SUPREME COURT OF THE PHILIPPINES
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Republic of the Philippines
Supreme Court
Manila

EN BANC

MANILA INTERNATIONAL AIRPORT AUTHORITY,
Petitioner,

- *versus* -

COMMISSION ON AUDIT,
Respondent.

G.R. No. 218388

Present:

BERSAMIN, *C.J.*,
CARPIO,
PERALTA,
PERLAS-BERNABE,
LEONEN,
CAGUIOA,
REYES, JR., A.,
GESMUNDO,
*REYES, JR., J.,
HERNANDO,
CARANDANG,
LAZARO-JAVIER,
INTING, and
ZALAMEDA, *JJ.*

Promulgated:

October 15, 2019

x---x

DECISION

BERSAMIN, *C.J.*:

A loan agreement executed in conjunction with an exchange of notes between the Republic of the Philippines and a foreign government shall be governed by international law, with the rule on *pacta sunt servanda* as the guiding principle. Any subsequent agreement adjunct to the loan agreement shall be similarly governed.

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* On leave.

The Case

We consider and resolve the petition for *certiorari* brought to nullify and set aside Decision No. 2012-268 dated December 28, 2012[1] and Resolution dated January 26, 2015,[2] both issued in COA CP Case No. 2011-294, whereby respondent Commission on Audit (COA) affirmed Decision No. 2008-067 dated November 21, 2008 of the Legal and Adjudication Office (LAO)-Corporate[3] upholding Notice of Disallowance (ND) No. (FMT) 99-00-04 dated November 24, 1999[4] and Notice of Disallowance (ND) No. (FMT) 2008-018 dated November 21, 2008.[5]

Antecedents

The COA summarized the factual and procedural antecedents as follows:

> As narrated in the assailed decision, the MIAA and the Aeroports de Paris-Japan Airport Consultants, Inc. Consortium (Consultant for brevity) entered into an Agreement for Consulting Services (Agreement for, brevity) for the NAIA Terminal 2 Development Project on April 15, 1994. The Agreement, covering 795 man-months of consulting services, commenced on July 1, 1994. It originally assumed a total duration of 53 months that included a 14-month post construction services up to November 30, 1998. The construction of the Project was originally estimated to take 26 months from August 1, 1995 to September 30, 1997, followed by a 12-month defect liability period.
>
> However, the duration of the services was extended and the number of man-months increased, due to a prolonged process of pre-qualification, bidding and awarding stages, delayed Department of Environment and Natural Resources approval and Contractor's site possession, as well as numerous additional construction works.
>
> The total duration of the consulting services was, thus, extended from 53 to 69 months or a total of 1,083.81 man-months. The extension was covered by three (3) Supplementary Agreements (SAs) entered into by the MIAA and the Consultant.
>
> On November 24, 1999, the then Corporate Auditor of MIAA issued ND No. (FMT) 99-00-04 finding the Agreement's remuneration cost of ₱41,784,850.00 (excluding expatriates) excessive because it was 19.80% above the corresponding COA estimated remuneration cost of ₱34,876,915.00. Then General Manager Antonio P. Gana of MIAA in his undated letter to COA, requested reconsideration of the ND based on the following grounds:

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[1] *Rollo* (Vol. 1), pp. 36-41, issued by Chairperson Ma. Gracia M. Pulido Tan, Commissioner Juanito G. Espino, Jr. and Commissioner Heidi L. Mendoza.
[2] Id. at 43.
[3] Id. at 44-58.
[4] Id. at 59.
[5] Id. at 60-65.

1. That the cost of Consulting Services was obtained after detailed negotiations, embodied in an Agreement and the same was approved by the Office of the Government Corporate Counsel (OGCC) and concurred in by Japan Bank of International Cooperation (JBIC); and

2. That under Section 9.3 of the NEDA Guidelines, the ceiling for contingency can be negated by any existing and future commitments with respect to the selection of consultants financed partly or wholly with funds from international financial institutions. Thus, considering that the consulting services were 100% funded by JBIC and in view of other previous JBIC projects, the 10% contingency was accepted by MIAA and the OGCC and concurred in by the JBIC; that the provision of the Overseas Economic Cooperation Fund (OECF) Loan Agreement should govern the expenditure of contingency and that the contingency is not a committed payment to the consultant upon execution of the Agreement, but may be used wholly or partially, or not at all depending on the circumstances.

Consequently, the MIAA Corporate Auditor referred, through the former Director of the then Corporate Audit Office (CAO) II, this Commission, the above request to the COA Technical Services Office (TSO), for further evaluation.

In the meantime, on January 25, 2000, MIAA and the Consultant entered into a fourth SA for the extension of another 8 months, for a total of 77 months or up to November 30, 2000. The corresponding number of professional man-months increased to 1,221.65.

The COA-TSO, in response to the request for reconsideration, conducted a re-evaluation of the Agreement and thereafter reversed its earlier stand on the excessive remuneration cost, but as regards to the issue of the contingency, the COA-TSO requested the then MIAA Corporate Auditor to validate the payments charged to contingency.

