G.R. No. 247924 – POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT (PSALM) CORPORATION, *Petitioner*, ***v.*** **COMMISSION ON AUDIT,** *Respondent.*

Promulgated:

November 16, 2021

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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

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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**

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

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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:

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.**
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> **COA's own definition** of **pre-audit** is exactly what its **written concurrence is all about:**
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> 5. This Honorable Court defined in *Dela Llana v. Commission on Audit* that a pre-audit is an examination of financial

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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.

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 disbnrsement 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.
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> 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.
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> 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

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14 *Ponencia*, pp. 7-9.

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

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.

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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.

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.
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> 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:
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> i. 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
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> ii. 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

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[20] *Ponencia*, pp. 28-29.

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.

ESTELA M. PERLAS-BERNABE
Senior Associate Justice