EN BANC

G.R. No. 247924 — POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION, *petitioner*, ***versus*** **COMMISSION ON AUDIT**, *respondent*.

Promulgated:

November 16, 2021

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CONCURRING AND DISSENTING OPINION

CAGUIOA, *J.*:

I concur in the result that the Petition should be granted. However, I cannot join the *ponencia*: (1) in holding that the Commission on Audit (COA) can determine whether to require pre-audit despite having lifted the same; and (2) in setting a period of 60 calendar days prior to the intended engagement for agencies to submit requests for concurrence and a period of 60 calendar days from receipt for the COA to resolve legal retainer reviews.

The *ponencia* finds that the prior written concurrence from the COA when it comes to the hiring of private counsel is an instance of pre-audit.[1] Nonetheless, the *ponencia* states that the COA's Office of the General Counsel (OGC) has the mandate to determine whether to require pre-audit or post-audit as this is a constitutional mandate.[2] As remedial measures, the *ponencia* adds that government agencies should file their requests for concurrence not later than 60 calendar days prior to the estimated date of engagement or retainer, and that the COA should resolve them within a period of 60 calendar days from its receipt.[3]

I write separately to submit my observations on the proper limits of the prior COA concurrence requirement in the engagement of private counsel. In particular, I respectfully disagree with the *ponencia*'s treatment of a prior written concurrence as a valid situation in which the COA decided to impose pre-audit, primarily because the COA had already lifted all pre-audit activities through its own issuances. To top it all, there has yet to be a circular from the COA reinstating the pre-audit system for all government transactions since its issuance of COA Circular No. 2011-002,[4] which fully implemented the post-audit system.

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1 *Ponencia*, pp. 8-10.
2 Id. at 11-12.
3 Id. at 27-29.
4 *Re*: Lifting of Pre-Audit of Government Transactions, July 22, 2011.

Moreover, I diverge from the holding that the 60-day period provided under Presidential Decree (PD) No. 1445[5] and COA's 2009 Revised Rules of Procedure[6] (COA Revised Rules of Procedure) is applicable when it comes to the engagement of private counsel.

Facts of the case

In a letter dated May 9, 2011, Power Sector Assets and Liabilities Management Corporation (PSALM) sought the concurrence of the COA and the Office of the Government Corporate Counsel (OGCC) to the engagement of two legal advisors on the privatization of the generation assets and Independent Power Producer (IPP) contracts of the National Power Corporation (NPC). The engagement of consultants was in connection with the implementation of PSALM's privatization mandate under the Electric Power Industry Reform Act[7] (EPIRA). PSALM requested that the action on its request be released on or before May 30, 2011 as the hiring of said legal advisors was urgently needed to conform to the strict timelines imposed under the EPIRA.

Only the OGCC's concurrence was received by PSALM before the requested deadline of May 30, 2011; the request to the COA was not acted upon. PSALM proceeded with the engagement of the legal advisors some three months later. It was only three years later in 2014 that the COA took official action denying the request for concurrence since PSALM engaged the services of the two legal advisors without its prior concurrence. The COA ruled that its prior concurrence was an indispensable requirement under COA Circular Nos. 86-255[8] and 95-011.[9]

The Court has the power to determine whether the requirement of prior COA concurrence is an instance of pre-audit

Senior Associate Justice Estela M. Perlas-Bernabe (Justice Bernabe) expressed reservations about dictating to the COA that the written concurrence requirement is an instance of pre-audit contrary to the COA's position in its Memorandum that it is not. Justice Bernabe explains that such jurisdiction belongs exclusively to the COA as it is given the exclusive authority to define the scope of its audit.[10]

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5 ORDAINING AND INSTITUTING A GOVERNMENT AUDITING CODE OF THE PHILIPPINES, otherwise known as the "GOVERNMENT AUDITING CODE OF THE PHILIPPINES."

6 The 2009 Revised Rules of Procedure of the Commission on Audit, September 15, 2009.

7 Republic Act No. 9136, June 8, 2001.

8 *Re*: Inhibition Against Employment by Government Agencies and Instrumentalities, Including Government-Owned and/or Controlled Corporations, of Private Lawyers to Handle Their Legal Cases, April 2, 1986.

9 *Re*: Prohibition Against Employment by Government Agencies and Instrumentalities, Including Government-Owned or Controlled Corporations, of Private Lawyers to Handle Their Legal Cases, December 4, 1995.

10 Separate Concurring Opinion of *J.* Perlas-Bernabe, pp. 5-8.

There is no doubt that COA Circular Nos. 86-255 and 95-011 were issued pursuant to the COA's exclusive authority to define the scope of its audit and promulgate accounting and auditing rules. However, while the COA has such exclusive authority, this does not preclude the Court from examining or determining whether a particular transaction is an instance of pre-audit or not. In fact, in *Villanueva v. COA*[11] (*Villanueva*), the Court had the occasion to determine whether a COA auditor conducted a pre-audit at the time of the subject public bidding in 1994. In *Villanueva*, petitioners challenged the COA's ruling that the role of the COA representative in public bidding is merely as a witness, arguing that this would make government representatives tasked with protecting government interests mere automatons. The COA, through the Office of the Solicitor General (OSG), countered that the resident auditor, as representative of the COA, serves only as an "observer" who can only perform post-audit functions and is not permitted to participate or be actively involved in the bidding process, as this would be tantamount to exercising pre-audit functions. Ruling in COA's favor, the Court in *Villanueva* defined what a pre-audit is, emphasized that pre-audit had already been lifted, and concluded that the COA auditor was not conducting pre-audit at the time:

> x x x COA Circular No. 78-87 dated 06 September 1978 x x x requires the attendance of an auditor or his duly authorized representative in the opening of bids. The scope of the functions of the auditor during the opening of bids is clearly delineated by the said circular[.] x x x
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> x x x x
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> As respondent COA obviously relied on the foregoing circular in affirming SAO Report No. 95-31 of the Special Audit Team finding that the responsibility for determining whether there has been an overprice in the items up for bid pertains to the members of the PBAC and not the COA auditor, it cannot be said that respondent COA acted in grave abuse of its discretion. In *Danville Maritime v. Commission on Audit*, where the petitioner thereat likewise argued that the bidding conducted was valid as the COA representative who was then present made no objections to the same, we ruled that "the role of the COA representative at the time of the bidding was only as a witness to insure documentary integrity, *i.e.*, by ensuring that every document is properly identified and/or marked and that the records of the bidding are securely kept."
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> Moreover, it must be kept in mind that **as early as 1989, COA had already passed COA Circular No. 89-299 lifting the pre-audit of government transactions. A pre-audit is an examination of financial transactions before their consumption or payment. A pre-audit seeks to determine that: "(1) The proposed expenditure complies with an appropriation law or other specific statutory authority; (2) Sufficient funds are available for the purpose; (3) The proposed expenditure is not unreasonable or extravagant and the unexpended balance of appropriations where it will be charged to is sufficient to cover the entire amount thereof; and (4) The transaction is approved by proper**

[11] G.R. No. 151987, March 18, 2005, 453 SCRA 782.

> **authority and the claim is duly supported by authentic underlying evidences."**
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> **Applying the foregoing to the facts before us, it can be safely said that at the time of the subject public bidding in 1994, the COA auditor was not conducting a pre-audit. Her presence thereat, as correctly pointed out by respondent, was merely as a witness to ensure documentary integrity.**[12]

In this lights, the Court then has the power to determine whether the requirement of obtaining the COA's prior concurrence to the engagement of private counsel is an instance of pre-audit. Furthermore, under Section 7, Article IX-A of the Constitution, a decision, order, or ruling of the COA may be brought to this Court on *certiorari*:

> Sec. 7. x x x Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court on *certiorari* by the aggrieved party within thirty days from receipt of a copy thereof.[13]

The Constitution limits the permissible scope of inquiry over judgments or resolutions of the COA only to errors of jurisdiction or those rendered with grave abuse of discretion.[14] The Court explained this in *Veloso v. COA*:[15]

> It is the general policy of the Court to sustain the decisions of administrative authorities, especially one which is constitutionally-created not only on the basis of the doctrine of separation of powers but also for their presumed expertise in the laws they are entrusted to enforce. Findings of administrative agencies are accorded not only respect but also finality when the decision and order are not tainted with unfairness or arbitrariness that would amount to grave abuse of discretion. 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. There is grave abuse of discretion when there is an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law or to act in contemplation of law as when the judgment rendered is not based on law and evidence but on caprice, whim and despotism.[16]

The present Petition challenges the COA's Decision, which was anchored on COA Circular Nos. 86-255 and 95-011. According to the COA, its concurrence is an indispensable requirement to the hiring of private counsel. Thus, the Court must determine whether the COA's Decision was tainted with grave abuse of discretion. In deciding this case, the Court should not therefore be prevented from determining whether the COA's prior written concurrence constitutes pre-audit. **The COA's exclusive authority to define the scope of its audit does not remove or denigrate the Court's power to**

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12 Id. at 792-796; emphasis supplied, citations omitted.
13 See *also* RULES OF COURT, Rule 64, Sec. 2 and PD No. 1445, Sec. 50.
14 *Reblora v. Armed Forces of the Philippines*, G.R. No. 195842, June 18, 2013, 698 SCRA 727, 735.
15 G.R. No. 193677, September 6, 2011, 656 SCRA 767.
16 Id. at 777; citations omitted.

review its judgments or resolutions, especially if it is tainted with grave abuse of discretion. As explained below, I believe that the COA committed grave abuse of discretion by relying solely on COA Circular Nos. 86-255 and 95-011 without taking into account its fully implemented post-audit system.

Prior COA concurrence is a species of pre-audit

In compliance with the Court's Resolution dated December 9, 2020, the COA, through the OSG, submits that the COA's prior written concurrence to the hiring of private counsel under COA Circular No. 86-255, as amended, is not a species of pre-audit.[17]

I do not agree with the OSG's position. My stance is that prior written concurrence is, and cannot be considered anything other than, a species of pre-audit. A pre-audit is an examination of financial transactions before their consummation or payment.[18] It seeks to determine whether the following conditions are present:

> (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.[19]

Applying the foregoing to the concurrence requirement, the COA's prior written concurrence before the engagement of private counsel is essentially a pre-audit.