Thereafter, on August 17, 2000, the then MIAA Corporate Auditor lifted and settled the disallowed amount of ₱6,907,935.00 after the same was found reasonable based on the COA-TSO Re-evaluation Report dated June 29, 2000.

On October 18, 2001, the then MIAA Corporate Auditor re-submitted the request for reconsideration, together with the COA-TSO validation and opined that the sum of payments charged to contingency was within the ceiling equivalent to 5% of the amount of the contract as prescribed under the NEDA Guidelines. He stressed that of ¥1,493,497,905.00 and ₱113,061,248.01 actually paid by MIAA to the Consultant, ¥36,349,705.00 and ₱2,752,610.77 representing 2.49% and 2.495%, respectively, or a total of 4.985% of the contract cost was charged to contingency. Moreover, the then MIAA Corporate Auditor averred that all four SAs entered into by MIAA and the Consultant were reviewed and found in order as to their technical aspects by the COA-TSO.

> Thereafter, pursuant to COA Memorandum No. 2002-039 dated July 11, 2002, the former Assistant Director of then Cluster IV-Industrial and Area Development and Regulatory, Corporate Government Sector (CGS), this Commission, forwarded the instant request to COA LAO-Corporate for appropriate action.
>
> On November 21, 2008, COA LAO-Corporate issued the assailed decision denying the remaining disallowance of ¥53,697,150.00 foreign portion and ₱3,215,267.50 local portion under ND No. (FMT) 99-00-04 dated November 24, 1999.
>
> It likewise issued the ND No. 2008-018 dated November 21, 2008 for the additional disallowance of ¥344,425,855.00 and ₱42,325,363.04 as mentioned in the decision.[6]

To assail the NDs, the petitioner appealed to the COA by petition for review, which ultimately denied the appeal upon the following ratiocination, *viz.*:

> The exemption mentioned in Section 9.3 of the NEDA Guidelines is only in respect to the selection of consultants and does not include exemption from the 5% ceiling on contingency. Also, a careful reading of Section 6.10 of the NEDA Guidelines would show that the 5% ceiling of contingency was written in a mandatory manner by the use of the verb "shall," to wit:
>
> > 6.10 Contingency
> >
> > 6.10.1 Payments in respect of costs which would exceed the estimates set forth in Section 6.1 may be chargeable to the contingency amounts in the respective estimates only if such costs are approved by the agency concerned prior to its being incurred and provided, further, that they shall be used only in line with the unit rates and costs specified in the contract and in strict compliance with the project needs. **Contingency amount shall not exceed 5% of the amount of the contract.** (emphasis added)
>
> It should be noted that the contingency amount is included in the contract cost for the purpose of facilitating the availability of funds for future requirements during the lifetime of the contract (e.g. per Section 2.04 of the Agreement, for performance of additional work to be covered by an SA). For such budgetary purposes, the NEDA Guidelines provide a ceiling of 5% of the Cost of Services.
>
> It is shown that the total actual amount charged to the contingency and paid to the Consultant exceeded the 5% ceiling, thus:

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[6] Id. at 36-38.

Actual amounts disbursed for SA 1 to SA 4 and charged to contingency	Contingency amount per Agreement	5% Contingency limit per NEDA Guidelines	Excess amount disbursed
¥451,820,155.00	¥107,394,300.00	¥53,697,150.00	¥398,123,005.00
₱48,755,898.04	₱6,430,535.00	₱3,215,267.50	₱45,540,630.54

Petitioner's claim that the actual disbursements from the contingency amount were only ¥36,349,705.00 and ₱2,752,610.77 which are 2.49% and 2.495% of the Revised Cost of Services in Yen and Pesos, respectively, does not appear factual since he did not include the portion of the cost of the SA Nos. 1 to 4. It was made to appear that the remuneration cost and reimbursement cost for the extension were part of the original Cost of Services instead of the amount being charged to contingencies as provided for in Section 2.04 of the original Agreement for Consulting Services of the parties. Section 2.04 states that:

Extension of Services Under Supplemental Agreement

The Services of Consultant may be extended for the performance of additional work as provided for in Sections 7.05 and 7.07 hereof. For each extension of the Services, a supplemental agreement shall be executed stipulating the scope and remuneration for the extended services.

The terms and conditions of the additional services under the supplemental agreement shall be also governed by this Agreement. **Remuneration to Consultant for the additional man-months shall be chargeable against Contingencies** and shall be governed by the provisions of the Agreement. (emphasis added)

After having ruled that the Agreement is not exempted from the 5% ceiling on contingency prescribed by the NEDA Guidelines, and that in fact the amount expended out of the contingency exceeded the 5% ceiling in the amount already disallowed, there is no reason to overturn the assailed decision.

RULING:

IN VIEW OF THE FOREGOING, the petition for review is hereby **DENIED**. Accordingly, COA LAO- Corporate Decision No. 2008-067 dated November 21, 2008 is hereby **SUSTAINED**. Consequently, ND Nos. (FMT) 99-00-04 and 2008-018, dated November 24, 1999 and November 21, 2008, respectively are hereby **AFFIRMED**.[7]

The petitioner moved for reconsideration, but the COA denied the motion for reconsideration on January 26, 2015.[8]

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7 Id. at 39-41.
8 Id. at 43.

