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

OFFICE OF THE GENERAL COUNSEL

24 July 2009

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SEC Opinion No. 09-18
Foreign Corporation:
Doing Business

Sir:

We write with reference to your letter-request dated 9 February 2009 requesting for an opinion whether your client DAXI S.A. – N.V. Etn. FRATEUR DE POURCQ JOINT VENTURE (DAXI, 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.

Your letter-request stated that DAXI, which was organized under Belgian laws, entered into a contract with the Light Rail Transit Authority (LRTA) for the latter's LRT Line 1 North Extension Project – Electro-Mechanical Subsystems (EMS:4) Trackworks. Except for the above-mentioned contract, DAXI has not engaged nor will it be engaged in any other business activity within the Philippines.

The governing law on the subject of foreign corporations doing business in the Philippines is Republic Act No. 7042 or the Foreign Investments Act[1] (FIA). Section 3 (d) of the FIA 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

[1] As amended by R.A. No. 8179.

> 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;"

An examination of your letter-request, its attached documents, as well as the documents subsequently submitted to this Office, indicate that DAXI is doing business in the Philippines for the reasons discussed below.

180-day Period

DAXI's activities in the Philippines will exceed the 180-day period prescribed in the FIA. While your letter-request failed to state the exact duration of the EMS:4 Trackworks project package, the Work Schedule detailing a Gantt chart of the durations of the Contract Packages[2] shows that EMS:4 Trackworks will last for 16.5 months or approximately 495 days[3] in total.

While it may be argued that the FIA envisages a situation where the 180-day period applies to the appointment of representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period totaling 180 days, the absence of any statement in your letter-request as to the stay of DAXI's representatives in the Philippines leads to the reasonable presumption that they will be in the country from the commencement of the Package until its end. After all, it is only logical to expect that it will be DAXI's representatives themselves who will supervise, control and implement the different phases of the Package such as the Interface and Design Activities, Procurement and Delivery, Installation, Testing & Commissioning and Stand Alone Test/System Integration Test.

Participation in Bidding Process

Another reason why DAXI is considered doing business in the Philippines is the Supreme Court's decisions on the participation by a foreign corporation in project biddings in the Philippines. In the case of *European Resources and Technologies, Inc. and Delfin J. Wenceslao v. Ingenieuburo Birkhahn + Nolte, Ingeniurgesellschaft mbh and Heers & Brockstedt Gmbh*

[2] Pages A2 47-48 of Bidding Contracts (Conditions of Contract: General Conditions of Contract and Special Conditions of Contract)
[3] Computed using one month as equal to thirty days.

and Co.,[4] the Court held that, notwithstanding the FIA:

> "There is no general rule or governing principle laid down as to what constitutes 'doing' or 'engaging in' or 'transacting' business in the Philippines. Thus, it has often been held that a single act or transaction may be considered as 'doing business' when a corporation performs acts for which it was created or exercises some of the functions for which it was organized. We have held that the act of participating in a bidding process constitutes 'doing business' because it shows the foreign corporation's intention to engage in business in the Philippines. In this regard, it is the performance by a foreign corporation of the acts for which it was created, regardless of volume of business, that determines whether a foreign corporation needs a license or not." [Underscoring supplied.]

The European Resources case was not a new ruling and had in fact invoked previous precedents in the cases of *Hutchison Ports Philippines Limited v. Subic Bay Metropolitan Authority, et al.*[5] and *Granger Associates v. Microwave Systems Inc. et al.*[6]

Attached to the letter-request was the Contract for the LRT LINE 1 NORTH EXTENSION PROJECT EMS-4: Trackworks. On page 2 of that Contract, stipulation number 2 states:

> "2. The following documents shall be deemed to form and be read and construed as part of this Contract, to wit:
>
> a. Invitation to Apply for Eligibility and to Bid;
> b. Eligibility Requirements, Documents and/or Statements;
> c. Instructions to Bidders along with Annexes;
> d. General and Special Conditions of Contract;
> e. Employer's Requirements – General Specifications and Particular Design and Performance Specifications;
> f. Drawings/Plans;
> g. Bid Data Sheet;
> h. Addenda and/or Supplemental Bid Bulletins;
> i. Bid Form (including all documents/statements contained in the Bidder's Bid Envelopes);
> j. Performance Security;
> k. Credit Line issued by a Licensed Bank, if any;
> l. Notice of Award of Contract and Bidder's 'Conforme' thereto; and
> m. Other contract documents that may be required by existing laws and/or the EMPLOYER." [Underscoring supplied.]

The above-quoted stipulation clearly leads to the conclusion that DAXI participated in the bidding of the EMS-4: Trackworks project package for the

[4] G.R. No. 159586, 26 July 2004. Yñares-Santiago, J.
[5] G.R. No. 131367, 31 August 2000, Yñares-Santiago, J.
[6] G.R. No. 79986, 14 September 1990, Cruz, J. citing the work of Tabios, Severiano S. in Fundamentals of Doing Business by a Foreign Corporation in the Philippines, 142 SCRA 10

purpose of installing the railroad tracks. Furthermore, DAXI's website[7] and other industry sites show that railways and tracks are its main line of business.

Applying the rulings in the European Resources, Hutchison and Granger cases, DAXI is thus considered to be doing business in the Philippines, and must thus obtain the necessary license to do so.

In light of the foregoing, we cannot confirm that DAXI is not doing business or that it is exempt from the requirement of obtaining a license to do business in the Philippines.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel

[7] http://www.daxi.be/ - accessed on 13 July 2009; http://www.kompass.com/mt/BE0188956 - accessed 13 July 2009; http://www.frateurdepourcq.be/ - accessed on 13 July 2009.