First, despite asserting that its prior written concurrence does not amount to pre-audit, the COA itself admits in its Memorandum that the primary purpose of securing its written concurrence is to determine the reasonableness of the legal fees of the private counsel.[20] This supports my position that the written concurrence falls under the purview of the pre-audit system. When government agencies seek the COA's concurrence, the COA reviews the letter-request to determine if the legal fees to be paid are excessive, extravagant, or unreasonable, which is a pre-requisite to the hiring of private counsel. Consequently, if the COA finds the payment to private

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17 *Rollo*, p. 157.
18 *Dela Llana v. The Chairperson, COA*, G.R. No. 180989, February 7, 2012, 665 SCRA 176, 185.
19 Id. at 186; citation omitted.
20 *Rollo*, p. 158.

counsel to be unreasonable or excessive, it would not give its written concurrence to the government agency concerned.[21]

Second, as astutely observed by the *ponente*, a pre-audit is done to identify suspicious transactions on their face to avoid the wastage of public funds before their disbursement, and this is what the written concurrence is also meant to achieve.[22] Certainly, the requirement of written concurrence and pre-audit share an identical purpose, *i.e.*, to avoid irregular, illegal, wasteful, and anomalous disbursements of huge amounts of public funds before their payment or disbursement.[23]

Third, in an attempt to show that its prior written concurrence is not a species of pre-audit, the COA states that such has no reference to any specific payment or disbursement to the private counsel.[24] Conversely, this is precisely what a pre-audit system is all about — reviewing the government transaction before payment. The determination of the reasonableness of the legal fees is fundamentally an examination of financial transactions before their consummation or payment. That the COA has the latitude to subject the payment to the private counsel to another instance of pre-audit after billing does not preclude its legal retainer review from being considered to be what it essentially is: a pre-audit.

In fine, therefore, the requirement of securing the COA's prior written concurrence before the engagement of private counsel comes within the purview of what a pre-audit system is.

Prior COA concurrence is not required with the lifting of pre-audit activities

The *ponencia* maintains that the contracts were subject to the concurrence requirement under COA Circular Nos. 86-255 and 95-011, but the COA committed grave abuse of discretion when it acted on PSALM's request for engagement of the legal advisors only after three years following its receipt thereof.[25]

I disagree. I maintain that COA Circular Nos. 86-255 and 95-011 have effectively been rendered *functus officio* by subsequent COA issuances. Thus, prior COA concurrence should no longer have been required.

I submit that the necessity of engaging private counsel rests primarily upon the determination of the OSG and the OGCC — as statutory counsel of

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21 *See* id. at 169.
22 Id.
23 *See* COA Circular No. 86-257, *Re*: Selective Pre-Audit on Government Transactions, March 31, 1986; and COA Circular No. 2009-002, *Re*: Reinstituting Selective Pre-Audit on Government Transactions, May 18, 2009.
24 *Rollo*, p. 158.
25 *Ponencia*, pp. 17-27.

national government agencies and government-owned and/or controlled corporations (GOCC) — who are in the best position to understand the requirements of a particular litigation or matter for which the engagement of private counsel is sought. Specifically, for the engagement of private counsel by GOCCs, Rule 9, Section 9.2.1 of the 2006 OGCC Rules[26] pertinently provides:

> Sec. 9.2. *Exception to general prohibition.* — Notwithstanding the foregoing prohibition stated in Section 9.1 above, the GOCC may engage private counsel in exceptional cases upon prior approval of the OGCC and with the written concurrence of the Commission on Audit (COA).
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> 9.2.1 Considerations in hiring private lawyers. — In determining whether or not to approve such hiring, the Government Corporate Counsel may consider the following circumstances, in addition to the nature of the case, among others:
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> a) the absence of a legal department or legal officer when the exigencies of service so requires;
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> b) the venue is in a distant province and the hiring of a local lawyer in that province would entail less expenses than in sending an OGCC lawyer to handle the case;
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> c) the nature of the case requires immediate attention;
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> d) the expertise or capability of the proposed private counsel in a particular field is well known or respected, and the hiring of the same will facilitate the completion of the negotiation or termination of proceedings thereof; and
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> e) in highly exceptional cases as may be determined by the Government Corporate Counsel.

To stress, the determination of whether the engagement of private counsel is necessary is beyond the competence and authority of the COA. The only reasonable explanation for the requirement of prior written concurrence under COA Circular Nos. 86-255 and 95-011 is that its participation is essentially a pre-audit, which was consistent with the **then** prevailing practice of subjecting most public expenditures to the COA's pre-audit.

An examination of the timeline of relevant COA issuances leading up to the lifting of pre-audit activities and full implementation of post-audit in 2011 provides the proper and correct context to the requirement of prior written concurrence.

In 1982, the COA issued COA Circular No. 82-195[27] which stated that financial transactions of the government shall no longer be subject to pre-audit

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[26] RULES GOVERNING THE EXERCISE BY THE OFFICE OF THE GOVERNMENT CORPORATE COUNSEL OF ITS FUNCTIONS AND POWERS AS PRINCIPAL LAW OFFICE OF ALL GOVERNMENT OWNED OR CONTROLLED CORPORATIONS, February 28, 2006.

[27] *Re*: Lifting of Pre-Audit of Government Transactions, October 26, 1982.

by the COA, with certain exceptions. Remarkably, this COA Circular No. 82-195 stated that pre-audit activities shall continue to be performed on the "review and evaluation of consultancy contracts" but not as pre-requisites to payment of claims.[28]

In 1986, the COA issued COA Circular No. 86-257 which reinstituted the pre-audit activities on a limited and selective basis in view of the subsequent events demonstrating that the elimination of the pre-audit system was contributory to irregular, illegal, wasteful and anomalous disbursements of huge amounts of public funds. In that same year, the COA issued Circular No. 86-255 requiring the prior written conformity of the OSG or OGCC as well as the written concurrence of the COA to the hiring of private counsel, otherwise, the payment of retainer fees would be disallowed in audit.

