EN BANC

[G.R. No. 218388, October 15, 2019]

MANILA INTERNATIONAL AIRPORT AUTHORITY, PETITIONER, VS. COMMISSION ON AUDIT, RESPONDENT.

D E C I S I O N

BERSAMIN, C.J.:

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

The Case

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

Antecedents

The COA summarized the factual and procedural antecedents as follows:

> As narrated in the assailed decision, the MIAA and the Aeroports de Paris-Japan Airport Consultants, Inc. Consortium (Consultant for brevity) entered into an Agreement for Consulting Services (Agreement for, brevity) for the NAIA Terminal 2 Development Project on April 15, 1994. The Agreement, covering 795 man-months of consulting services, commenced on July 1, 1994. It originally assumed a total duration of 53 months that included a 14-month post construction services up to November 30, 1998. The construction of the Project was originally estimated to take 26 months from August 1, 1995 to September 30, 1997, followed by a 12-month defect liability period.
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> However, the duration of the services was extended and the number of man-months increased, due to a prolonged process of prequalification, bidding and awarding stages; delayed Department of Environment and Natural Resources approval and Contractor's site possession, as well as numerous additional construction works.
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> The total duration of the consulting services was, thus, extended from 53

to 69 months or a total of 1,083.81 man-months. The extension was covered by three (3) Supplementary Agreements (SAs) entered into by the MIAA and the Consultant.

On November 24, 1999, the then Corporate Auditor of MIAA issued ND No. (FMT) 99-00-04 finding the Agreement's remuneration cost of P41,784,850.00 (excluding expatriates) excessive because it was 19.80% above the corresponding COA estimated remuneration cost of P34,876,915.00. Then General Manager Antonio P. Gana of MIAA in his undated letter to COA, requested reconsideration of the ND based on the following grounds:

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

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

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

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

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

Thereafter, on August 17, 2000, the then MIAA Corporate Auditor lifted and settled the disallowed amount of P6,907,935.00 after the same was

found reasonable based on the COA-TSO Re-evaluation Report dated June 29, 2000.

On October 18, 2001, the then MIAA Corporate Auditor resubmitted the request for reconsideration, together with the COA-TSO validation and opined that the sum of payments charged to contingency was within the ceiling equivalent to 5% of the amount of the contract as prescribed under the NEDA Guidelines. He stressed that of ¥1,493,497,905.00 and P113,061,248.01 actually paid by MIAA to the Consultant, ¥36,349,705.00 and P2,752,610.77 representing 2.49% and 2.495%, respectively, or a total of 4.985% of the contract cost was charged to contingency. Moreover, the then MIAA Corporate Auditor averred that all four SAs entered into by MIAA and the Consultant were reviewed and found in order as to their technical aspects by the COA-TSO.

Thereafter, pursuant to COA Memorandum No. 2002-039 dated July 11, 2002, the former Assistant Director of then Cluster IV-Industrial and Area Development and Regulatory, Corporate Government Sector (CGS), this Commission, forwarded the instant request to COA LAO-Corporate for appropriate action.

On November 21, 2008, COA LAO-Corporate issued the assailed decision denying the remaining disallowance of ¥53,697,150.00 foreign portion and P3,215,267.50 local portion under ND No. (FMT) 99-00-04 dated November 24, 1999.

It likewise issued the ND No. 2008-018 dated November 21, 2008 for the additional disallowance of ¥344,425,855.00 and P42,325,363.04 as mentioned in the decision.[6]

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

The exemption mentioned in Section 9.3 of the NEDA Guidelines is only in respect to the selection of consultants and does not include exemption from the 5% ceiling on contingency. Also, a careful reading of Section 6.10 of the NEDA Guidelines would show that the 5% ceiling of contingency was written in a mandatory manner by the use of the verb "shall," to wit:

6.10 Contingency

6.10.1 Payments in respect of costs which would exceed the estimates set forth in Section 6.1 may be chargeable to the contingency amounts in the respective estimates only if such costs are approved by the agency concerned prior to its being incurred and provided, further, that they shall be used only in line with the unit rates and costs specified in the contract and in strict compliance with the project needs. **Contingency amount shall not exceed 5% of the amount of the contract.** (emphasis added)

It should be noted that the contingency amount is included in the contract cost for the purpose of facilitating the availability of funds for future requirements during the lifetime of the contract (e.g. per Section 2.04 of the Agreement, for performance of additional work to be covered by an SA). For such budgetary purposes, the NEDA Guidelines provide a ceiling of 5% of the Cost of Services.

It is shown that the total actual amount charged to the contingency and paid to the Consultant exceeded the 5% ceiling, thus:

Actual amounts disbursed for SA 1 to SA 4 and charged to contingency	Contingency amount per Agreement	5% Contingency limit per NEDA Guidelines	Excess amount disbursed
¥451,820,155.00	¥107,394,300.00	¥53,697,150.00	¥398,123,005.00
P48,755,898.04	P6,430,535.00	P3,215,267.50	P45,540,630.54

Petitioner's claim that the actual disbursements from the contingency amount were only ¥36,349,705.00 and P2,752,610.77 which are 2.49% and 2.495% of the Revised Cost of Services in Yen and Pesos, respectively, does not appear factual since he did not include the portion of the cost of the SA Nos. 1 to 4. It was made to appear that the remuneration cost and reimbursement cost for the extension were part of the original Cost of Services instead of the amount being charged to contingencies as provided for in Section 2.04 of the original Agreement for Consulting Services of the parties. Section 2.04 states that:

Extension of Services Under Supplemental Agreement

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

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

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

RULING:

IN VIEW OF THE FOREGOING, the petition for review is hereby **DENIED**. Accordingly, COA LAO-Corporate Decision No. 2008-067 dated

November 21, 2008 is hereby **SUSTAINED**. Consequently, ND Nos. (FMT) 99-00-04 and 2008-018, dated November 24, 1999 and November 21, 2008, respectively are hereby **AFFIRMED**.[7]

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

Issues

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

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

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

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

The COA counters that the NEDA guidelines providing for the 5% contingency applied in the absence of any provision in the agreement that the Philippine laws should not apply;[18] that the loan agreement involved herein did not mention of international laws, regulations or practices with respect to the payments of the consultants;[19] that the exemption under Section 9.3 of the NEDA Guidelines pertained only to the selection of consultants and did not include exemption from the 5% ceiling on contingency;[20] and that the petitioner's officials were held accountable for the government funds and property as the heads of agencies.[21]

Ruling of the Court