

EN BANC

[G.R. No. 214910, February 13, 2018]

BAYANI F. FERNANDO, ANGELITO S. VERGEL DE DIOS, CESAR S. LACUNA, RUBEN C. GUILLERMO, RAMON S. ONA, FELIMON T. TARRAGO, FEDERICO E. CASTILLO, ALLAN ARCEO, DANILO M. SEÑORAN,* RENE ESTIPONA AND EDENISON F. FAINSAN, IN HIS CAPACITY AS THE INCUMBENT ASSISTANT GENERAL MANAGER FOR FINANCE AND ADMINISTRATION OF THE METRO MANILA DEVELOPMENT AUTHORITY, PETITIONERS, VS. HONORABLE COMMISSION ON AUDIT *EN BANC*, RIZALINA Q. MUTIA, DIRECTOR IV, CLUSTER B GENERAL PUBLIC SERVICE II AND DEFENSE, NATIONAL GOVERNMENT SECTOR, COMMISSION ON AUDIT AND IRENEO B. MANALO, STATE AUDITOR V, SUPERVISING AUDITOR, COMMISSION ON AUDIT, RESPONDENTS.

D E C I S I O N

JARDELEZA, J.:

This is a petition for review on *certiorari*^[1] under Rule 64, in relation to Rule 65, of the Rules of Court, assailing Decision No. 2012-165^[2] dated October 15, 2012 of the Commission on Audit (COA) which disapproved the COA-National Government Sector (NGS) Cluster-B Decision No. 2010-006 dated June 18, 2010 and effectively denied the appeal of the Metropolitan Manila Development Authority (MMDA) with modifications.^[3]

On March 22, 2004, the MMDA conducted a public bidding for the Design and Construction of Steel Pedestrian Bridges in various parts of Metro Manila, with William L. Tan Construction (WLTC) emerging as the winning bidder.^[4] Thus, on March 24, 2004, the MMDA^[5] and WLTC^[6] executed a Contract^[7] where the latter agreed to design and construct 14 steel pedestrian bridges for a price of P196,291,834.71^[8] to be completed within 120 calendar days from receipt of the Notice to Proceed (NTP). The MMDA also issued the NTP on March 24, 2004 and WLTC received it on the same day.^[9]

During the construction, WLTC executed Deeds of Assignment for parts of the project to third-party contractors.^[10] The MMDA also issued three suspension orders (SOs) to WLTC on various dates, as well as the corresponding resume orders subsequently.^[11] Based on WLTC's claimed work accomplishment, the MMDA paid WLTC a total of P161,903,009.85 net of taxes,^[12] and withheld P9,052,570.48 as retention fee.^[13] The MMDA also did not pay WLTC the difference of P5,861,078.43 since it was the computed liquidated damages for the 120-calendar day delay in the completion of the project.^[14]

On post-audit, the Supervising Auditor of COA-MMDA issued Notice of Suspension (NS) No. 08-23-TF-(2004-2007) on all payments pending the MMDA's submission of required documents within 90 days from notice, and by reason of the Technical Evaluation Reports (TERs) dated March 9, 2007 and June 18, 2007 of COA engineers assigned at COA-MMDA.^[15] The TERs concluded that the contract cost of P199,801,671.91 was excessive for being 29.63% above the COA Estimated Cost of P151,409,330.45 due to high percentage mark-up and erroneous computation of site works.^[16] The TERs also showed that the liquidated damages to be imposed should be P18,153,348.63, instead of P5,861,078.43, due to the delay in the construction for 344 days.^[17]

On January 29, 2009, the COA State Auditor issued Notice of Disallowance (NO) No. 09-001-TF-(04-06).^[18] The COA State Auditor held that the documents^[19] requested under the NS remained unsubmitted. As such, the suspended transactions matured into a disallowance pursuant to Section 82 of Presidential Decree (PO) No. 1445.^[20] These documents were essential support for the claim against government funds and in the evaluation of the contract considering the audit observations cited in the NS. The COA State Auditor held WLTC, its subcontractors, and petitioners, except Edenison F. Fainsan (Fainsan), liable for the disallowance.^[21]

The MMDA appealed before the COA-NGS Cluster-B, attaching WLTC's request for extension of the contract period dated February 10, 2005 and the approval of the MMDA dated February 17, 2005.^[22]

Ruling on the appeal, the COA-NGS Cluster-B lifted the disallowance, except for liquidated damages of P2,063,321.56. It reevaluated the disallowance and found that the increased deployment of labor and equipment was necessary in the actual implementation of the project. The contract cost variance was, upon re-evaluation, found to be well within the COA allowable limit. The liquidated damages, on the other hand, were reduced after the team considered the granted request for extension of time to WLTC. In view of the modification of the ND, the decision of the COA NOS Cluster-B was elevated to the COA Proper on automatic review.^[23]