After three years, COA Circular No. 89-299,[29] as amended by COA Circular No. 89-299A,[30] again lifted the pre-audit as a pre-requisite to the implementation or prosecution of projects and payment of claims. This Circular covered the financial transactions, irrespective of amount, of all agencies of the National Government Agencies (NGAs) and all GOCCs. Instead, those financial transactions of the government agencies were subjected to post-audit by the COA.[31]

The COA subsequently issued COA Circular No. 94-006[32] in 1994 which expanded the lifting of pre-audit to cover local government units (LGUs) and COA Circular No. 95-006[33] in May 1995 which lifted the pre-audit of all financial transactions without exception. In December 1995, COA Circular No. 95-011 was issued which provides that the written conformity and acquiescence of the OSG or the OGCC and the written concurrence of the COA shall first be secured before the hiring or employment of a private counsel or law firm under extraordinary or exceptional circumstances.

EPIRA created PSALM in 2001 which took ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets.[34]

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28 Id.

29 *Re*: Lifting of Pre-Audit of Government Transactions of National Government Agencies and Government-Owned or Controlled Corporations, March 21, 1989.

30 *Re*: Restatement with Amendments of COA Circular No. 89-299 on Lifting of Pre-Audit of Financial Transactions of National Government Agencies and Government-Owned and/or Controlled Corporations, September 8, 1989.

31 Id.

32 *Re*: Lifting of Pre-Audit in All Agencies of the Government, Including Government-Owned and/or Controlled Corporations and Local Government Units, And Restating the Provisions of All COA Circular on the Matter, February 17, 1994.

33 *Re*: Total Lifting of Pre-Audit on All Financial Transactions of the National Government Agencies, Government-Owned and/or Controlled Corporations and Local Government Units, May 18, 1995.

34 Section 49 of Republic Act No. 9136 provides:

> Sec. 49. *Creation of Power Sector Assets and Liabilities Management Corporation.* — There is hereby created a government-owned and controlled corporation to be known as the "Power Sector Assets and Liabilities Management Corporation," hereinafter referred to as the "PSALM Corp.," which shall take ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets. All outstanding

Subsequently, through the issuance of COA Circular No. 2009-002, the COA reinstituted selective pre-audit on government transactions in NGAs, LGUs, GOCCs with original charters for certain transactions mentioned therein. Annex A of this Circular listed the covered government agencies among which are Philippine National Oil Company, NPC, and National Transmission Commission. **PSALM is not included in the list**.

In a letter dated May 9, 2011, PSALM requested the OGCC and COA concurrences. Only the OGCC acquiesced to the hiring of the legal advisors before the requested deadline. **On July 22, 2011, COA Circular No. 2011-002 again lifted the pre-audit of government transactions**.[35] After three years, the COA denied PSALM's request for concurrence.

Based on the timeline, with PSALM not being included in the list of government agencies in COA Circular No. 2009-002 whose transactions were subject to pre-audit, it can be seen that it is still governed by COA Circular No. 95-006 which lifted pre-audit activities. Particularly, COA Circular No. 95-006 enumerated the pre-audit activities which were lifted including the "review and evaluation of government contracts for auditing, accounting and related services."[36] Aside from this, COA Circular No. 95-006 mentioned that pre-audit of all financial transactions such as "consultancy and other related services" were lifted and shall be subject to post-audit.[37] The mere fact of stating that these transactions would no longer be subject to pre-audit had

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obligations of the NPC arising from loans, issuances of bonds, securities and other instruments of indebtedness shall be transferred to and assumed by the PSALM Corp. within one hundred eighty (180) days from the approval of this Act.

35 The relevant provision of the Circular reads:

> Guided by the foregoing, and in order to accelerate the delivery of public services and ensure facilitation of government transactions, this Commission hereby withdraws selective pre-audit under COA Circular No. 2009-002 **and thereby lifts all pre-audit activities presently being performed on financial transactions of the** national government agencies, **government owned and/or controlled corporations** and local government units, except those required by existing law. (Emphasis supplied)

36 The relevant provisions of the Circular read:

> 5.01 All audit activities heretofore undertaken by this Commission or its representatives in the form of pre-audit including those provided in international agreement, are hereby lifted. The following and other such similar audit activities previously performed by COA Auditors shall not be pre-requisites to implementation/prosecution of projects, perfection of contracts, payment of claims, and/or approval of applications filed with the agencies:
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> x x x x
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> 5.01.12 Review and evaluation of government contracts for auditing, accounting and related services.
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> x x x x

37 The relevant provisions of the Circular read:

> 3.01 This Circular shall apply to financial transactions, irrespective of amount, of all agencies of the National Government, government-owned and/or controlled corporations and local government units. Such transactions shall include but shall not be limited to x x x consultancy and other related services x x x[.]
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> x x x x
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> 4.01 The pre-audit of all financial transactions of national government agencies, local government units and government-owned and/or controlled corporations involving implementation/prosecution of projects and/or payment of claims is hereby lifted without exception. These transactions shall be subject to post-audit by the Commission on Audit or its representatives.

effectively erased any doubt on whether prior COA concurrence is still required when it comes to the hiring of private counsel.

