of Private Lawyers to Handle Their Legal Cases, December 4, 1995.

[10] Separate Concurring Opinion of J. Perlas-Bernabe, pp. 5-8.

[11] G.R. No. 151987, March 18, 2005, 453 SCRA 782.

[12] *Id.* at 792-796; emphasis supplied, citations omitted.

[13] See also RULES OF COURT, Rule 64, Sec. 2 and PD No. 1445, Sec. 50.

[14] *Reblora v. Armed Forces of the Philippines*, G.R. No. 195842, June 18, 2013, 698 SCRA 727, 735.

[15] G.R. No. 193677, September 6, 2011, 656 SCRA 767.

[16] *Id.* at 777; citations omitted.

[17] *Rollo*, p. 157.

[18] *Dela Llana v. The Chairperson, COA*, G.R. No. 180989, February 7, 2012, 665 SCRA 176, 185.

[19] *Id.* at 186; citation omitted.

[20] *Rollo*, p. 158.

[21] See *id.* at 169.

[22] *Id.*

[23] See COA Circular No. 86-257, Re: Selective Pre-Audit on Government Transactions, March 31, 1986; and COA Circular No. 2009-002, Re: Reinstating Selective Pre-Audit on Government Transactions, May 18, 2009.

[24] *Rollo*, p. 158.

[25] *Ponencia*, pp. 17-27.

[26] RULES GOVERNING THE EXERCISE BY THE OFFICE OF THE GOVERNMENT CORPORATE COUNSEL OF ITS FUNCTIONS AND POWERS AS PRINCIPAL LAW OFFICE OF ALL GOVERNMENT OWNED OR CONTROLLED CORPORATIONS, February 28, 2006.

[27] Re: Lifting of Pre-Audit of Government Transactions, October 26, 1982.

[28] *Id.*

[29] Re: Lifting of Pre-Audit of Government Transactions of National Government Agencies and Government-Owned or Controlled Corporations, March 21, 1989.

[30] Re: Restatement with Amendments of COA Circular No. 89-299 on Lifting of Pre-Audit of Financial Transactions of National Government Agencies and Government-Owned and/or Controlled Corporations, September 8, 1989.

[31] *Id.*

[32] Re: Lifting of Pre-Audit in All Agencies of the Government, Including Government-Owned and/or Controlled Corporations and Local Government Units, And Restating the Provisions of All COA Circular on the Matter, February 17, 1994.

[33] Re: Total Lifting of Pre-Audit on All Financial Transactions of the National Government Agencies,

Government-Owned and/or Controlled Corporations and Local Government Units, May 18, 1995.

[34] Section 49 of Republic Act No. 9136 provides:

Sec. 49. Creation of Power Sector Assets and liabilities Management Corporation. — There is hereby created a government-owned and controlled corporation to be known as the "Power Sector Assets and Liabilities Management Corporation," hereinafter referred to as the "PSALM Corp.," which shall take ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets. All outstanding obligations of the NPC arising from loans, issuances of bonds, securities and other instruments of indebtedness shall be transferred to and assumed by the PSALM Corp. within one hundred eighty (180) days from the approval of this Act.

[35] The relevant provision of the Circular reads:

Guided by the foregoing, and in order to accelerate the delivery of public services and ensure facilitation of government transactions, this Commission hereby withdraws selective pre-audit under COA Circular No. 2009-002 and thereby lifts all pre-audit activities presently being performed on financial transactions of the national government agencies, government owned and/or controlled corporations and local government units, except those required by existing law. (Emphasis supplied)

[36] The relevant provisions of the Circular read:

5.01 All audit activities heretofore undertaken by this Commission or its representatives in the form of pre-audit including those provided in international agreement, are hereby lifted. The following and other such similar audit activities previously performed by COA Auditors shall not be pre-requisites to implementation/prosecution of projects, perfection of contracts, payment of claims, and/or approval of applications filed with the agencies:

x x x x

5.01.12 Review and evaluation of government contracts for auditing, accounting and related services.

x x x x

[37] The relevant provisions of the Circular read:

3.01

This Circular shall apply to financial transactions, irrespective of amount, of all agencies of the National Government, government-owned and/or controlled corporations and local government units. Such transactions shall include but shall not be limited to x x x consultancy and other related services x x x[.]

x x x x

4.01

The pre-audit of all financial transactions of national government agencies, local government units and government-owned and/or controlled corporations involving implementation/prosecution of projects and/or payment of claims is hereby lifted without exception. These transactions shall be subject to post-audit by the Commission on Audit or its representatives.

