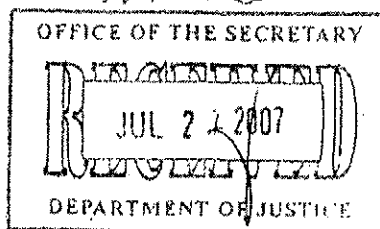


OPINION NO. 402, S. 2007

July 26, 2007

SECRETARY LEANDRO R. MENDOZA
Department of Transportation and Communications
17/F The Columbia Tower, Brgy. Wack-Wack
Ortigas Avenue, Mandaluyong City



Sir:

This has reference to your request for opinion on the queries stated therein relating to the proposed National Broadband Network (NBN) Project which will be undertaken by the ZTE Corporation and funded by the Government of the People's Republic of China, through the China Export-Import Bank.

Specifically, you raise the following issues for this Department's consideration:

- I. Whether or not the proposed NBN Project can be considered as an **Executive Agreement** by virtue of the Memorandum of Understanding signed between the Philippine Government, as represented by DTI Secretary Peter J. Favila, and ZTE Int'l and the subsequent "exchange of notes" between representatives from both the Government of the Republic of the Philippines and the Chinese Government.
- II. Granting the said Project is deemed to be an **Executive Agreement**, in connection with the mode of procurement, would the Project fall under Executive Order No. 423 (30 April 2005) under alternative modes of procurement (Direct Contracting) since the funding source is from the China Export-Import Bank and which under the stated correspondence designates ZTE Corporation to undertake the project or would it fall under the last sentence of Section 4 of Republic Act No. 9184 (Government Procurement Reform Act) which provides: "Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine Government is a signatory shall be observed." (emphasis supplied)

You state that the NBN Project aims to build a fully integrated single platform, nationwide, wireless broadband network that will initially provide connectivity for the Cyber Education Project of the Department of Education providing distance learning. It will also provide Voice Over Internet Protocol (VoIP) services to some 2,000 government offices. The Project will allow a seamless connectivity among all government agencies for Voice, Data, Internet and Video Conferencing complemented with a state-of-the-art central IDC (Information Data Center) for hosting multiple government applications. In brief, you state that the project is a comprehensive solution for fast-tracking the Philippine Government's National Cyber Corridor Initiative.

To support your request for opinion, you submitted the following documents, to wit:

1. Memorandum of Understanding between the Government of the Republic of the Philippines, through the Department of Trade and Industry, and ZTE International Investment Limited dated July 12, 2006;
2. Letter of Presidential Chief of Staff Michael Defensor to Chinese Minister of Commerce Bo XiLai dated November 21, 2006;
3. Letter of Chinese Ambassador Li Jinjun to Presidential Chief of Staff Michael Defensor dated December 2, 2006;
4. Letter of the General Manager of the Export-Import Bank of China to the National Economic and Development Authority (NEDA) dated September 8, 2006; and
5. Letter of NEDA to Chinese Minister of Commerce Bo XiLai and the President of the Export-Import Bank of China, Li Ruogu, dated April 20, 2007.

With regard to the Supply Contract that was entered into by the Philippine Government with the ZTE Corporation on April 21, 2007, only representations as to the contents thereof were made to this Department because of confidentiality issues.

In giving the opinion below, this Department has made the following assumptions: (1) that all documents submitted to this Department as copy or specimen documents conform to the originals thereof; (2) that all documents have been validly authorized, executed and delivered by all the parties thereto; (3) that the signatures on the originals of all the documents submitted

are genuine; and (4) that the factual representations made in the documents are true, correct and accurate. However, this Department has not taken into account the financial and technical merits of any of the agreements because they are within the official competence and jurisdiction of both the NEDA and the DOTC.

I

On the first issue, it is the view of your Department that the agreements that were entered into by the Philippine Government with regard to the proposed NBN Project are constitutive of an "executive agreement".

"Executive agreements" is a term commonly used to designate international agreements entered into by the President, without the concurrence of the Senate, and embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature.¹

Thus, in *Commissioner of Customs v. Eastern Sea Trading*,² the Supreme Court ruled that:

" . . . the right of the Executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history we have entered into executive agreements covering such subjects as commercial and consular relations, most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. The validity of these has never been seriously questioned by our courts.