Moreover, and in any event, COA Circular Nos. 86-255 and 95-011 requiring prior COA concurrence were effectively rendered *functus officio* when the COA changed course on July 22, 2011 in COA Circular No. 2011-002, which lifted the pre-audit of government transactions to accelerate the delivery of public services and ensure facilitation of government transactions.[38] The reason for the lifting of pre-audit activities was stated concisely by former COA Chairman Grace Pulido-Tan: "We have [been] receiving concerns from agencies that auditors are looking for this and that documents. *Nauuntol ang mga proyekto* x x x."[39] **To date, Circular No. 2011-002 remains valid**.[40]

At the risk of belaboring the point, COA Circular No. 86-255, as amended, which requires the COA's prior written concurrence, is a species of pre-audit. This holding, coupled with the COA's admission in its Memorandum that COA Circular No. 2011-002 is still in effect and has not been amended or revoked,[41] confirms my view that COA Circular Nos. 86-255 and 95-011 were rendered *functus officio* with the lifting of all pre-audit activities and the full implementation of the post-audit system. Indeed, this Court had already recognized in *Villanueva* that as early as 1989, the COA had already passed COA Circular No. 89-299 lifting the pre-audit of government transactions.

As well, COA Circular No. 2011-002, which lifted all pre-audit activities that were then performed on financial transactions, was issued in accordance with the COA's constitutional mandate that it has the exclusive authority to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations.[42]

Even more, if the COA saw the need to revert to a system of pre-audit, it could have done so by issuing another circular amending or revoking COA Circular No. 2011-002. This is in relation to the COA's exclusive authority to define the scope of its audit and examination, where it may reinstitute the pre-audit system when necessary. For instance, before 1982, the COA conducted pre-audit on government transactions. Nonetheless,

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38 The relevant provision of the Circular reads:

> Guided by the foregoing, and in order to accelerate the delivery of public services and ensure facilitation of government transactions, this Commission hereby withdraws selective pre-audit under COA Circular No. 2009-002 **and thereby lifts all pre-audit activities presently being performed on financial transactions of the** national government agencies, **government owned and/or controlled corporations** and local government units, except those required by existing law. (Emphasis supplied)

39 John Constantine G. Cordon, *Pre-Audit Process Doesn't Prevent Corruption – COA*, The Manila Times, December 21, 2011, available at <https://www.manilatimes.net/2011/12/21/news/national/pre-audit-process-doesnt-prevent-corruption-coa/755528/>.

40 *Rollo*, p. 162.

41 Id.

42 CONSTITUTION, Art. IX-D, Sec. 2(2).

as previously stated, pre-audit was lifted with the issuance of COA Circular No. 82-195. Over the years, the COA issued circulars[43] that reinstated pre-audit activities on a limited and selective basis and subsequently lifted them. **That said, 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**.

On this point, the *ponencia* disagrees and asserts that requiring a separate issuance to reinstall pre-audit would be redundant with the "saving clause" in place under COA Circular No. 2011-002.[44]

While the *ponencia* correctly cites COA Circular No. 2011-002, which provides that COA may reinstitute pre-audit whenever circumstances warrant, the *ponencia* fails to mention that the same Circular categorically states that all transactions submitted or pending pre-audit as of July 22, 2011 shall no longer be pre-audited.[45]

It is likewise necessary to point out that COA Circular No. 95-006, which lifted pre-audit activities, also had the same provision, *viz.*:

> 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.

Notwithstanding such "saving clause" in COA Circular No. 95-006, the COA found it necessary to issue COA Circular No. 2009-002, which reinstituted selective pre-audit on government transactions. In effect, if an amendment is not needed, why would the COA issue COA Circular No. 2009-002 reverting to selective pre-audit? **This only goes to show that whenever selective pre-audit is reinstituted, the COA has issued another Circular amending, revoking, or modifying the previous circular which lifted pre-audit**.[46]

For sure, the COA's practice of still requiring its written concurrence contradicts what its most recent circular states — that the COA lifted all pre-audit activities. Thus, requiring the COA's prior written concurrence to the hiring of private counsel should no longer be necessary, as this amounts to pre-audit, which the COA had long lifted.

To stress, there has yet to be a circular from the COA reverting to pre-audit system for all government transactions since the issuance of COA

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43 COA Circular Nos. 86-257 and 2009-002.

44 *Ponencia*, pp. 13-14.

45 The relevant provision under COA Circular No. 2011-002 reads:

> All transactions submitted for or otherwise pending pre-audit by this Commission as of July 22, 2011 shall no longer be pre-audited and shall be returned to the agency concerned for its appropriate action.

46 *See* repealing clause in COA Circular No. 2009-002.

Circular No. 2011-002. This COA Circular No. 2011-002 has yet to be amended or revoked by a subsequent circular. **Thus, by its own issuances, the COA already lifted all pre-audit activities, which include the requirement of written concurrence for the engagement of private counsel.**

In view of the foregoing, I submit that the COA's prior concurrence should no longer be required once the statutory government counsel acquiesces to the engagement of private counsel.

Notably, in this case, the OGCC gave its concurrence to the engagement of private counsel. What is more, at the time the COA denied PSALM's request for concurrence in 2014, all pre-audit activities had already been lifted through COA's own Circular No. 2011-002.[47] In its Decision, the COA asserted that its concurrence was an indispensable requirement prior to the hiring of legal advisors.[48] This, to me, is an act of grave abuse of discretion as there is no valid basis for ignoring its own issuance through COA Circular No. 2011-002 lifting all pre-audit activities. To be sure, allowing the COA to continue invoking COA Circular Nos. 86-255 and 95-011 would frustrate and reject its objectives in COA Circular No. 2011-002 to accelerate the delivery of public services and ensure facilitation of government transactions. To say that the lack of the COA's concurrence can defeat an otherwise necessary and lawful engagement of private counsel is to diminish, denigrate, if not totally undermine, both the OSG or OGCC's competence as counsel and the agency or GOCC's right and responsibility to protect governmental interest.