Issues

The petitioner now submits the following grounds in support of its petition for *certiorari*, namely:

1) Respondent Commission on Audit acted with grave abuse of discretion amounting to lack or excess of jurisdiction in sustaining COA-LAO Corporate Decision No. 2008-067 dated November 21, 2008, thereby affirming ND Nos. (FMT) 99-00-04 and 2008-018 dated November 24, 1999 and November 21, 2008 respectively.[9]

2) Respondent Commission on Audit failed to establish the direct participation of the persons held liable in the disallowance, as well as their evident malice and bad faith in relation to the disallowed transaction.[10]

The petitioner argues that the COA gravely abused its discretion in sustaining Decision No. 2008-067;[11] that the Agreement for Consulting Services was financed by Loan Agreement No. PH-136 executed by and between the Government of the Philippines and the Overseas Economic Cooperation Fund (OECF), the implementing agency for loan aid of the Japanese Government;[12] that the loan agreement was equivalent to an executive agreement based on the ruling in *Abaya v. Ebdane* (G.R. No. 167919, February 14, 2007, 515 SCRA 720); that as an executive agreement, the loan agreement should control the determination of payments charged to contingency;[13] that the 5% ceiling for payments charged to contingency under the NEDA[14] Guidelines did not apply because the normal practice of international financial institutions was to provide a 10% contingency;[15] that the COA adjudged the officers personally liable for the disallowance without supplying any reasons for holding them personally liable;[16] and that the additional works and expenditures were incurred in good faith and utilized for legitimate purposes.[17]

The COA counters that the NEDA guidelines providing for the 5% contingency applied in the absence of any provision in the agreement that the Philippine laws should not apply;[18] that the loan agreement involved herein did not mention of international laws, regulations or practices with respect to the payments of the consultants;[19] that the exemption under Section 9.3 of the NEDA Guidelines pertained only to the selection of

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[9] Id. at 12.
[10] Id. at 19.
[11] *Rollo* (Vol. II), pp. 476-489
[12] Id. at. 445.
[13] Id. at.448.
[14] National Economic Development Authority.
[15] *Rollo* (Vol. II), pp. 448-449.
[16] Id. at 451-461.
[17] Id. at 461-462.
[18] Id. at 634.
[19] Id. at 634-635.

consultants and did not include exemption from the 5% ceiling on contingency;[20] and that the petitioner's officials were held accountable for the government funds and property as the heads of agencies.[21]

Ruling of the Court

We find merit in the petition for *certiorari*.

Generally, deference is given by the Court to the decisions and resolutions of the COA as a matter of general policy, not only on the basis of the doctrine of separation of powers but also in recognition of the COA's expertise on the laws it was entrusted to enforce. The Court also acknowledges the role that the COA assumes as guardian of public funds and properties pursuant to the 1987 Constitution under which the COA has been granted exclusive authority to disallow irregular, unnecessary, excessive, extravagant, or unconscionable expenditures or uses of government funds and properties.[22] The Court may only intervene to correct an assailed decision or resolution when the COA, in the exercise of its authority, acted without or in excess of jurisdiction, or with grave abuse of discretion.[23]

Upon review of the records, we find and hold that the COA gravely abused its discretion in affirming and issuing the questioned NDs.

We expound.

This case involved six instruments, namely: (1) the Exchange of Notes dated August 16, 1993 entered into by and between the Government of the Philippines and the Government of Japan;[24] (2) the Loan Agreement No. PH-136 executed by and between the Government of the Philippines and the OECF;[25] (3) the Agreement for Consulting Services entered into by and between the petitioner and the ADP-JAC Consortium dated April 15, 1994; (4) the Supplemental Agreement No. 1 (December 1995) executed by and between the petitioner and the ADP-JAC Consortium;[26] (5) the Supplemental Agreement No. 2 (June 1998) entered into by and between the

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[20] Id. at 639.

[21] Id. at 643-645.

[22] See Section 2 (2), Article IX, 1987 Constitution, which pertinently states:

x 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.

[23] See *Miralles v. Commission on Audit,* G.R. No. 210571, September 19, 2017, 840 SCRA 108, 117.

[24] See page 1 of Loan Agreement No. PH-136 (*rollo* [Vol. I], p. 105).

[25] *Rollo* (Vol. I), pp. 103-138.

[26] Id. at 144-164.

petitioner and the ADP-JAC Consortium;[27] and (6) the Supplemental Agreement No. 3 (September 1999) concluded by and between the petitioner and the ADP-JAC Consortium.[28]

The petitioner submits that following our ruling in *Abaya v. Ebdane, supra*, Loan Agreement No. PH-136 should be treated as an executive agreement, and, as such, the parties' intention as to how the payments would be charged to contingency should govern. On its part, the COA insists that the loan agreement did not carry any stipulation referencing the provisions to international law; hence, domestic law, particularly the NEDA Guidelines, should apply as to the 5% ceiling on contingency.

The submission of the petitioner is upheld.

