



## TECHNICAL SUPPORT OFFICE

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Pasig City, Philippines 1605

**NPM 020-2011**

11 November 2011

**PDIR. GEORGE Q. PIANO, CEO VI**

*Director for Logistics*

**PHILIPPINE NATIONAL POLICE**

National Headquarters, Camp Crame, Quezon City

**Re : Requirements for a Joint Venture Agreement**

Dear PDIR. Piano:

This refers to your letter dated 25 October 2011 seeking our opinion and guidance in connection with the upcoming procurement by the Philippine National Police (PNP) of Twelve Thousand Three Hundred Sixty-Eight (12,368) units of Caliber 9MM Pistol with an Approved Budget for the Contract (ABC) of Two Hundred Ninety-Six Million Eight Hundred Thirty-Two Thousand Pesos (PhP296,832,000).

In particular, the PNP is requesting for clarification on the following concerns:

1. The required place and manner of execution of the Notarized Statement and the Joint Venture Agreement (JVA), including the necessary documents to support the authority of the signatory to the JVA;
2. The need to state that the capitalization of the joint venture is sixty percent (60%) Filipino and forty percent (40%) foreign; and
3. The need for the JV to register with the Securities and Exchange Commission (SEC).

### **Place and Manner of Execution of the Notarized Statement and JVA**

Republic Act No. (RA) 9184, otherwise known as the Government Procurement Reform Act, and its revised Implementing Rules and Regulations (IRR) do not provide for specific rules relative to the place, manner and formalities in the execution of the notarized statement and the JVA. In order not to be too limiting, the rules simply provide that a "valid JVA" should be submitted by the prospective bidder if the JVA is already in existence; or in its absence, a duly notarized statement attesting to the fact that the partners to the JV shall execute a JVA upon award of the contract. In other words, the forms and solemnities, including the situs in the execution of the notarized statement and JVA, are left for the parties to determine.

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For this purpose, Article 17<sup>1</sup> of the Civil Code of the Philippines may be consulted to determine the applicable law relative to the place and manner of execution of the notarized statement and JVA. As a general rule, the law of the place shall govern the forms and solemnities in the execution of the instrument under the *Lex Loci Celebrationis* principle. However, if the instrument is executed before diplomatic or consular officials of the Philippines in another country, the form and solemnities established under Philippine laws shall govern their execution. Accordingly, if the notarized statement or JVA is executed abroad, the law of the foreign country shall govern the form and solemnities of the instrument. Conversely, if the notarized statement or JVA is executed in the Philippines or before its diplomatic or consular officials in a foreign country, the form and solemnities under Philippine laws shall be observed.

Insofar as the submission of the relevant document to support the authority of the signatory to the JVA, *i.e.* Board Resolution, Secretary's Certificate, etc., the procurement law and its associated IRR are likewise silent on this matter. Be that as it may, the procuring entity is mandated to verify, validate and ascertain all statements made and documents submitted by the bidder during the post-qualification stage. In that, the procuring entity, through its Bids and Awards Committee (BAC) should be able to confirm the authority of the signatories to the JVA by requiring the JV partners to present the relevant document to prove their respective authorities as signatory to the JVA during the post-qualification process. This approach is likened to the requirement provided for in the IRR, where in the execution of the Omnibus Sworn Statement, the bidder must attest to the fact that the "signatory is the duly authorized representative of the prospective bidder, and granted full power and authority to do, execute and perform any and all acts necessary and/or to represent the prospective bidder in the bidding."<sup>2</sup>

### **Statement of Capitalization**

Persons/entities forming themselves into a joint venture and intend to be jointly and severally responsible and liable are eligible to participate in the bidding provided that the Filipino ownership or interest of the joint venture concerned shall be at least sixty percent (60%).<sup>3</sup> The rules likewise provide that the "[F]ilipino ownership or interest shall be based on the contributions of each of the members of the joint venture as specified in their JVA."<sup>4</sup> Accordingly, the partners must clearly specify their respective contributions in the JVA to determine the 60% Filipino ownership or interest. The specificity of the contribution, however, is for the determination of ownership or interest of the partners to the JV, the rules do not specify that the ownership or interest should only be in the form of monetary contribution to the capital. Thus, the JV partners may likewise contribute property or industry with appropriate and identified valuation to determine the extent of the contribution of each partner *vis-a-vis* their ownership and interest in the JV entity.

As an eligibility criterion, procuring entities, through the BAC, are required to check on the bidders' compliance with the 60% ownership or interest requirement. Absence of such information



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<sup>1</sup> Art. 17. The forms and solemnities of contracts wills, and other public instruments shall be governed by the laws of the country in which they are executed. When the acts referred to are executed before the diplomatic or consular officials of the Republic of the Philippines in a foreign country, the solemnities established by the Philippine laws shall be observed in their execution. ...

<sup>2</sup> Section 25.2(a)(iv), IRR of RA 9184.

<sup>3</sup> Section 23.5.1.1(e), IRR of RA 9184.

<sup>4</sup> *Id.*

may be ground for the disqualification of the JV entity in light of the non-discretionary pass/fail rule in the examination, evaluation and post-qualification of bids.

In this regard, it is our considered view that the JVA should clearly state that the Filipino ownership or interest over the joint venture is at least sixty percent (60%) regardless of the form of contribution by which such ownership or interest was obtained.

### **Registration of JV with SEC**

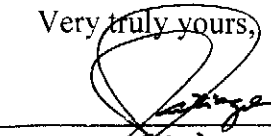
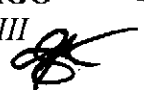
As regards the registration of the JV entity with the SEC, please be informed that this office had the occasion to discuss a similar concern in an earlier Non-Policy Opinion<sup>5</sup>, as follows:

Unlike in a corporation or partnership existence, no other formal requirement other than a JVA is necessary before individuals and/or entities can establish a JV among themselves. What is essential is that a contract embodying the agreement of partnership of the co-venturers and defining their rights and obligations under such agreement is submitted. In other words, mere submission of the valid joint venture agreement of the parties is sufficient compliance of the requirement under R.A. 9184. Hence, the requirement for registration from the SEC is not necessary to make a JV valid in light of R.A. 9184.

Considering that the above-quoted discussion still holds true in the case of the revised IRR, we maintain the foregoing view that SEC registration is not required to make a JV valid for purposes of RA 9184 and its IRR.

We trust that we have provided sufficient guidance on the matter. Should you have other concerns or clarifications, please do not hesitate to contact us.

Very truly yours,

  
**DENNIS S. SANTIAGO**  
Executive Director III  


*Copy furnished:*

**HON. RUBY U. ALVAREZ**

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<sup>5</sup> Non Policy Matter No. 004-2005 dated 19 January 2005.