

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office
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NPM No. 080-2004

June 3, 2004

HON. ROBERT R. CASTAÑARES
Assistant Secretary
Department of Transportation and Communications
The Columbia Tower, Brgy. Wack-Wack,
Ortigas Avenue, Mandaluyong City

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**Re : Execution of Supplemental Agreement for the Consulting Services
for the Nationwide Air Navigation Facilities Modernization
Project Phase III L/A Ph-P160**

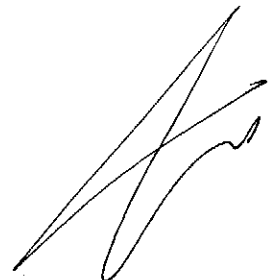
Dear Asec. Castañares:

This refers to your letter dated May 20, 2004 which we received on May 21, 2004 requesting for clarification on the following issue:

Whether or not Section 8.3 of the National Economic and Development Authority Guidelines for Procurement of Consulting Services issued in accordance with Executive Order 164, Series of 1987 will apply in the implementation of the above-mentioned procurement project.

This request is in connection with the supplemental agreement your Department seeks to execute in favor of Japan Airport Consultants, Inc., the Project Consultant for the subject procurement project, due to several delays mentioned in your letter.

Please note that a similar concern involving the same issue has been raised by your Department with our office, specifically with respect to the procurement of consulting services for the Laguindingan Airport Development Project. In view of the apparent similarity in the nature and circumstances of the subject procurement project with the Laguindingan Airport Development Project, allow us to reiterate and quote in verbatim our opinion under NPM No. 062-2004, dated May 6, 2004, to wit:



It can be observed that a number of Philippine laws and executive issuances¹ 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.² 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 bidded out long before its effectivity,³ 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

¹ 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.

² Tañada vs. Angara, GRN 118295, May 2, 1997.

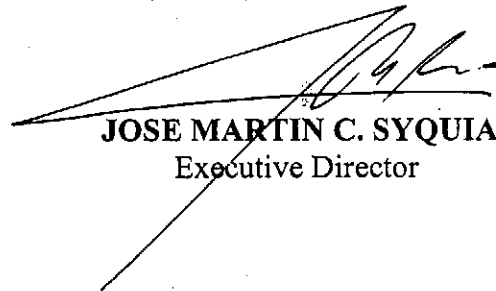
³ See Section 77 of the IRR-A of R.A. 9184

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.

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.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director

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