Pursuant to the pronouncement in *Abaya v. Ebdane, supra*, a loan agreement executed in conjunction with the Exchange of Notes between the Philippine Government and a foreign government is an executive agreement, and should be governed by international law. This pronouncement has been consistently applied in succeeding rulings, including those in *DBM Procurement Service v. Kolonwel Trading*,[29] *Land Bank of the Philippines v. Atlanta Industries, Inc.*,[30] and *Mitsubishi Corporation-Manila Branch v. Commissioner of Internal Revenue.*[31]

Consequently, we see no justification to treat Loan Agreement No. PH-136 differently, particularly as its pre-ambular paragraph expressly made reference to the Exchange of Notes between the Philippines and Japan on August 16, 1993, to wit:

> Loan Agreement No. PH-136, dated August 19, 1993, between THE OVERSEAS ECONOMIC COOPERATION FUND and THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES
>
> In the light of the contents of the Exchange of Notes between the Government of Japan and the Government of the Republic of the Philippines dated August 16, 1993, concerning Japanese loans to be extended with a view to promoting the economic development and stabilization efforts of the Republic of the Philippines,
>
> THE OVERSEAS ECONOMIC COOPERATION FUND (hereinafter referred to as "the Fund") and THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES (hereinafter referred to as "the Borrower") herewith conclude the following Loan Agreement (hereinafter

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27 Id. at 165-181.
28 Id. at 182-188.
29 G.R. Nos. 175608, 175616 and 175659, June 8, 2007, 524 SCRA 591.
30 G.R. No. 193796, July 2, 2014, 729 SCRA 12.
31 G.R. No. 175772, June 5, 2017, 825 SCRA 332.

> referred to as "the Loan Agreement", which includes all agreements supplemental hereto).[32]

We point out that Loan Agreement No. PH-136, which financed the NAIA Terminal 2 Development Project, stemmed from the August 16, 1993 Exchange of Notes whereby the Government of Japan agreed to extend loans in favor of the Philippines to promote economic development and stability. Thusly, the loan agreement was the adjunct of the Exchange of Notes and should thus be treated as an executive agreement. In other words, international law should apply in the implementation and construction of the terms and conditions of Loan Agreement No. PH-136. Accordingly, the Philippine Government was bound to faithfully comply with the provisions of the loan agreements in accordance with the doctrine of *pacta sunt servanda*. Needless to indicate, the doctrine has been incorporated in the 1987 Constitution pursuant to Section 2 of its Article II, which declares:

> Sec. 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

Logically, the Agreement for Consulting Services (ACS) executed by and between the petitioner and the ADP-JAC Consortium, being a mere accessory of Loan Agreement No. PH-136, should likewise be treated as an executive agreement, and construed and interpreted in accordance with the doctrine of *pacta sunt servanda*. The Court elucidated on the nature of the intimate relationship between the principal loan agreement and the accessory agreement in *Land Bank of the Philippines v. Atlanta Industries, Inc.*,[33] opining:

> As may be palpably observed, the terms and conditions of Loan Agreement No. 4833-PH, being a project-based and government-guaranteed loan facility, were **incorporated and made part of the SLA** that was subsequently entered into by Land Bank with the City Government of Iligan. Consequently, this means that the SLA cannot be treated as an independent and unrelated contract but as a conjunct of, or having a joint and simultaneous occurrence with, Loan Agreement No. 4833-PH. **Its nature and consideration, being a mere accessory contract of Loan Agreement No. 4833-PH, are thus the same as that of its principal contract from which it receives life and without which it cannot exist as an independent contract.** Indeed, the accessory follows the principal; and, concomitantly, accessory contracts should not be read independently of the main contract. Hence, as Land Bank correctly puts it, the SLA has attained indivisibility with the Loan Agreement and the Guarantee Agreement through the incorporation of each other's terms and

[32] See page 1 of Loan Agreement No. PH-136 (*Rollo* [Vol. I], p. 105).

[33] Supra note 30.

> conditions such that the character of one has likewise become the character of the other.[34]

A similar treatment should be extended to the three Supplemental Agreements entered into by the petitioner and the ADP-JAC Consortium.

Accordingly, the COA could not validly insist that the NEDA Guidelines, particularly that on applying a 5% interest on contingency, should find application because the contracting parties did not stipulate on the applicable law. The pronouncement in *Abaya v. Ebdane*, *supra*, and its progeny that international law applies in interpreting and implementing contracts executed in conjunction with executive agreements was controlling. No express stipulation by the contracting parties to that effect was necessary.

Having settled the issue of the governing law in interpreting and implementing the agreements, we next determine whether or not the COA properly disallowed the amounts disbursed for the additional man-months for the consulting services as provided in the supplemental agreements.

Let us first review the background on how the supplemental agreements came about, and look at the significance of each in the completion of the NAIA Terminal 2 Development Project.

The petitioner and ADP-JAC Consortium executed the ACS for the NAIA Terminal 2 Development Project on April 15, 1994. The ACS pertinently stipulated as follows:

> Article II
>
> SERVICES
>
> x x x x
>
> 2.03 Estimated Man-Months
>
> Notwithstanding any contrary provision herein, the parties hereto agree that Consultant shall perform the Services in accordance with the Work Plan contained in Annex C attached hereto and made an integral part hereof. For the performance of its obligation under this Agreement, Consultant shall render **a total of seven hundred and ninety five (795) man-months of services in the Philippines**, xxxx.
>
> x x x x
>
> x x x x

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[34] Id. at 31-32.

