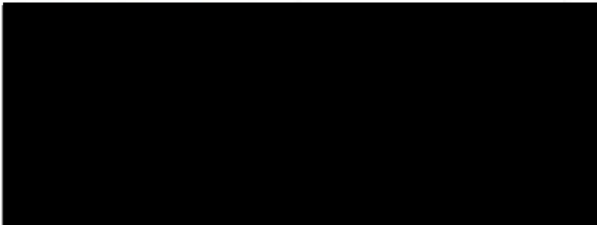


**NPM No. 163-2015**

22 December 2015



**Re: Registration of Joint Venture**

Dear [REDACTED]:

This is in response to your email requesting for an opinion on the following concerns:

1. Whether a Joint Venture is required to be registered with the Securities and Exchange Commission (SEC) prior to award of contract;
2. If a Joint Venture has been registered, what document shall be required as proof of such registration; and
3. What is the liability of the Procuring Entity (PE) if the contract has been awarded to a registered Joint Venture which failed to submit the appropriate SEC Certificate of Registration.

At the outset, we wish to inform you that the GPPB and the GPPB-TSO do not have the jurisdiction to rule over actual controversies with regard to the conduct of bidding, since the office has no quasi-judicial functions or investigatory powers under the law. We adhere to the position that apart from courts having actual jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the Bids and Awards Committee (BAC), since these duties and responsibilities fall solely within the ambit of its authority and discretion sanctioned by the law.<sup>1</sup> Likewise, we do not have the authority to determine the liability of the members of the BAC for indiscretions and violations under Republic Act (RA) No. 9184, its revised Implementing Rules and Regulations (IRR), and other allied laws. Hence, we shall limit our discussion on the interpretation of relevant procurement laws, rules and regulations pertinent to the issue presented.

**A Joint Venture Need not be Registered**

In order to be eligible to participate in a bidding activity under RA 9184 and its IRR, a Joint Venture need not be registered with the SEC at any stage of the procurement process, i.e., prior to, or after the award of contract.

<sup>1</sup> NPM No. 46-2013, dated 11 June 2013.

*TRW*

In *Information Technology Foundation of the Philippines. v. COMELEC*<sup>2</sup> citing *Kilosbayan v. Guingona*<sup>3</sup>, a joint venture was defined by the Supreme Court as follows:

[A]n association of persons or companies jointly undertaking some commercial enterprise; generally, all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and [a] duty, which may be altered by agreement to share both in profit and losses.

Accordingly, in the context of Philippine public procurement, a Joint Venture is treated as a mere association for some temporary business purpose devoid of any juridical personality such that corporations or entities forming it retain their respective individual legal personalities.<sup>4</sup> The parties to a Joint Venture form such association with the intention to submit a bid, and can be held jointly and severally responsible and liable before and after contract award. Moreover, forming a Joint Venture is considered to be the recourse for interested bidders who do not possess the minimum requirements<sup>5</sup> to participate in the procurement opportunity. Individual bidders are allowed to partner with other persons/entities to satisfy the requirements provided by law and the qualifications necessary for the project. This encourages wider participation of prospective bidders, especially in industries, where there are limited qualified suppliers, contractors, or consultants, thereby enhancing competition.

In the procurement of goods and consulting services, bids from existing and prospective Joint Ventures shall be accepted by the PE, provided that Filipino ownership or interest in the Joint Venture shall be at least sixty percent (60%)<sup>6</sup>. In compliance with the rules on eligibility requirements, existing Joint Ventures are required to submit a valid Joint Venture Agreement (JVA) without need of registering it with the SEC, while prospective Joint Ventures shall submit a duly notarized statement from all the potential co-venturers stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful.<sup>7</sup> In this case, a copy of the valid JVA shall be submitted to the PE within ten (10) calendar days from receipt by the bidder of the notice from BAC that the bidder has the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid, as the case may be.<sup>8</sup>

In the procurement of infrastructure projects, only existing Joint Ventures are allowed to participate in accordance with GPPB Resolution No. 29-2014<sup>9</sup>, which amended Section 23.1(b) of the IRR pursuant to RA 4566<sup>10</sup>. In this regard, a duly notarized statement from prospective parties to a Joint Venture is no longer acceptable in lieu of a valid JVA. Nevertheless, the Joint Venture must still comply with the eligibility criterion that ownership or interest in the Joint Venture concerned shall be at least seventy-five percent (75%) Filipino owned. However, where the structures to be built require the application of techniques and/or technologies which are not adequately possessed by a person/entity meeting the seventy-five

<sup>2</sup> G.R. No. 159139, 13 January 2004.