The Court in said case also differentiated between a treaty and an executive agreement in this wise:

International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary

¹ USAFFE Veterans Association, Inc. v. The Treasurer of the Philippines, 105 Phil. 103 (1959)

² 3 SCRA 351 (1961).

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nature usually take the form of executive agreements.
(underscoring ours)

In several instances, this Department had the occasion to rule that commercial agreements concerning loans, guarantees or other credit accommodations are in the nature of an executive agreement because they embody arrangements of a more or less temporary nature, that is, they become *functus officio* upon settlement of the obligors' liabilities.³

Thus, in Opinion No. 102, series of 2004, involving a project covered by a Loan Agreement with the Japan Bank for International Cooperation (JBIC), this Department ruled:

... Considering that the subject matter of the original Loan Agreement involves agreements of a more or less temporary nature, the said Agreement is deemed an executive agreement, not a treaty, under international law.

In Opinion No. 17, series of 2005, the request for opinion involves the Philippine Rural Electrification Service (PRES) Project which was (1) approved for funding by the French Government in a Loan Agreement entered into by and between the Government of the French Republic and the Government of the Republic of the Philippines and (2) covered under the Memorandum of Undertaking (MOU) executed by and between the Department of Energy (DOE) and National Power Corporation (NPC), on one part, and the Consortium of Paris Manila Technology Corporation (PAMATEC) and ETDE of Bouygues Construction (the "Consortium"), on the other. The Department ruled in this case that the requirement of the law on public bidding does not apply to the PRES Project because it is governed by an international or executive agreement. To support our opinion, we cited, in particular, (1) the Loan Agreement which provides, as a condition, that the fund shall be used to purchase in France French goods and services and (2) the letter of the French Ambassador to the Philippines which states, among others, that the Consortium, which will undertake the Project, had been rigorously assessed and evaluated by a French Government expert.

We note that, unlike the facts involved in the foregoing opinions of this Department, the proposed NBN Project subject of the instant opinion is not yet covered by any loan agreement between the Government of the

³ Op. No. 70, s. 1987; Op. No. 147, s. 1994; Op. No. 102, s. 2004.

Republic of the Philippines and Government of the People's Republic of China.

To buttress the importance of a loan agreement in the determination of whether or not a certain project is covered by an executive agreement, we point that the document denominated as "Exchange of Notes" in the case of *Abaya v. Ebdane*,⁴ which was invoked by your Department to support your aforesaid view on the matter, contains the salient terms and conditions of the loan to be extended by the Government of Japan to the Government of the Republic of the Philippines.

Moreover, the Supreme Court in *Abaya* ruled that the subsequent Loan Agreement that was entered into between the Government of the Republic of the Philippines and the Japan Bank of International Cooperation (JBIC) forms part of the Exchange of Notes and cannot be properly taken independent thereof, thus:

Loan Agreement No. PH-P204 was subsequently executed and it declared that it was so entered by the parties "[i]n the light of the contents of the Exchange of Notes between the Government of Japan and the Government of the Republic of the Philippines dated December 27, 1999, concerning Japanese loans to be extended with a view to promoting the economic stabilization and development efforts of the Republic of the Philippines." Under the circumstances, the JBIC may well be considered an adjunct of the Japanese Government. Further, Loan Agreement No. PH-P204 is indubitably an integral part of the Exchange of Notes. It forms part of the Exchange of Notes such that it cannot be properly taken independent thereof. (*emphasis ours*)

In effect, therefore, it is the ruling in *Abaya v. Ebdane* that the Exchange of Notes, which was considered by the Supreme Court as an executive agreement, includes, as an integral part thereof, the Loan Agreement between the JBIC and the Government of the Republic of the Philippines.

In this connection, it is this Department's opinion that the exchange of correspondence between Presidential Chief of Staff Michael Defensor and Chinese Minister of Commerce Bo XiLai / Chinese Ambassador Li

⁴ G.R. No. 167919, February 14, 2007.