2.04 Extension of Services Under Supplemental Agreement

The Services of Consultant may be extended for the performance of additional work as provided in Sections 7.05 and 7.07 hereof. For each such extension of the Services, a supplement agreement shall be executed stipulating the scope and remuneration for the extended services.

The terms and conditions of the additional services under the supplemental agreement shall also be governed by this Agreement. Remuneration to Consultant for the additional man-months shall be chargeable against Contingencies and shall be governed by the provisions of the Agreement.[35]

ARTICLE IV

PAYMENTS TO CONSULTANT

x x x x

4.02. Ceiling Amount

Except as may otherwise be agreed upon under Section 7.05 – Changes, and subject to Section 4.05 – Use of Contingency, and notwithstanding any other provision of this Agreement, payments due to Consultant under this Agreement shall not exceed Japanese Yen ONE BILLION ONE HUNDRED EIGHTY ONE MILLION THREE HUNDRED THIRTY-SEVEN THOUSAND THREE HUNDRED (¥1,181,337.300) and Philippine Pesos ONE HUNDRED SEVEN MILLION THREE HUNDRED FORTY-TWO THOUSAND NINE HUNDRED SIX (₱107,342,906).

The above ceiling amounts of payment shall comprise Japanese Yen ONE BILLION FORTY-ONE MILLION SIX HUNDRED SEVENTY-SEVEN THOUSAND SEVEN HUNDRED FIFTY (¥1,041,677,750) and Philippine Pesos SIXTY FOUR MILLION THREE HUNDRED FIVE THOUSAND THREE HUNDRED FIFTY (₱64,305,350) as Total Cost of Services; x x x x; Japanese Yen ONE HUNDRED SEVEN MILLION THREE HUNDRED NINETY FOUR THOUSAND THREE HUNDRED (¥107,394,300) and Philippine Pesos SIX MILLION FOUR HUNDRED THIRTY THOUSAND FIVE HUNDRED THIRTY FIVE (₱6,430,535) set aside for Contingencies; x x x x.

x x x x

x x x x

4.05 Use of Contingency Amount

Payments in respect of costs which exceeds the estimates set forth in Annex D hereof may be chargeable to the Congency amounts in the respective estimates, provided that such costs are approved by MIAA and concurred by OECF prior to their being incurred, and

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[35] *Rollo* (Vol. I), pp. 73-74.

provided further that they shall be paid only at the unit rates and costs specified in Annex D of the Agreement or such as amended and in strict compliance with the Project needs.[36]

x x x x

ARTICLE VII

GENERAL CONDITIONS

7.01 Laws of the Republic of the Philippines

The governing law of this Agreement shall be the laws of the Republic of the Philippines. Consultant and its Staff shall conform to all applicable laws of the Republic and shall take prompt corrective action with regard to any violation called to their attention.[37]

x x x x

7.07 Delay in Services

In the event that Consultant encounters delay in obtaining the required services or facilities under this Agreement, it shall promptly notify MIAA of such delay and may request an appropriate extension for completion of the Services.

In the event of delay caused by circumstances beyond the control of Consultant, an extension shall be granted by MIAA subject to the concurrence by OECF, and any additional costs incurred during the extension shall be expended out of the Contingency in accord with the procedures stipulated under Section 4.04 – Use of Contingency Amount.[38]

x x x x

Owing to delays occasioned during the prequalification and bidding stages,[39] the parties entered into Supplemental Agreement No. 1, the relevant portions of which follow:

SUPPLEMENTARY AGREEMENT NO. 1
BETWEEN
MANILA INTERNATIONAL AIRPORT AUTHORITY
AND
ADP-JAC CONSORTIUM

x x x x

WHEREAS, an Agreement for Consulting Services for the Terminal 2 Development Project of Ninoy Aquino International Airport,

36 Id. at 78-79.
37 Id. at 93.
38 Id. at 95.
39 Id. at 145-147; see 5th to 17th Whereas clauses of Supplemental Agreement No. 1.

hereinafter referred to as the Project, was executed on 15 April 1994 at Manila, Philippines, by and between MIAA and the Consultant, said agreement hereinafter referred to as the Original Agreement;

x x x x

WHEREAS, the Consultancy Agreement allows, in its Clause 2.04, that Services of Consultant not covered under the Agreement to be extended through Supplementary Agreement.

WHEREAS, MIAA and the Consultant agreed on the extension of the period of the Consultants Services and the associated additional cost during the extended Pre-Construction period.