<sup>3</sup> 232 SCRA 110, 144, May 5, 1994.

<sup>4</sup> NPM No. 04-2005, dated 19 January 2005.

<sup>5</sup> NPM No. 105-2014, dated 4 November 2014.

<sup>6</sup> Sections 23.5.1.1(e) and 24.3.1(e), IRR of RA 9184.

<sup>7</sup> Sections 23.1(b) and 24.1(b), IRR of RA 9184.

<sup>8</sup> Section 37.1.4(a)(i), IRR of RA 9184.

<sup>9</sup> Issued on 5 December 2014.

<sup>10</sup> Contractor's License Law.

percent (75%) Filipino ownership requirement, Filipino ownership or interest shall not be less than twenty-five percent (25%).<sup>11</sup>

Anent the foregoing, what is mandated by the IRR is the validity of the JVA between persons or companies such that their respective rights and obligations are delineated therein, and not the establishment or creation of a new juridical entity. It is clear therefore that once the JVA has been executed and its validity has been established, the requirements of the IRR and RA 9184 in this regard are deemed satisfied.<sup>12</sup> Pointedly, the requirement under the IRR of RA 9184 is the establishment of a contractual JV, not a juridical JV.

### **Registered Joint Venture**

A Joint Venture duly registered with the SEC is considered either as a partnership or a corporation in accordance with the Certificate of Registration issued by the SEC. Once a Joint Venture has been registered with the SEC, it shall have a distinct and separate legal personality from its co-venturers. Hence, the registered Joint Venture shall submit the appropriate Certificate of Registration issued by the SEC as part of its eligibility documents pursuant to Sections 23.1(a) and 24.1(a) of the IRR of RA 9184, including all the legal, technical and financial requirements relevant to the newly created Joint Venture entity.

### **Failure to Submit the SEC Certificate of Registration**

A Certificate of Registration issued by the SEC is one of the eligibility documents required to be submitted by a prospective bidder registered as a partnership or a corporation.<sup>13</sup> Hence, if it fails to submit the appropriate Certificate of Registration, it shall be declared ineligible upon determination by the BAC using the non-discretionary "Pass/Fail" criterion. Accordingly, an award made to an ineligible bidder shall be null and void with the concerned BAC officials bearing full responsibility of the failed bidding and award.<sup>14</sup>

### **Summary**

In view of the foregoing, we reiterate that a Joint Venture need not be registered with the SEC in order for it to be eligible to participate in bidding activities. For purposes of the procurement process what is important is the determination of the responsibilities and liabilities of each co-venturer and not the creation of a separate legal entity. Hence, it is sufficient that the bidder submits a valid JVA in the case of procurement of civil works; or, in the case of procurement of Goods and Consulting Services, a valid JVA or a duly notarized statement from all the potential co-venturers stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful.

In the event that the Joint Venture has already registered with the SEC either as a partnership or a corporation, it shall submit the appropriate Certificate of Registration issued by the SEC as part of its eligibility documents, including all the other legal, technical and financial requirements in the name of the Joint Venture entity. Failure to submit the SEC Certificate of Registration will render the Joint Venture ineligible to participate.

<sup>11</sup> Section 23.5.2.1(e), IRR of RA 9184.

<sup>12</sup> NPM No. 04-2005, dated 19 January 2005.

<sup>13</sup> Sections 23.1(a)(i) and 24.1(a)(i) of the IRR of RA 9184.

<sup>14</sup> *Information Technology Foundation of the Philippines. v. COMELEC*, G.R. No. 159139, 13 January 2004.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

Very truly yours,

(sgd.)

 **DENNIS S. SANTIAGO**  
*Executive Director V*

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