The COA Proper disapproved the decision of the COA-NGS Cluster B and denied the appeal of the MMDA with modifications. It reduced the original disallowance from P161,903,009.85 to P37,255,307.46 consisting of liquidated damages of P18,153,348.63 and contract cost variance of P19,101,958.83. This was further reduced to P22,341,658.55 considering that the MMDA already withheld P9,052,570.48 as retention money and P5,861,078.43 as liquidated damages. The COA Proper named WLTC and the responsible officials of the MMDA liable for the disallowance.^[24]

It further ruled that WLTC was liable for P18,153,348.63 due to the delay in the construction for 344 days. The contract expressly provided that the project should be completed for 120 days, or on July 21, 2004,^[25] counted from March 24, 2004. The project, however, was only completed on June 30, 2005 without any request for extension of time before the original date of completion. The COA Proper faulted the MMDA and the COA-NGS Cluster-S for considering the SO dated March 23, 2004 and thusly using the April 21, 2004, the date of the RO, as the effective date of the

Contract.^[26] The COA Proper held that it was incorrect to do so because there was no project to suspend yet on March 23, 2004 as the contract was executed on March 24, 2004. Said SO was also merely signed by Ramon S. Ona (Ona), for and in behalf of the MMDA. The COA Proper held that he did not have authority to issue any SO or contract that will bind the Government. Even on the assumption that he did, the approved contract time extension, as confirmed by Fainsan, was not covered with the required performance security under Republic Act (RA) No. 9184.^[27] It also held that the reasons for the SOs^[28] were inherent risks that a contractor assumes in a design and construction project.^[29]

The COA Proper also upheld the original disallowance of P19,101,958.83 representing contract cost variance. WLTC explained that this pertains to additional cost of manpower and equipment due to increased deployment of labor and equipment to expedite the completion of the project. However, the COA Proper found that WLTC only needed to expedite the completion of the project because it had long been overdue. Thus, the alleged additional cost of manpower and equipment should not be borne by the Government.^[30]

Hence, this petition which raises the issue of whether the MMDA and/or its concerned officers can be held liable for the liquidated damages and/or contract cost variance. Petitioners argue that WLTC bears the sole liability because the delay in the project and the additional costs incurred to expedite its completion were the entire fault of WLTC.

We deny the petition.

At the outset, we sustain petitioners' position that Ona, as Project Manager, had the authority to issue the SOs and ROs, and to approve the request for extension of contract time on behalf of the MMDA. Office Order No. 220, series of 2003^[31] issued by then MMDA Chairman Bayani F. Fernando, and which designated Ona as Project Manager, has the general objective of ensuring the proper implementation of the project. We find that the authority to suspend construction work and grant requests for contract time extension are necessarily included in Ona's tasks. We take note of the practice in the construction industry where the Project Manager exercises discretion on technical matters involving construction work. Owners of the project are oftentimes not technically suited to oversee the construction work; professional project managers are thus usually hired, precisely to oversee the day-to-day operations on the construction site, exercise professional judgment when expedient, and render his independent decision on technical matters such as adjustments in cost and time.^[32]

We note further that the MMDA never repudiated the acts of Ona, but has, in fact, ratified the same. However, this is not to take anything away from the COA's duty to look into the propriety of Ona's acts. The COA is endowed with enough latitude to determine, prevent and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds. As specifically applied here, it is well within the scope of the COA's authority to evaluate and determine whether the SOs or the extension of the contract time, which necessarily includes the waiver of any penalty or liquidated damages to be imposed, is valid. The plain reason is that government funds are involved. Hence, even if the MMDA, through Ona, favorably

granted the requests for suspension of work and the extension of contract time, this cannot bind or preclude the COA from exercising its constitutionally mandated function in reviewing the same and to ensure its conformity with the law.^[33] It has the power to ascertain whether public funds were utilized for the purpose for which they had been intended. Thus, the COA is traditionally given free rein in the exercise of its constitutional duty to examine and audit expenditures of public funds especially those which are palpably beyond what is allowed by law. It is only when the COA has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, that this Court entertains a petition questioning its rulings.^[34]

Bearing all the foregoing in mind, we find no grave abuse of discretion on the part of the COA in issuing its assailed Decision.