NOW, THEREFORE, for and in consideration of the foregoing premises and mutual covenants and undertakings hereinafter provided, the parties have agreed as follows:

ARTICLE II – SERVICES

Clause 2.03 – Estimated Man-Months

The revised total of man-months shall be 807.99 as specified in Attachment A.

x x x x

ARTICLE IV – PAYMENT TO CONSULTANT

x x x x

Clause 4.02 – Ceiling Amount

The ceiling Amount shall remain unchanged but the amounts comprising the Ceiling Amount shall be charged as follows:

Total cost of services:

Japanese Yen – One Billion, Seventy-Eight Million, Five Hundred and Twenty-Six Thousand and Fifty (¥1,078,526,050)

Philippine Peso - Sixty-Six Million, Three Hundred and Thirty-Two Thousand, Seven Hundred and Sixty-Five (₱66,332,765)

x x x x

Contingency

Japanese Yen – Seventy Million, Five Hundred and Forty-Six Thousand (¥70,546,000)

Philippine Peso - Four Million, Four Hundred and Three Thousand, One Hundred and Twenty (₱4,403,120)[40]

x x x x

The project still experienced additional delays from the belated issuance by the Department of Environment and Natural Resources (DENR) of tree cutting certificates and additional tree balling requirements, among others.[41] As a result, the parties had to execute Supplemental Agreement No. 2 in order to revise the man-months, as well as to adjust the total cost of services for the consulting services, *viz.*:

ARTICLE II – SERVICES

Clause 2.03 – Estimated Man-Months

The revised total of man-months shall be 893.23 as specified in Attachment A.

x x x x

ARTICLE IV – PAYMENT TO CONSULTANT

x x x x

Clause 4.02 – Ceiling Amount

The ceiling Amount shall become:

Japanese Yen – One Billion, Three Hundred and Five Million, Seven Hundred and Seventy-nine Thousand Two Hundred (¥1,305,779,200)

Philippine Peso - Eighty-four Million, Eight Hundred and Seventy Thousand, Five Hundred and Eighty-nine and Thirty-one centavo (₱84,870,589.31)

The above ceiling amounts of payment shall comprise Japanese Yen One Billion One Hundred Eighty-seven Million, Seventy-two Thousand (¥1,187,072,000) and Philippine Pesos Seventy Million, One Hundred and Forty Thousand, Nine Hundred and Eighty-two and Ninety Centavos (₱70,140,982.90) as Total Cost of Services; Japanese Yen One Hundred and Eighteen Million, Seven Hundred and Seven Thousand, Two Hundred (¥118,707,200) and Philippine Peso Seven Million, Fourteen Thousand and Ninety-eight and Twenty-nine centavos (₱7,014,098.29) set aside for Physical Contingency;[42] x x x.

x x x x

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40 Id. at 148-149.
41 Id. at 166.
42 Id. at 167.

In view of the prior delays and extensions, the parties entered into Supplemental Agreement No. 3 to revise further the man-months and total cost of services, thusly:

> ARTICLE II – SERVICES
>
> Clause 2.03 – Estimated Man-Months
>
> The revised total of man-months shall be 1083.81 as specified in Attachment A.
>
> x x x x
>
> ARTICLE IV – PAYMENT TO CONSULTANT
>
> x x x x
>
> Clause 4.02 – Ceiling Amount
>
> The Ceiling Amount shall become:
>
> Japanese Yen – One Billion, Three Hundred Seventy-Seven Million, Sixty Five Thousand Four Hundred Sixty Three (¥1,377,065,463)
>
> Philippine Peso - One Hundred One Million, Nine Hundred Thirty-Eight Thousand, Seven Hundred Thirteen and Eight Six centavos (₱101,938,713.86)
>
> The above ceiling amounts shall comprise Japanese Yen One Billion Three Hundred Forty Three Million Four Hundred Seventy Eight Thousand Five Hundred (¥1,343,478,500) and Philippine Pesos Ninety Million Four Hundred Eleven Thousand Two Hundred Seventy Six and Fifteen Centavos (₱90,411,276,15) as Total Cost of Services; Japanese Yen Thirty three Million, Five Hundred Eighty Six Thousand Nine Hundred Sixty Three (¥33,586,963) and Philippine Peso Two Million Two Hundred Sixty Thousand Two Hundred Eighty One and Ninety Centavos (₱2,260,281.90) set aside for Contingency;[43] x x x x.

It appears, however, that in disallowing the disbursements for the additional man-months, the COA charged the disallowance against the contingency,[44] and thus concluded that the same exceeded the 5% ceiling (or ¥53 million and ₱3.2 million[45]) fixed under the NEDA Guidelines by ¥398 million and ₱45.5 million. Considering that ND No. (FMT) 99-00-44 only disallowed ¥53 million and ₱3.2 million, the COA ordered an additional

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[43] *Rollo* (Vol. I), p. 186. It appears also that because of the previous extensions that affected the commencement of the later stages in the project, the parties also signed Supplemental Agreement No. 4 and agreed to cover the extension of another eight months for a total of 77 months or 1,221.65 man months.

[44] The COA arrived at the amount by extracting the difference between the actual payments made by the petitioner to ADP-JAC Consortium of ¥1.49 billion and ₱113 million and the ¥1.04 billion and ₱64 million original cost of services. The process arrived at ¥451 million and ₱48 million as actual additional total costs of services charged to contingency.

[45] 5% of the amount of the contract pursuant to Section 6.10 of the NEDA Guidelines.

disallowance of ¥344 million and ₱42 million to be charged against the liable officials of the petitioner.[46]

The Court finds the action of the COA not only erroneous but also in contravention of the doctrine of *pacta sunt servanda* and, most importantly, contrary to the intention of the parties in entering into the supplemental agreements.