[38] The relevant provision of the Circular reads:

Guided by the foregoing, and in order to accelerate the delivery of public services and ensure facilitation of government transactions, this Commission hereby withdraws selective pre-audit under COA Circular No. 2009-002 and thereby lifts all pre-audit activities presently being performed on financial transactions of the national government agencies, government owned and/or controlled corporations and local government units,

except those required by existing law. (Emphasis supplied)

[39] John Constantine G. Cordon, Pre-Audit Process Doesn't Prevent Corruption - COA, The Manila Times, December 21, 2011, available at <<https://www.manilatimes.net/2011/12/21/news/national/pre-audit--process-doesnt-prevent-corruption-coa/755528/>>.

[40] Rollo, p. 162.

[41] Id.

[42] CONSTITUTION, Art. IX-D, Sec. 2(2).

[43] COA Circular Nos. 86-257 and 2009-002.

[44] Ponencia, pp. 13-14.

[45] The relevant provision under COA Circular No. 2011-002 reads:

All transactions submitted for or otherwise pending pre-audit by this Commission as of July 22, 2011 shall no longer be pre-audited and shall be returned to the agency concerned for its appropriate action.

[46] See repealing clause in COA Circular No. 2009-002.

[47] COA Circular No. 2011-002 states:

All transactions submitted for or otherwise pending pre-audit by [the COA] as of July 22, 2011 shall no longer be pre-audited and shall be returned to the agency concerned for its appropriate action.

[48] Ponencia, p. 5.

[49] Rollo, p. 169.

[50] Re: Exempting Government Agencies and Instrumentalities, Including Government-Owned or Controlled Corporations from the Requirement of Written Concurrence from the Commission on Audit on the Engagement of: (1) Lawyers under Contracts of Service or Job Order Contracts; and (2) Legal Consultants, Subject to Specific Conditions, July 16, 2021.

[51] Id., Sec. 2.

[52] Id., Sec. 4.

[53] Id., Sec. 4.2.f.

[54] Id., Sec. 1.

[55] Delos Santos v. COA, G.R. No. 198457, August 13, 2013, 703 SCRA 501, 512.

[56] Rollo, p. 172.

[57] Ponencia, p. 17.

[58] Id. at 15.

[59] See COA Circular No. 2011-002.

[60] Ponencia, pp. 27-28.

[61] Id. at 28.

[62] Id.

[63] Id. at 29; emphasis omitted.

[64] 2009 REVISED RULES OF PROCEDURE OF THE COA, Rule III, Sec. 4.

[65] Id., Rule VIII, Sec. 1.

[66] Id., Sec. 3.

[67] Id., Sec. 2.

[68] Id., Sec. 1.

[69] Id.

[70] See *Star Special Watchman and Detective Agency, Inc. v. Puerto Princesa City*, G.R. No. 181792, April 21, 2014, 722 SCRA 66, 82-86; citing Supreme Court Administrative Circular No. 10-00, dated October 25, 2000. The relevant portion of the Circular reads:

x x x All money claims against the Government must first be filed with the Commission on Audit which must act upon it within sixty days. Rejection of the claim will authorize the claimant to elevate the matter to the Supreme Court on certiorari and in effect sue the State thereby (P.D. 1445, Sections 49-50). (Emphasis supplied)

[71] Sec. 5. Duties of Public Officials and Employees. - In the performance of their duties, all public officials and employees are under obligation to:

(a) Act promptly on letters and requests. - All public officials and employees shall, within fifteen (15) working days from receipt thereof, respond to letters, telegrams or other means of communications sent by the public. The reply must contain the action taken on the request.

[72] CODE OF CONDUCT AND ETHICAL STANDARDS FOR PUBLIC OFFICIALS AND EMPLOYEES, February 20, 1989.

[73] Rollo, p. 173.

[74] *Pagpalain Haulers, Inc. v. Trajano*, G.R. No. 133215, July 15, 1999, 310 SCRA 354, 362.

[75] G.R. No. 180016, April 29, 2014, 724 SCRA 1.

[76] Id. at 67.

[77] *Yap v. Commission on Audit*, G.R. No. 158562, April 23, 2010, 619 SCRA 154, 167-168.

[78] G.R. No. 244128, September 8, 2020.

[79] Id. at 14-15.

[80] Rollo, p. 175.

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