With the acquiescence of the OGCC to PSALM's request for the hiring of the legal advisors, the COA's prior concurrence to their hiring was no longer required. By issuing COA Circular No. 86-255, the COA's objective was to curb the hiring of private lawyers in consideration of fixed retainer fees, at times in unreasonable amounts, paid from public funds. One cannot, I believe, fairly characterize such rationale as requiring from the COA a prior written concurrence for the necessity of hiring of private counsel, lest a disallowance automatically issues.

Even assuming that the COA can insist on the continued effectivity of COA Circular Nos. 86-255 and 95-011 as an exercise of its determination to conduct pre-audit, it must necessarily be limited to the reasonableness of the legal fees to be paid to the private counsel. This much is apparently admitted by the COA when it stated in its Memorandum that "[it] respectfully informs the [Court] that it is currently working on revisions to existing policies which would seek to limit the Legal Retainer Review to the reasonableness of the

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47 COA Circular No. 2011-002 states:

> All transactions submitted for or otherwise pending pre-audit by [the COA] as of July 22, 2011 shall no longer be pre-audited and shall be returned to the agency concerned for its appropriate action.

48 *Ponencia*, p. 5.

rates, since the acquiescence of the OSG or OGCC would cover the question of necessity of the engagement."[49]

COA Circular No. 2021-003

On July 16, 2021, COA Circular No. 2021-003[50] was issued by the COA outlining the guidelines for exempting NGAs and GOCCs from the requirement to obtain the COA's prior written concurrence to the hiring of private counsel. COA Circular No. 2021-003 was issued "to avoid unnecessary delay in the hiring of a private lawyer or legal retainer x x x and improve efficiency in government operations."[51]

COA Circular No. 2021-003, however, did not totally remove the prior written concurrence requirement. Certain conditions[52] must be met to claim an exemption from the requirement of COA's prior written concurrence. Nevertheless, even if the conditions are met, this does not preclude the COA from conducting post-audit over the disbursements made to the private counsel. COA Circular No. 2021-003 categorically states:

> **Notwithstanding the exemption** from the requirement of COA's written concurrence, any disbursements made to the private lawyer engaged by the national government agency or GOCC, **shall still be subject to post-audit** based on existing rules and regulations of the Commission and to applicable rules and regulations issued by the CSC and other government agencies. (Emphasis supplied)

Based on the afore-quoted provision, the COA, in effect, implies that its prior written concurrence amounts to a pre-audit. This must be the case, given that the COA acknowledged that should its concurrence be not required, any disbursement made to the private counsel would be subject to post-audit. For instance, one of the conditions outlined in COA Circular No. 2021-003 to claim an exemption from the requirement of prior written concurrence is that "[t]he consultancy fee of the lawyer, including other remunerations and allowances, does not exceed [Php50,000.00] per month."[53] Consequently, if this condition is met, along with the other enumerated guidelines, prior written concurrence is not required. As clearly stated in the COA's latest issuance, the purpose of the written concurrence which is to determine the reasonableness of the amount of legal fees,[54] is essentially a form of pre-audit.

Conversely, if any of the conditions outlined in COA Circular No. 2021-003 is not met, *e.g.*, the amount of legal fees is beyond the limit of

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49 *Rollo*, p. 169.

50 *Re*: 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, July 16, 2021.

51 Id., Sec. 2.

52 Id., Sec. 4.

53 Id., Sec. 4.2.f.

54 Id., Sec. 1.

Php50,000.00 per month, then the COA's prior written concurrence should ***still*** not be required to be secured, as this amounts to pre-audit. In any case, COA's audit jurisdiction is preserved with the post-audit of the payment to private counsel. The role of the COA is not to resolve whether government agencies should hire a private counsel. Rather, its task is to determine, prevent, and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds.[55]

This power, authority, and duty of the COA is not lost in cases where the legal fees paid to private counsel are deemed irregular or excessive, as these fees are necessarily subjected to post-audit. Indeed, the COA states in its Memorandum that it may disallow in audit the payment to private counsel on post-audit if the auditor finds, among other things, that the private counsel was overpaid.[56] This means that even in the absence of COA Circular Nos. 86-255 and 95-011, the COA still has the power and duty to disallow the unnecessary, extravagant, or excessive payment of legal fees.

A question now arises as to the effect of COA Circular No. 2021-003 to the present case. The *ponencia* clarifies that the contracts of engagement here are not covered by COA Circular No. 2021-003 for two reasons. First, the contracts are no longer pending review with COA. Second, they failed to comply with the condition limiting legal fees to Php50,000.00 per month.[57]

For a completely different reason, I agree that COA Circular No. 2021-003 does not apply here. Again, not being one of the GOCCs covered by COA Circular No. 2009-002 which reinstated selective pre-audit, I thus reiterate my discussion above that PSALM is governed by COA Circular No. 95-006 which lifted pre-audit without exception. Moreover, even if COA Circular No. 2011-002 is applied, the same conclusion would still be reached because when the COA denied the request for concurrence in 2014, all pre-audit activities had already been lifted.