To reiterate, the applicable law in interpreting and construing the agreements should be the canons of international law, particularly the doctrine of *pacta sunt servanda.* Yet, in affirming the NDs, the COA proposed that the Government negate its accession to the executive agreements without any valid justification. Obviously, this approach should not be adopted. In *Agustin v. Edu,* [47] we stressed that "[i]t is not for this country to repudiate a commitment to which it had pledged its word. The concept of *pacta sunt servanda* stands in the way of such an attitude, which is, moreover, at war with the principle of international morality."

Properly viewed, the petitioner and the ADP-JAC Consortium, by executing the supplemental agreements, intended to modify the original consultancy services agreement with respect to the estimated man-months in order to complete the project, and to institute the necessary adjustments in the total cost of services.[48] This is the only conclusion to be arrived at in view of the parties' choice of the word "*revised*" in Clause 2.03 found in each of the supplemental agreements[49] in their reference to the estimated total number of man-months corresponding to the delays incurred in the completion of the project. We reiterate the wise rule that the contemporaneous and subsequent acts of the parties should be considered in determining their intention.[50]

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[46] Amount of disallowance based on COA's framework:

Actual total cost of services paid	1,493,497,905.00	113,061,248.04
Less: Original total cost of services	(1,041,677,750.00)	(64,305,350.00)
Actual additional total cost of services charged to "Contingency"	451,820,155.00	48,755,898.04
Less: Contingency ceiling per NEDA Guidelines	(53,697,150.00)	(3,215,267.50)
Amount charged in [excess of] the NEDA ceiling	398,123,005.00	45,540,630.54
Less: Amount disallowed under ND No. FMT 99-00-44	(53,697,150.00)	(3,215,267.50)
Additional disallowance	344,425,855.00	42,325,363.04

[47] G.R. No. L-49112, February 2, 1979, 88 SCRA 195.

[48] Based on Supplemental No. 4, the total cost of services from the original ¥1.04 billion and ₱64 million contained in the ACS increased to ¥1.46 billion and ₱110.3 million (See LAO Corporate Decision No. 2008-067, *Rollo* (Vol. I), p. 48.,

[49] *Rollo*, p. 148. Supplemental Agreement No. 1. Clause 2.03 - Estimated Man-Months
The **revised** total man-months shall be 807.99 as specified in Attachment A.

[50] Article 1371, *Civil Code.*

In revising the estimated man-months and total cost of services as contained in the supplemental agreements, therefore, the petitioner and the ADP-JAC Consortium intended to charge all additional man-months to the total cost of services, not against the contingency. Hence, only the extra man-months in excess of what had been finally agreed upon, and the unforeseen expenditures incurred by the parties in connection with the project should be charged against the contingency. In this regard, we remind that parties to a contract are not forever locked unto its terms, but have the right to amend their covenant by mutual consent. Thus, the parties to an existing contract may, by mutual assent, modify it, provided the modification does not contravene the law or public policy.[51]

We do not find anything irregular and unlawful in the manner that the petitioner and the ADP-JAC Consortium executed the supplemental agreements. For this purpose, we should uphold the right of the parties to alter any term of an existing contract by entering into a subsequent agreement, and the contract, as modified, becomes a new contract between the parties, and the meaning to be given the subsequent agreements depends on the intention of the parties.[52]

By going against the intention of the parties as to how the cost of man-months should be charged against, as well as the manner of charging items against contingency, and thus affirming the NDs, the COA contravened the Constitution and international law, and thereby gravely abused its discretion amounting to lack or excess of jurisdiction. By *grave abuse of discretion* is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be grave as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined by or to act at all in contemplation of law.[53] The burden is on the part of the petitioner to prove not merely reversible error, but grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the public respondent issuing the impugned order. Mere abuse of discretion is not enough; it must be grave.[54]

WHEREFORE, the Court **GRANTS** the petition for *certiorari*; and **REVERSES** and **SETS ASIDE** Decision No. 2012-268 dated December 28,

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[51] Am Jur 2d - Contracts § 496.

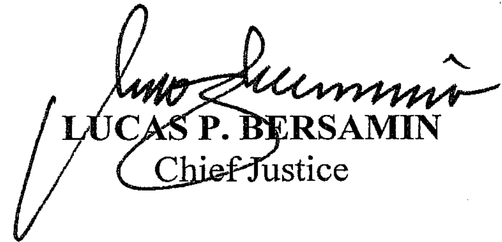
[52] *Alarmax Distributors, Inc. v. New Canaan Alarm Co., Inc.*, 141 Conn. App. 319, 61 A.3d 1142, 80 U.C.C. Rep. Serv. 2d 258 (2013)

[53] *United Coconut Planters Bank v. Looyuko*, G.R. No. 156337, September 28, 2007, 534 SCRA 322, 331.

[54] *Tan v. Antazo,* G.R. No. 187208, February 23, 2011, 644 SCRA 337, 342.

