Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

11 August 2009
SEC-OGC Opinion No. 09-23
Re: Foreign Equity Participation in Construction Business

ORTEGA, DEL CASTILLO, BACORRO, ODULIO, CALMA & CARBONELL
ALPAP I Bldg., 5th and 6th Floors,
140 L.P. Leviste Street, Salcedo Village,
Makati City

Attention: Attys. Renato G. Calma and Ma. Aurora Celestina M. Lopez

Sir/Madam:

This refers to your letter dated 22 July 2009 requesting for an opinion on some legal matter(s) stated therein.

You mentioned that, for and in behalf of your clients who compose a group of foreign investors, you are in the process of establishing a corporation which will engage in the business of **constructing power plants for energy companies.** You request an opinion on whether such proposed corporation, assuming it has a minimum paid-up capital of Two Hundred Thousand US Dollars (US$ 200,000.00), can be a 100% foreign-owned domestic corporation.

To compute the required percentage of Filipino ownership of a corporation engaged in a particular industry, resort must be had to the 1987 Constitution and/or the statutes enacted by Congress, such as Republic Act ("RA") No. 7042 or the Foreign Investments Act ("FIA"), including the applicable Foreign Investment Negative List ("FINL"), pursuant to its power to determine which areas of investment may be opened to foreign participation, and which should be completely reserved to Filipino citizens.

Of particular pertinence to your query are the following provisions of the Seventh Regular FINL[1]:

[1] Executive Order No. 584.

LIST A:

Foreign ownership is ***limited up to 25% foreign equity*** for entities which participate in the following ***construction projects***:

(1) Contracts for the construction and repair of locally-funded ***public works*** EXCEPT [a] infrastructure or development projects covered by RA 7718; and [b] projects which are foreign funded or assisted and required to undergo international competitive bidding; and,

(2) Contracts for construction of ***defense related*** structure.

LIST B.

Foreign ownership is ***limited up to 40% foreign equity*** for protection of small and medium scale enterprises:

Domestic market enterprises with paid-in equity capital of less than the equivalent of US$ 200,000.00;

Domestic market enterprises which involve advanced technology or employ at least 50 direct employees with paid-in equity capital of less than US$ 100,000.00.

The projects covered by RA 7718, also known as The Expanded BOT Law ("BOT Law"), are those defined in Section 2(a) thereof as "***private sector infrastructure or development projects***" which are implemented through the build-operate-and-transfer ("BOT") scheme and its permutations. The term "*private sector infrastructure or development projects*" is defined as:

"(a) *Private sector infrastructure or development projects* --- The general description of infrastructure or development projects ***normally financed and operated by the public sector but which will now be wholly or partly implemented by the private sector***, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects ***as may be authorized by the appropriate agency[2] pursuant to this Act.***"

[2] All government infrastructure agencies, including government-owned and -controlled corporations and local government units, are mandated to include in their development programs those priority projects that may be financed, constructed, operated and maintained by the private sector under the provisions of the BOT Law with respect to which they are authorized to enter into contract with any duly pre-qualified project proponent. The list of such national projects costing up to Three Hundred Million Pesos (P300,000,000) shall be submitted to the Investment Coordination Committee (ICC) of the National Economic Development Authority (NEDA) for its approval and to the NEDA Board for projects costing more than Three Hundred Million Pesos (P300,000,000).

Section 5.4 of the Implementing Rules and Regulations ("IRR") of the BOT Law provides:

> "Sec. 5.4. Prequalification Requirements — To prequalify, a project proponent must comply with the following requirement:
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> a. Legal Requirements.
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> i. For ***projects*** to be implemented ***under the BOT scheme*** whose operations require a ***public utility franchise***[3], the ***proponent***[4] and ***facility operator***[5] must be a Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission and ***owned up to at least sixty percent (60%) by Filipinos.***
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> ii. For projects to be implemented through ***a scheme other than the BOT and requiring a public utility franchise***, the ***facility operator*** must be a Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission and ***owned up to at least sixty percent (60%) by Filipinos***. . . .
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> xxx xxx xxx
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> iv. For projects to be operated by the project proponent itself or owned by the proponent itself or owned by the proponent but operated through a facility operator where operation of the facility ***does not require a public utility franchise***, the project proponent or the facility operator ***may be Filipino or foreign-owned.***

The list of local projects to be implemented by the local government units concerned shall be submitted for confirmation to the municipal development council for projects costing up to Twenty Million Pesos (P20,000,000); those costing above Twenty Million Pesos (P20,000,000) up to Fifty Million Pesos (P50,000,000) to the provincial development council; those costing up to Fifty Million Pesos (P50,000,000) to the city development council; above Fifty Million Pesos (P50,000,000) up to Two Hundred Million Pesos (P200,000,000) to the regional development council; and those above Two Hundred Million Pesos (P200,000,000 to the ICC of the NEDA. (See Section 3 in relation to Section 4 of the BOT Law).