Glaringly, petitioners do not deny the fact of delay in the project and actually state in their petition that it is undisputed. Indeed, records show that petitioners counted a 120-day delay reckoned from March 2, 2005^[35] until June 30, 2005.^[36] In contrast, the COA counted a 344-day delay reckoned from July 21, 2004^[37] until June 30, 2005. The point of difference in their respective computations was in how the SOs, ROs, and extension of contract time were considered. For petitioners, these were valid; while for the COA, they were not. We agree with the COA.

It appears that petitioners, for some reason, treated the first SO and RO on March 23, 2004 and April 21, 2004, respectively, to have pushed the effectivity of the contract to April 21, 2004. This is erroneous. As the name itself suggests, the SO should have only suspended the operation and nothing more. The SO,^[38] in fact, expressly directed WLTC to suspend all construction operation and did not contain anything about revising or moving the effectivity of the contract.

Petitioners also failed to belie the COA's finding that the first SO was dated March 23, 2004. This was highly suspicious, to say the least, because the Notice of Award and the NP were issued on the next day, March 24, 2004. The COA is correct, therefore, in holding that there was no contract or

project to suspend yet when the first SO was issued. There was also no reasonable explanation why WLTC's alleged request for suspension was dated March 24, 2004, when the SO was issued a day before. At any rate, the request was in complete violation of Clause 7 of the Contract which expressly provides that the "contractor shall give written notice to the Authority at least 10 days prior to the beginning, suspension or resume of the work, to the end that the Authority may make the necessary preparation for inspection."^[39]

Considering, therefore, that the original effectivity (March 24, 2004) and expiry (July 21, 2004) of the contract must stand, it follows that the succeeding SOs in July 30, 2004 and November 15, 2004 are invalid. No extension of contract time was issued before the expiry of the contract. Even if we were to assume that the contract time was validly extended and the July and November 2004 SOs could have been feasible, we stress that petitioners failed to refute the findings of the COA that the reasons for these SOs are without legal basis for being inherent risks of the project.

Moreover, in further revising the expiry of the contract and pushing it to March 2, 2005, petitioners claim that WLTC, in its letter dated February 10, 2005, requested for an extension of contract time and the MMDA granted the same on February 17, 2005. Again, even if we were to assume that the contract time was validly extended to April 24, 2004 and that the subsequent SOs could have likewise been feasible, the supposed contract time extension must still fail. Records do not show what the reasons for such extension were and whether they were valid and allowed under the law in the first place.^[40] Significantly, as admitted by Fainsan, the extension was not covered with Performance Security.^[41]

Petitioners, however, insist that the consequences of delay in the form of liquidated damages should fall on the shoulders of WLTC alone because it was the one who requested the suspension of work (and extension of contract time). The MMDA, on the other hand, never suspended the work operations at its own discretion; it merely assented to the requests "upon finding of reasonable justification therefor."^[42] As for the contract cost variance, petitioners posit it was due to WLTC's act of subcontracting parts of the project. This was allegedly made entirely at the behest and preference of WLTC upon realizing that it cannot complete the project on time. Petitioners denied any participation in the acts of WLTC and even alleged that these were in violation of the Contract.^[43]

The question, however, as to which party is at fault for subcontracting parts of the project is beside the point. The same holds true with respect to which party initiated the requests for suspension of work and extension of contract time, as petitioners suggest. The bottom line is petitioners allowed and approved the disbursement of funds for the payment to WLTC, without withholding or deducting the correct amount of liquidated damages and contract cost variance. Their very admission in their petition that WLTC was at fault for the delay and guilty of violating the provisions of the contract against subcontracting proves that they have acted negligently in the disbursement of the payment to WLTC.

Petitioners are correct that under RA No. 9184, liquidated damages are payable by the contractor in case of breach of contract. As the owner of the project, however, the MMDA has the obligation to make sure that the contractor pays in case of breach. Paragraph 3, Item CI 8 of the Implementing Rules and Regulations of PD No. 1594 provides that liquidated damages "shall be deducted from any money due or which may become due the contractor under the contract, and/or collect such liquidated damages from the retention money or other securities posted by the contractor, whichever is convenient to the Government." This is mandatory.

Petitioners' position with regard to the contract cost variance also dovetails with the findings of the COA that it was incurred by WLTC to expedite the completion of the project. The COA found that by February 2005, the project was only halfway done despite having three subcontractors already. WLTC executed another agreement with a fourth subcontractor, Yamato, which finally expedited the construction. The COA is correct, therefore, in holding that these alleged additional costs of manpower and equipment must not be borne by the Government. These are not the same as additional or extra work which are performed over and above of what is required under the contract (or would not have been included in the agreed contract price) which would necessitate compensation for the contractor. In any case, these costs cannot be validly considered as additional or extra work costing because they were