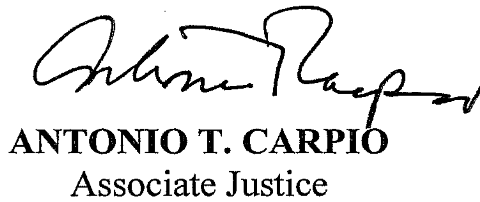
2012 and the Resolution dated January 26, 2015 by the Commission on Audit in COA CP Case No. 2011-294.

SO ORDERED.

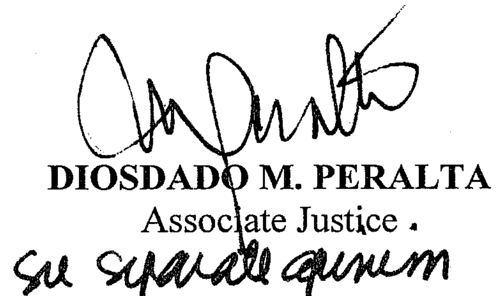


LUCAS P. BERSAMIN
Chief Justice

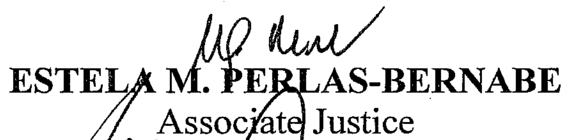
WE CONCUR:



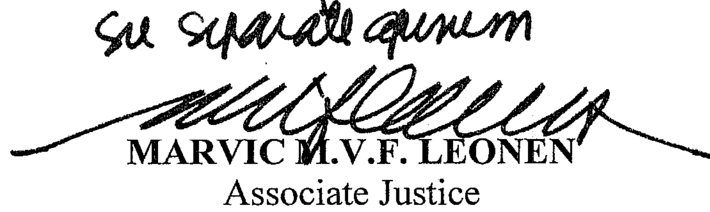
ANTONIO T. CARPIO
Associate Justice



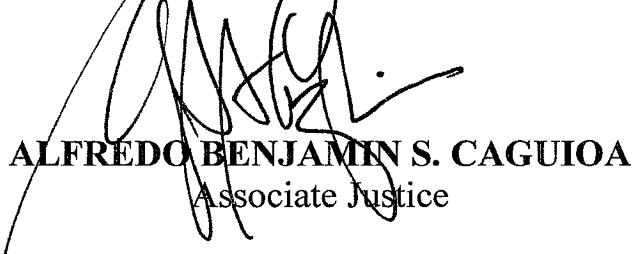
DIOSDADO M. PERALTA
Associate Justice



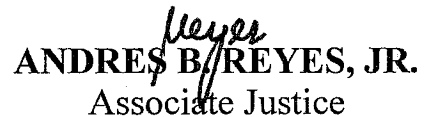
ESTELA M. PERLAS-BERNABE
Associate Justice



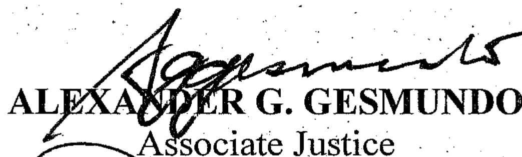
MARVIC M.V.F. LEONEN
Associate Justice



ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

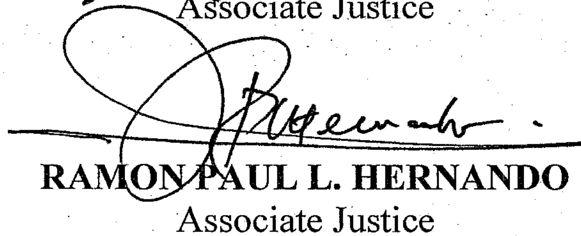


ANDRES B. REYES, JR.
Associate Justice



ALEXANDER G. GESMUNDO
Associate Justice

(ON LEAVE)
JOSE C. REYES, JR.
Associate Justice

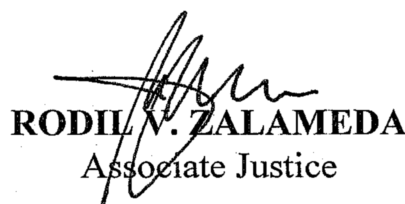


RAMON PAUL L. HERNANDO
Associate Justice

ROSMARI D. CARANDANG
Associate Justice

AMY C. LAZARO-JAVIER
Associate Justice

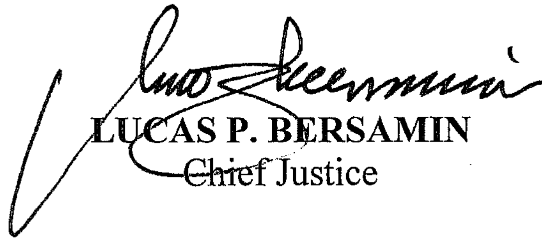
HENRI JEAN PAUL B. INTING
Associate Justice



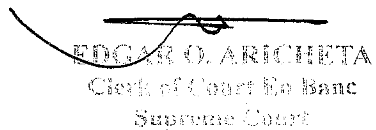
RODIL V. ZALAMEDA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.



LUCAS P. BERSAMIN
Chief Justice



CERTIFIED TRUE COPY
EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court