

REPUBLIC OF THE PHILIPPINES  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
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**NPM No. 062-2004**

May 6, 2004

**Hon. ROBERT R. CASTAÑARES**  
Assistant Secretary for Planning and  
Project Development  
Department of Transportation and Communications  
The Columbia Tower, Ortigas, Mandaluyong City

Re : **Procurement of Consulting Services for the Laguindingan  
Airport Development Project**

Dear Asec. Castañares:

This refers to your letter dated April 26, 2004 which we received on April 28, 2004 seeking for guidance on this issue:

Whether or not the procurement of consulting services funded through a loan agreement entered into by the Government of the Philippines with the Export-Import Bank of Korea is covered by the National Economic Development Authority ("NEDA") Guidelines for the Procurement of Consulting Services.

This request was made in connection with the supplemental agreement to be executed with Yooshin Engineering Corporation, the Project Consultant for the Laguindingan Airport Development Project, which would entail a 50% increase in the original contract cost, in view of the increase in the scope of work of the airport project to conform with the International Civil Aviation Organization ("ICAO") standards. Apparently, such supplemental agreement would violate Section 8.4 of the NEDA Guidelines for the Procurement of Consulting Services, which provides:

**8.4 Extension of Services Under Supplemental Agreement**

The services of the Consultant may be extended for the performance of additional work (man-months) not covered under the original agreement through supplemental agreement. The remuneration to the Consultant for the additional man-months, including the terms and conditions for additional work, shall be governed by the provisions of the original agreement. **The total consultancy cost of all**



supplemental agreements shall not exceed 50% of the original contract amount regardless of the number of supplemental agreements. Should additional consulting services be required for the project that will result in a total additional consulting cost greater than 50% of the original contract amount, consultant/consulting firm shall be engaged through the process stipulated in the IRR. (Emphasis supplied)

### **Loan Agreements with International Financial Institutions Prevail over Domestic Laws on Procurement and Contract Implementation of Government Projects**

It can be observed that a number of Philippine laws and executive issuances<sup>1</sup> have established the consistent policy upholding international agreements entered into by the Philippine Government with other states and international organizations to faithfully comply with its commitment in its international dealings. This is in accordance with principle of *pacta sunt servanda* - international agreements must be performed in good faith, which is one of the oldest and most fundamental rules in international law. Under this maxim, a state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.<sup>2</sup> For this reason, the legislative trend in the area of government procurement is to exempt international agreements from the application of our domestic procurement laws. This is even more evident with our newly enacted law on government procurement, Republic Act No. 9184 ("R.A. 9184") otherwise know as the "Government Procurement Reform Act," Section 4 thereof provides:

**SEC. 4. *Scope and Application.*** - This Act 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 supplied)

In view of the foregoing discussions, we are of the opinion that the procurement of Consulting Services for the Laguindingan Airport Development Project and the consequent supplemental agreement modifying the consultancy contract with the winning bidder are beyond the ambit of our domestic laws on procurement and contract implementation of government projects. Based on your representations, we have observed that the Laguindingan Airport Development Project is covered by a loan agreement with the Export-Import Bank of Korea, which is an international financial institution. Hence, such loan agreement is in a nature of an international agreement which exclusively governs the consultancy contract with Yooshin Engineering Corporation. While it may be true that this contract would not fall under the exempting clause of Section 4 of R.A. 9184 as this project was advertised and

<sup>1</sup> See Section 4 of Republic Act No. 4860 (Foreign Borrowings Act); Section 1 Executive Order No. 40 and its Implementing Rules and Regulations; Department of Justice ("DOJ") Opinion No. 46, Series of 1987.

<sup>2</sup> Tañada vs. Angara, GRN 118295, May 2, 1997.

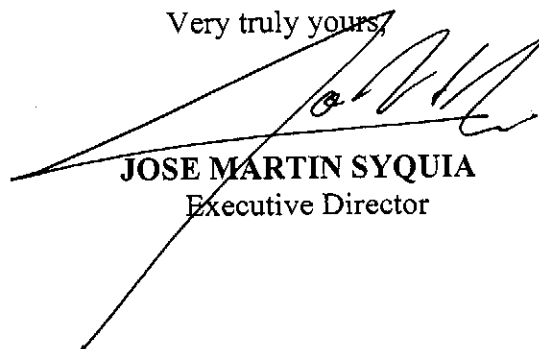
bidded out long before its effectivity,<sup>3</sup> the NEDA's Guidelines itself on the Procurement of Consulting Services has the same policy on international agreements. Section 9.3 thereof explicitly provides:

9.3 The above notwithstanding, these IRR shall not negate any existing and future commitments with respect to the selection of Consultants financed partly or wholly with funds from international financial institutions, as well as from bilateral and other similar sources as stipulated in the corresponding agreements with such institutions/sources.

With the foregoing elucidations we trust that this opinion has provided the Department of Transportation and Communication with the needed information relative to the procurement of Consulting services for the Laguindingan Airport Development Project.

Please note that that this opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts or circumstances.

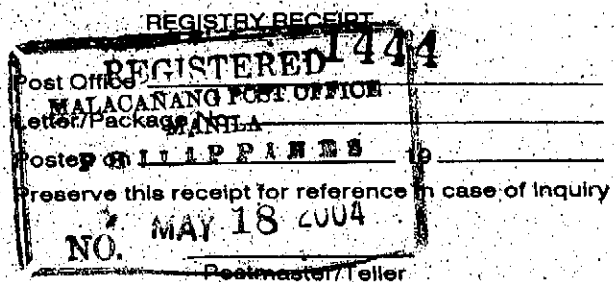
Very truly yours,



**JOSE MARTIN SYQUIA**  
Executive Director

Copy furnished:

**Mr. ROY GAMOSA**  
Project Manager  
Laguindingan Airport Development Project



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<sup>3</sup> See Section 77 of the IRR-A of R.A. 9184