[3] "Public Utility Projects" refers to projects including public roads and thoroughfares, railways and urban rail mass transit, electricity and gas distribution systems, city and municipal water distribution and sewerage systems, and telecommunication systems serving the general public, and such other public services as defined under the Public Services Act, as amended. [Section 1.3(t), IRR of the BOT Law].

[4] "Project Proponent" refers to the private sector entity which shall have contractual responsibility for the project and which shall have an adequate financial base to implement the said project consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project. [Section 2(k), BOT Law; Section 1.3(s), IRR of the BOT Law].

[5] "Facility Operator" refers to a company registered with the Securities and Exchange Commission, which may or may not be the project proponent, and which is responsible for all aspects of operation and maintenance of the infrastructure or development facility, including but not limited to the collection of tolls, fees, rentals, or charges from facility users. [Section 2(m), BOT Law; Section 1.3(h), IRR of the BOT Law].

v. If the ***contractor***[6] to be engaged by the project proponent ***to undertake the construction works of the project*** under bidding needs to be pre-identified as prescribed in the published Invitation to Prequalify and Bid and ***is a Filipino***, it must be duly licensed and accredited by the Philippine Contractors Accreditation Board (PCAB). If the same is a ***foreign contractor***, it must secure the necessary licenses from the PCAB required of foreign contractors wishing to engage in construction works in the Philippines." (Emphasis supplied.)

The nationality requirement, i.e. 60% Filipino-owned and 40% foreign-owned, is prescribed by the BOT Law and its IRR for both the project proponent and facility operator or the facility operator only, as the case may be, in projects requiring public utility franchise.[7] However, the engagement or hiring of a foreign contractor is expressly authorized for the construction stage of the "infrastructure projects" which are included in the specific enumeration of projects found in the first paragraph of Section 2(a) of the BOT Law and "other infrastructure and development projects as may be authorized by the appropriate agency" pursuant to the same law.[8] But such foreign contractor should not at the same time be the project proponent because then, the nationality requirement would apply.[9]

On the premise that it has a minimum paid-up capital of Two Hundred Thousand US Dollars (US$ 200,000.00), we are of the opinion that the proposed corporation is not covered by the afore-quoted provisions of the Seventh Regular FINL considering that "*construction of power plants for energy companies*" is neither "*construction and repair of locally-funded public works*" nor "*construction of defense related structure*". Nor is the proposed corporation covered by the above-said restrictions of the BOT Law absent any showing of the concurrence of the following conditions: (a) that the power plants it would construct for energy companies are those "*private sector infrastructure or development projects*" and other projects authorized by the appropriate agency pursuant to the BOT Law which would require a public utility franchise[10]; and (b) in case letter (a) is satisfied, that the proposed corporation would at same time be the project proponent.

From the foregoing, we answer your query in the affirmative.

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[6] "Contractor" refers to any entity accredited under the laws **which may or may not be the project proponent** and which shall undertake the actual construction and/or supply of equipment for the project. [Section 2(l), BOT Law; Section 1.3(e), IRR of the BOT Law].

[7] DOJ Opinion No. 30, Series of 1995.

[8] Ibid.

[9] See definition of a "contractor" under Section 2(l) of the BOT Law and Section 1.3(e) of its IRR, in relation to DOJ Opinion No. 30, Series of 1995.

[10] This must be stressed: the fact that a corporation constructs projects requiring a public utility franchise does not make such corporation a public utility company. Under Section 13(b) of the Public Service Act, the term "public service" or "public utility" refers to every person that now or hereafter may ***own, operate, manage, or control*** in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental and done for general business purposes, any common carrier, railroad, street railway . . . and other similar public service. Thus, the 60%-40% equity restriction for public utilities apply only to those who ***own, operate, manage, or control*** such entities and not to those who merely construct the said entities' structures. See DOJ Opinion No. 49, Series of 2004, and DOJ Opinion No. 2, Series of 2002.

The opinion is based solely on the facts disclosed in the query and relevant only to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts.[11]

Please be guided accordingly.

VERNETTE G. UMALI-PACO
General Counsel

[11] Section 7, SEC Memorandum Circular No. 15, Series of 2003.