Additionally, I cannot completely agree with the *ponencia*'s holding that the COA's issuance of COA Circular No. 2021-003 establishes that prior written concurrence had always been the rule.[58] The *ponencia* disregarded the fact that transactions submitted or pending pre-audit as of July 22, 2011,[59] which includes PSALM's request for the COA's prior written concurrence, was held to no longer be subject to pre-audit. Hence, it is not accurate to assert that the requirement of prior written concurrence had always been the rule, as the existence of COA Circular No. 2011-002 negates this statement.

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55 *Delos Santos v. COA*, G.R. No. 198457, August 13, 2013, 703 SCRA 501, 512.
56 *Rollo*, p. 172.
57 *Ponencia*, p. 17.
58 Id. at 15.
59 *See* COA Circular No. 2011-002.

The 60-day period provided under PD No. 1445 and the COA Revised Rules of Procedure is not applicable

In view of my position that prior COA concurrence is no longer required, I cannot join the rule laid down by the *ponencia*, which it said the COA **may** adopt, requiring the submission to the COA of the request for concurrence not later than 60 calendar days prior to the estimated date of engagement or retainer, attaching thereto the written conformity or acquiescence of the OGCC.[60] The *ponencia* continues that the COA must act on it within 60 calendar days from the date of its receipt.[61] Even further, the *ponencia* adds that if the period of 60 calendar days were to expire without any action from the COA, then the request should be deemed approved.[62]

The *ponencia* concludes that these remedial measures are "matters of best practice or factors that underlie an analysis of the present subject."[63]

I disagree with this postulation. I find the reliance on the 60-day period for submitting and acting on the request for concurrence completely misplaced.

Section 49 of PD No. 1445 as well as Section 4, Rule X of the COA Revised Rules of Procedure set out the period within which the COA shall render decisions brought before it:

> Sec. 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.
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> x x x x
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> Sec. 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**. (Emphasis supplied)

The 60-day period in PD No. 1445 and in the COA Revised Rules of Procedure starts from the date a case is submitted for decision or resolution. And under Section 4, Rule III of the COA Revised Rules of Procedure, a case is deemed submitted for decision or resolution "upon the filing of the last pleading, brief or memorandum."[64]

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60 *Ponencia*, pp. 27-28.
61 Id. at 28.
62 Id.
63 Id. at 29; emphasis omitted.
64 2009 REVISED RULES OF PROCEDURE OF THE COA, Rule III, Sec. 4.

In assessing to what case or matter the 60-day period applies, a distinction between a request for concurrence in the hiring of legal advisors and money claims is the point of reference.

While it is the Commission Proper which has original jurisdiction over request for concurrence in the hiring of legal advisors and money claims[65] — there is a difference between the two. When a government agency requests for concurrence from the COA, what it files is not a pleading, brief, or memorandum but a letter-request. Such request for concurrence shall be filed with the OGC which shall approve or deny the same in behalf of the COA.[66] On the other hand, what is filed in a money claim is a petition.[67] As to the application of the 60-day period, this distinction makes all the difference.

While it is the Commission Proper which has original jurisdiction over request for concurrence in the hiring of legal advisors,[68] **it bears to stress that the period within which the COA shall act on the letter-request is not provided for in PD No. 1445 or in its Revised Rules of Procedure.** In contrast, money claims over which the Commission Proper also has original jurisdiction,[69] it is a petition that is filed before the COA which must unquestionably act upon it within 60 days.[70] This being so, the 60-day period does not come into play when only a letter-request for concurrence is filed.

Equally telling, the COA states in its Memorandum that it is covered by the 15-day period under Section 5(a)[71] of Republic Act (RA) No. 6713[72] and the 60-day period under PD No. 1445 and the COA Revised Rules of Procedure.[73] Yet, in response to this Court's question on whether the COA has set a clear and specific timeline (a) within which government agencies should obtain its prior written concurrence and (b) within which it should act on the requests, the COA's response does not provide a specific time frame. It is thus not clear whether requests for concurrence should be filed and resolved within

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65 Id., Rule VIII, Sec. 1.
66 Id., Sec. 3.
67 Id., Sec. 2.
68 Id., Sec. 1.
69 Id.
70 *See Star Special Watchman and Detective Agency, Inc. v. Puerto Princesa City*, G.R. No. 181792, April 21, 2014, 722 SCRA 66, 82-86; citing Supreme Court Administrative Circular No. 10-00, dated October 25, 2000. The relevant portion of the Circular reads:

> x x x All money claims against the Government must first be filed with the Commission on Audit which must act upon it **within sixty days**. Rejection of the claim will authorize the claimant to elevate the matter to the Supreme Court on *certiorari* and in effect sue the State thereby (P.D. 1445, Sections 49-50). (Emphasis supplied)

71 Sec. 5. *Duties of Public Officials and Employees.* -- In the performance of their duties, all public officials and employees are under obligation to:

> (a) *Act promptly on letters and requests.* -- All public officials and employees shall, within fifteen (15) working days from receipt thereof, respond to letters, telegrams or other means of communications sent by the public. The reply must contain the action taken on the request.

72 CODE OF CONDUCT AND ETHICAL STANDARDS FOR PUBLIC OFFICIALS AND EMPLOYEES, February 20, 1989.
73 *Rollo*, p. 173.

the 15-day period prescribed by RA No. 6713 or the 60-day period prescribed by PD No. 1445 and the COA Revised Rules of Procedure.

