Republic of the Philippines
Supreme Court
Manila

EN BANC

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, and in behalf of the concerned and affected OFFICERS and EMPLOYEES of PSALM, Petitioner, - versus - **COMMISSION ON AUDIT,** Respondent.	**G.R. No. 247924** Present: GESMUNDO, *C.J.*, PERLAS-BERNABE,* LEONEN, CAGUIOA, HERNANDO, CARANDANG, LAZARO-JAVIER, INTING, ZALAMEDA, LOPEZ, M.,** GAERLAN, ROSARIO, LOPEZ, J., and DIMAAMPAO, *JJ.* Promulgated: November 16, 2021

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DECISION

LAZARO-JAVIER, *J.*:

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* On official leave.
** On leave.

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.

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

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.

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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.

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.

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6 *Id.* at 72-77.
7 *Id.* at 30-33.
8 390 Phil. 1101, 1112 (2000).
9 *Rollo*, pp. 35-37.

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;

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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.

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:
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> (1) The proposed expenditure complies with an appropriation law or other specific statutory authority;
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> (2) Sufficient funds are available for the purpose;
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> (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
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> (4) The transaction is approved by the proper authority and the claim is duly supported by authentic underlying evidence.
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> 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.

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16 *Id.* at 157-158.

17 681 Phil. 186, 197 (2012).

> 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

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[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.
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> x x x x
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> 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.**
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> 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.

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.

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

> 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.
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> 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.

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

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**
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> 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:

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[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

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
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> 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;
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> 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;
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> 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*;
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> 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;
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> e) The lawyer meets the minimum eligibility and qualification standards imposed by the Civil Service Commission (CSC) for comparable positions in government;
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> 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

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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

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 95-01.1.

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.

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

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**

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

> **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]

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27 Supra note 13, at 266.

28 *Rollo*, p. 41-A.

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]

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[29] *Id.* at 69-71.
[30] *Id.* at 36.

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.

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[31] https://www.coa.gov.ph/phocadownload/userupload/transparency/citizen_charter/COA_Citizens_Charte_Dec2019.pdf

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

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

> 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**

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33 *Miralles v. COA*, 818 Phil. 380, 389-390 (2017).
34 *Oñate v. COA*, supra note 13, at 266.

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.

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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.

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

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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.

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**

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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.

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:

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

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.*

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.

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[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."

SO ORDERED.

AMY C. LAZARO-JAVIER
Associate Justice

WE CONCUR:

ALEXANDER G. GESMUNDO
Chief Justice

While on official leave, I left my vote and submitted a separate concurring opinion in this case

See separate concurring and dissenting opinion

(On official leave)
ESTELA M. PERLAS-BERNABE
Associate Justice

MARVIC M.V.F. LEONEN
Associate Justice

See Concurring & Dissenting Opinion

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

RAMON PAUL L. HERNANDO
Associate Justice

ROSMARI D. CARANDANG
Associate Justice

HENRI JEAN PAUL B. INTING
Associate Justice

RODIL V. ZALAMEDA
Associate Justice

(On leave)
MARIO V. LOPEZ
Associate Justice

SAMUEL H. GAERLAN
Associate Justice

RICARDO R. ROSARIO
Associate Justice

JHOSEP Y. LOPEZ
Associate Justice

JAPAR B. DIMAAMPAO
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.

ALEXANDER G. GESMUNDO
Chief Justice