Jinjun may be considered as an executive agreement, *provided that*, the Loan Agreement between the Government of the Republic of the Philippines and the China Exim Bank is subsequently concluded, considering that said loan agreement is considered an integral part of the executive agreement with the Government of the People's Republic of China.

To be sure, as ruled by the Supreme Court in *Abaya v. Ebdane*, an exchange of notes is considered a form of an executive agreement, which becomes binding through executive action without need of a vote by the Senate and that like treaties and conventions, it is an international instrument binding at international law.

II

The second issue involves an examination of the coverage of Republic Act No. 9184, otherwise known as the "Government Procurement Reform Act". Section 4 of the said Act provides that it shall apply to:

... the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or -controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed. (*emphasis ours*)

Clearly, therefore, executive agreements involving infrastructure projects to be funded by a foreign lending institution do not fall within the scope of R.A. No. 9184 which mandates that all procurement activities must be made through public bidding.

In the present case, no public bidding is required because based on the exchange of correspondence between Chinese Ambassador Li Jinjun and Presidential Chief of Staff Michael Defensor, the Chinese Government has designated ZTE Corporation as the project's prime contractor, thus:

It may interest Your Honorable to know that ZTE Corporation, a reputable and established telecommunications

Company in China, responded to this worthwhile undertaking and, consequently, the People's Republic of China through the Chinese Ministry of Commerce designated it as the NBN project's prime contractor.

Moreover, Chinese Ambassador Li Jinjun also confirmed in the said exchange of correspondence that the NBN Project will be funded by the Chinese Government through the China Exim Bank, thus:

... Instructed by Chinese government, I would like to inform you and the Philippine Government that we intend to support your priority initiative, the NBN Project and agree to provide preferential buyer's credit financing support through the China Exim Bank.

In Opinion No. 102, series of 2004, this Department adopted the comments of the Government Procurement Policy Board (GPPB) and ruled that since R.A. No. 9184 has yet no implementing rules and regulations on procurement activities that are foreign-funded (to be called "Implementing Rules and Regulations Part B" or "IRR-B"),⁵ said foreign-funded procurement activities may be conducted following the guidelines set by the foreign lending institution concerned in the loan agreement. The reason for this is that although R.A. No. 9184 covers all types of government procurement regardless of source of funds, Section 4 thereof recognizes the Government's international commitments and obligations in requiring that any treaty or international or executive agreement shall be observed, in accordance with the international law principle of *pacta sunt servanda*.⁶ The only exception to this, according to the GPPB, is if the subject loan agreement is silent as to the governing guidelines, the provisions of the Implementing Rules and Regulations Part A (IRR-A) of R.A. No. 9184 covering domestically-funded procurement activities may apply.

Thus, since, as represented by your Department, the NBN Project will be funded by a foreign lending institution, specifically, the China Exim Bank, the guidelines of said bank on procurement shall be followed, unless the loan agreement with said bank is silent as to the governing guidelines. In which case, the IRR-A of R.A. No. 9184 may apply.

In sum, it is the opinion of this Department that: (1) the exchange of correspondence between Presidential Chief of Staff Michael Defensor and

⁵ Up until now, there is yet no IRR-B.

⁶ "international agreements must be performed in good faith"

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Chinese Minister of Commerce Bo Xilai / Chinese Ambassador Li Jinjun may be considered as an executive agreement pursuant to the case of *Abaya v. Ebdane*, provided that, the Loan Agreement between the Government of the Republic of the Philippines and the China Exim Bank is subsequently concluded, (2) the designation of ZTE Corporation as the project's prime contractor in the exchange of notes has to be observed pursuant to Section 4 of R.A. No. 9184 and the principle of *pacta sunt servanda*; and (3) the guidelines of the foreign lending institution, which in this case is the China Exim Bank, on procurement shall be followed, unless the loan agreement with said institution is silent as to the governing guidelines; in which case, the IRR-A of R.A. No. 9184 may apply.

Please be guided accordingly.

Very truly yours,

RAUL M. GONZALEZ
Secretary