Furthermore, if the Court subscribes to the *ponencia*'s proposed measures, it would essentially be an act of judicial legislation as this Court would be pre-empting the power of Congress to enact laws. The Court's function is to apply or interpret the laws, particularly where gaps exist or where ambiguities becloud issues, but this Court should not arrogate unto itself the task of legislating.[74]

In the case of *Corpuz v. People*,[75] which involved the question of whether the Court can adjust the period of imprisonment for crimes against property which period is based on the value of the property, and which valuation had been set way back in the 1930s, it was noted that the Court cannot modify the range of penalties because that would constitute judicial legislation:

> x x x [T]he Court should give Congress a chance to perform its primordial duty of lawmaking. The Court should not preempt Congress and usurp its inherent powers of making and enacting laws. While it may be the most expeditious approach, a short cut by judicial *fiat* is a dangerous proposition, lest the Court dare trespass on prohibited judicial legislation.[76]

More importantly, aside from engaging in judicial legislation, the remedial measures proposed by the *ponencia* would violate the COA's authority to promulgate its own rules of procedure under Article IX-A, Section 6 and Article IX-D, Section 2(2) of the 1987 Constitution which read:

> Sec. 6. **Each Commission *en banc* may promulgate its own rules concerning pleadings and practice before it or before any of its offices.** Such rules however shall not diminish, increase, or modify substantive rights.
>
> x x x x
>
> Sec. 2. x x x
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> (2) The Commission shall have **exclusive authority**, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and **promulgate accounting and auditing rules and regulations**, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties. (Emphasis supplied)

The 1987 Constitution has made the COA the guardian of public funds, vesting it with broad powers over all accounts pertaining to government revenue and expenditures and the uses of public funds and property including

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74 *Pagpalain Haulers, Inc. v. Trajano*, G.R. No. 133215, July 15, 1999, 310 SCRA 354, 362.
75 G.R. No. 180016, April 29, 2014, 724 SCRA 1.
76 Id. at 67.

the exclusive authority to define the scope of its audit and examination, establish the techniques and methods for such review, and promulgate accounting and auditing rules and regulations.[77]

The Court cannot impose conditions not otherwise provided for by PD No. 1445 and the COA Revised Rules of Procedure. To repeat, there is nothing in PD No. 1445 or in the COA Revised Rules of Procedure that specifies a period for filing requests for concurrence and for the COA to rule on them within 60 calendar days. That the 60-day period is culled from PD No. 1445 and the COA Revised Rules of Procedure cannot be taken to mean that requests for concurrence should be filed and acted upon within the same time frame as money claims. **While the *ponencia*'s proposed remedial measures are laudable, this Court cannot adopt them without engaging in judicial legislation. More, the Court would be violating the exclusive authority of the COA to promulgate its own rules of procedure under the Constitution.**

At any rate, the 60-day period is not applicable considering that COA Circular Nos. 86-255 and 95-011 were rendered *functus officio* with the lifting of all pre-audit activities in 2011.

The proposed period to submit and resolve a request for written concurrence cannot be likened to the Rules on Return the Court laid down in *Madera v. COA*[78] (*Madera*). To recall, the Court explicitly stated in *Madera*:

> Indeed, the Court recognizes that the jurisprudence regarding the refund of disallowed amounts by the COA is evolving, at times conflicting, and is primarily dealt with on a case-to-case basis. The discussions made in this petition, however, have made it apparent that there is now a need to harmonize the various rulings of the Court. For this reason, the Court takes this opportunity to lay down the rules that would be applied henceforth in determining the liability to return disallowed amounts, guided by applicable laws and rules as well as the current state of jurisprudence.[79]

It is clear from the foregoing that what *Madera* did was to harmonize conflicting rulings of the Court and set guideposts for the Court to follow in resolving future disallowance cases — it was not directed to the COA or to parties that may appear before it.

For the COA to take its cue from how the Court resolves disallowance cases is an altogether different matter from the Court laying down periods and conditions for COA to follow anent requests brought before it. In the same manner that I submit that the COA must defer to the statutory government counsel's determination of the necessity of engaging private counsel, this Court must also stay its hand before setting periods and conditions to submit and resolve requests for concurrence in violation of the COA's constitutional

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77 *Yap v. Commission on Audit*, G.R. No. 158562, April 23, 2010, 619 SCRA 154, 167-168.
78 G.R. No. 244128, September 8, 2020.
79 Id. at 14-15.

authority to promulgate its own rules of procedure. If the proposed remedial measures are merely recommendatory, as the *ponencia* suggests, then the Court should defer to the COA as to what period it deems appropriate in resolving requests for concurrence. This is especially appropriate given that the COA already manifested that it is "currently formulating more policy issuances on the written concurrence to avoid unnecessary delay in the hiring of a private lawyer[.]"[80]

In fine, I concur with the *ponencia* in holding the COA in grave abuse of discretion in denying the request for concurrence to the engagement of private counsel by PSALM, after a three-year delay and without determining the reasonableness of the expenses the engagement would entail.

However, I maintain that the COA abused its discretion in invoking COA Circular Nos. 86-255 and 95-011 to require its prior concurrence to the hiring of private counsel — which runs counter to the full implementation of its own later COA Circular No. 2011-002 that negated these requirements. Again, COA Circular Nos. 86-255 and 95-011 were rendered *functus officio* through the COA's own initiative in fully implementing post-audit. I also maintain that the 60-day period is not applicable when it comes to the engagement of private counsel.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

80 *Rollo*, p. 175.