Republic of the Philippines
SECURITIES AND EXCHANGE COMMISSION
SEC Bldg. EDSA , Mandaluyong City

OFFICE OF THE GENERAL COUNSEL

17 April 2009

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SEC Opinion No. 09-07
Foreign Corporation:
Doing Business

Sir:

We write with reference to your letter dated 3 February 2009 asking for an opinion whether your client, Horus Telecoms & Utilities (Horus, for brevity) can be considered as not doing business in the Philippines and is exempt from obtaining a license to do business in the Philippines.

In your letter, you represented the following circumstances:

1. That Horus is a foreign corporation duly organized and existing under French laws.

2. That Horus entered into a contract with the Philippine Information Agency/Bureau of Broadcast Services for the supply of consulting services for the Philippine Administration Network Project Phase 2 (PANP 2) for the duration of eighteen (18) months.

3. That Horus has not engaged in any other venture, activity or involvement within the Philippines other than PANP 2 nor has further business ventures or transactions related to the PANP 2 after its completion.

Section 3 (d) of Republic Act No. 7042 or the Foreign Investments Act (FIA, for brevity) defines "doing business" as:

> The phrase *"doing business"* shall include soliciting orders, service contracts, opening offices, whether called *"liaison"* offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling one hundred eighty [180] days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that

imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or of the purpose and object of the business organization: *Provided, however,* That the phrase *"doing business"* shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account;

Based on the FIA, "doing business" in the Philippines includes the following activities and circumstances:

a) soliciting orders, service contracts;
b) opening offices, whether called 'liaison' offices or branches;
c) appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eighty days [180] days or more;
d) participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines;
e) any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.

It is our opinion that Horus is doing business in the Philippines.

The FIA expressly states that the act of appointing representatives or distributors, operating under the full control of the foreign corporation, domiciled in the Philippines, or who, in any calendar year, stay in the country for a period or periods totaling one hundred eighty (180) days or more is an act of doing business. In your letter-request and in the documents[1] you submitted to this Office, the duration of the contract entered into by Horus with the Philippine Information Agency/Bureau of Broadcast Services is for **eighteen (18) months**. The project technical manager Gerard Jacot and the IT manager Yosri El Karaa will be "resident(s) in the Philippines."[2] Also, Horus will open a Project Office in Manila.[3] These circumstances effectively qualify Horus' activities as acts of doing business as defined under the FIA.

Furthermore, the Implementing Rules and Regulations of Republic Act No. 9184 or the Government Procurement Reform Act governs the hiring of foreign consultants in the Philippines. Section 24.1.2 of the said IRR states:

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[1] Contract for the Digitalization of the Philippine Government Mass Media and Information Network, Clause 21 - Time of Completion. Page 15.
[2] Annex C, PANP Phase II Contract, Horus Project Team.
[3] Ibid.

2. A foreign consultant may be an individual, sole proprietorship, partnership, corporation or joint venture satisfying the definition of consultant under this IRR-A, but not meeting the citizenship, ownership, interest and/or registration/authorization requirements for a Filipino consultant. To qualify for hiring for consulting services, the foreign consultant must satisfy the following minimum requirements:

a) ***The foreign consultant must be registered with the SEC and/or any agency authorized by the laws of the Philippines; and*** [Emphasis ours.]

b) When the types and fields of consulting services in which the foreign consultant wishes to engage involve the practice of regulated professions, the foreign consultant must be authorized by the appropriate Philippine Government professional regulatory body to engage in the practice of those professions and allied professions: *Provided, however,* That the limits of such authority shall be strictly observed.

Should a foreign consultant be considered for award, any registration, license or authority required under this provision shall be submitted by the said consultant prior to award of contract.

A similar requirement was already imposed prior to the enactment of R.A. 9184. Under Section 2.2.5.1 of the "*Implementing Rules and Regulations on the Procurement of Consulting Services for Government Projects*" issued by the National Economic Development Authority on 07 October 1998, the said NEDA Rules already required:

"A foreign consultant may be an individual, sole proprietorship, partnership or corporation who satisfies the definition of a Consultant as defined in Section 2.2.3 but does not meet the citizenship, ownership/interests and/or registration/authorization requirements for a Filipino Consultant as defined in 2.2.4. To qualify for hiring for consulting services, the Foreign Consultant must satisfy the following minimum requirements:

a. ***The Foreign Consultant must be registered with the Securities and Exchange Commission and/or agency authorized by the law.***" [Emphasis ours.]

Again, this prerequisite for the hiring of foreign consultants is not new. In our 13 June 1996 Opinion to Attys. Leo G. Dominguez and Felix T. Sy, Jr. of Quisumbing Torres and Evangelista Law Office, we wrote:

"Under the 'Guidelines On The Hiring Of Foreign Consultants for Government Projects', dated May 5, 1987, issued by the National Economic Development Authority (NEDA) pursuant to Executive Order No. 164, ***foreign consultants for government projects are required to be licensed by the SEC as a prerequisite to the awarding and/or approval of consultancy contracts involving foreign consultants.*** Accordingly, ***all foreign consultant firms of government projects,***

regardless of whether or not they are engaged in an isolated transaction, shall be required to secure a license from the Commission." [Emphases ours.]

In light of the foregoing discussion, we cannot confirm that Horus is not doing business under the FIA nor that Horus is exempt from the requirement of obtaining a license to do business in the Philippines.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel