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

Office of the General Counsel

2 October 2014

SEC-OGC Opinion No. 14-27
Re: Foreign Equity Limitations on Corporations Engaged in Private Construction Contracts

PICAZO BUYCO TAN FIDER & SANTOS
18th, 19th & 17th Floors, Liberty Center
104 H. V. dela Costa Street
Salcedo Village,Makati City 1227

Attention: Atty. Jonas-Karl V. Perez and Atty. Kristina Irene C. Dy

Gentlemen:

This is in reply to your letter dated 1 June 2010, on behalf of your client, Whessoe Philippines Construction, Inc. ("WPCI").

In the request, you seek confirmation of your following positions:

1. An earlier SEC Opinion which states that the Construction Industry Authority of the Philippines ("CIAP"), being an administrative agency, can neither amend nor overrule the law it seeks to implement, nor by its rules and regulations extend or restrict the terms and provisions thereof;
2. Construction corporations which will cater exclusively to private construction contracts are not subject to limitation on foreign ownership and that the same can be majority-owned by foreign nationals, provided that it is not engaged in any of the industries indicated in the Foreign Investments Negative List ("FINL") and the minimum capitalization requirement is satisfied; and
3. Ownership, management, and operations of WPCI need not be vested in citizens of the Philippines.

According to you, WPCI is a domestic corporation primarily engaged in the construction business pursuant to its primary purpose under the Second Article of its Articles of Incorporation ("AOI"), to wit:

> To engage in general construction and other allied businesses including the constructing, enlarging, repairing, removing, developing, or otherwise engaging in any work upon buildings, roads, highways, manufacturing plants, bridges, airfields, piers, docks, mines, shafts, waterworks, railroads, railway structures, all iron, steel, wood, masonry and earth construction, except locally funded projects, and to make, execute, bid for, and take or receive any contracts or assignment of contracts therefore, or in relation thereto, or connected therewith and to manufacture and furnish building materials and supplies connected therewith; and doing of any and all other business and contracting incidental thereto or connected therewith, and the doing and performing of any and all acts and things necessary, proper or convenient for and incidental to the furtherance and/or implementation of the purposes therein mentioned.

You stated that WPCI intends to undertake overseas construction projects, and that for this purpose, WPCI proposes to register with the Philippine Overseas Construction Board, which operates under the CIAP.

You likewise stated that: (1) WPCI is sixty percent (60%) owned by Luzon Industrial Commercials Holdings, Inc., a Filipino corporation, and forty percent (40%) owned by British Nationals; (2) the authorized capital stock of the corporation is Five Million Two Hundred Thousand Pesos (Php5,200,000.00), divided into Fifty Two Thousand (52,000) shares with par value of One Hundred Pesos (Php100.00) each; and (3) it has a paid-in capital amounting to Ten Million One Hundred Thirty Nine Thousand Five Hundred Ninety Pesos and Fifteen Cents (Php10,139,590.15), consisting of the paid-up capital of One Million Three Hundred Pesos (Php1,300,000.00) and the additional paid-in capital of Eight Million Eight Hundred Thirty Nine Thousand Five Hundred Ninety Pesos and Fifteen Cents (Php8,839,590.15).

As to your first position, the same arises from what you believe to be an inconsistency between Section 20 of Republic Act No. 4566, otherwise known as the Contractor's License Law ("CL Law")[1] and Section 3.1(a) of the Rules and Regulations Governing Licensing and Accreditation of Constructors in the Philippines ("Rules"),[2] promulgated by the CIAP.

As you pointed out, the forty percent (40%) foreign equity limitation as a requirement for the issuance of a contractor's license is found only in the Rules, but not in the CL Law which the Rules seek to implement.

However, we cannot give any confirmation as to your presented position. First, it is the policy of the Commission to refrain from rendering opinions on matters which require an examination and review of the acts and ruling of another government agency since Commission does not review acts and ruling of other government agencies.[3]

---

[1] Section 20 reads:

Qualifications of applicants for contractors' licenses. The Board shall require an applicant to show at least two years of experience in the construction industry, and knowledge of the building, safety, health and lien laws of the Republic of the Philippines and the rudimentary administrative principles of the contracting business as the Board deems necessary for the safety of the contracting business of the public.

For the purpose of this section, a partnership, corporation, or any other organization may qualify through its responsible managing officer appearing personally before the Board who shall prove that he is a bona fide responsible officer of such firm and that he exercises or is in a position to exercise authority over the contracting business of his principal or employer in the following manner: (1) to make technical and administrative decisions; and, (2) to hire, superintend, promote, transfer, lay off, discipline or discharge employees.

[2] Section 3.1 reads:

SECTION 3.1 *License Types* X X X

a) The Regular License

X X X

The Regular License shall be reserved for and issued only to constructor-firms of Filipino sole proprietorship, or partnership/corporation with at least seventy percent (70%)* Filipino equity participation and duly organized and existing under and by virtue of the laws of the Philippines.

*Adjusted to 60% under Article 48 of Chapter III, Book II of the Ominubus Investments Code of 1987.

[3] SEC Memorandum Circular No. 15, Series of 2003, Item 5.7.

Second, **the opinion you cited is NOT of this Commission, but of the Department of Justice ("DOJ")**, particularly DOJ Opinion No. 017, Series of 1996.[4] **Please ascertain and verify the premises of your queries** in your future communications and dealings with the Commission.

Further, the Commission, in a past Opinion,[5] took note that the CIAP, through the Philippine Contractors Accreditation Board, still maintains the forty percent (40%) foreign equity limit as a requirement for the issuance of regular contractors' licenses. In relation thereto, the Commission suggested that this particular matter be clarified with the said government agency. The same suggestion was made as well by the DOJ in the Opinion you cited.

Concerning the second position, the Commission has acknowledged that **as a business**, private construction contracts used to be included in List A of the Foreign Investments Negative List ("FINL") with forty percent (40%) foreign equity limitation.[6] In the current FINL,[7] the said **economic activity** is no longer included. This means that corporations which undertake private construction contracts **may be wholly owned by foreign nationals**[8] provided the minimum capitalization requirement under the FINL is satisfied and that it does not undertake other nationalized or partially nationalized activities.

On the other hand, a corporation, although engaged in private construction, **may be covered by the foreign equity restrictions** for domestic market enterprises. Under Section 8 of the Foreign Investments Act of 1991 ("FIA"),[9] which is adopted in List "B" of the current FINL, domestic market enterprises, with paid-in equity capital of less than the equivalent of two hundred thousand US Dollars (US$ 200,000.00), are restricted to a maximum of forty percent (40%) foreign equity. Moreover, if the domestic market enterprise either (1) involves advanced technology as determined by the Department of Science and Technology, or (2) employs at least fifty (50) direct employees, and has a paid-in capital of less than the equivalent of one hundred thousand US Dollars (US$ 100,000.00), then the foreign equity restriction applies.[10]

Based on the foregoing, we confirm your second position. Construction corporations which will cater *exclusively* to private construction contracts are not subject to limitation on foreign ownership and that the same can be majority-owned by foreign nationals, provided that it is not engaged in any of the industries indicated in the current FINL and the minimum capitalization requirement therein is satisfied.

With regard to the third position, relevant is Section 2-A of Commonwealth Act No. 108, otherwise known as the Anti-Dummy Law. In firms engaged in wholly or partially

---

[4] Dated 9 February 1996, Addressed to Mr. Cielito F. Habito of the NEDA.
[5] SEC Opinion dated 18 April 2001, addressed to Atty. Renato Calma.
[6] Ibid.
[7] Ninth Regular Foreign Investments Negative List, Executive Order No. 98, 29 October 2012 as of this Opinion.
[8] See note 5.
[9] Republic Act No. 7402, as amended by Republic Act No. 8179.
[10] SEC-OGC Opinion No. 14-11, dated 2 June 2014, addressed to Navarro Amper & Co.

nationalized activities,[11] aliens may not be appointed to management positions, although they may be elected as directors in proportion to their allowable participation or share in the capital of such entities.

Based on WPCI's AOI, it will not undertake locally funded projects, and, based on your representation, WPCI intends to engage in overseas construction projects only. If the business activities of WPCI are limited to overseas construction projects or private construction contracts, then, the foreign equity ownership limitations under the List "A" of the FINL do not apply since the activity is not nationalized.

However, under List "A", No. 18 of the current FINL, only those corporations or associations at least 60 *per centum* (60%) of whose capital is owned by Philippine citizens may own private lands in the Philippines. Based on the first of the secondary purposes[12] in WPCI's AOI, among the activities to be undertaken by WPCI is ownership of land, which is a partly nationalized activity. Hence, foreign ownership of WPCI shall be limited to a maximum of forty percent (40%) *if it will own land*. This being the case, Section 2-A of the Anti-Dummy Law may apply.

In view of the foregoing, the restrictions on ownership, management, and operations under the Anti-Dummy Law shall not apply to WPCI, *for as long as*: (1) it does not engage in any nationalized or partially nationalized activity; and (2) the minimum capitalization requirement under the current FINL for corporations engaged in domestic market enterprises is complied with, *should it undertake private construction projects in the Philippines*.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances. If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.[13]

Please be guided accordingly.

Very truly yours,

CAMILO S. CORREA
General Counsel

/mpb /vpbg

---

[11] Under the same provision, an undertaking or activity is partially nationalized if its enjoyment or exercise is limited by the Constitution or any law to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty percent (60%) of the capital of which is owned by Filipino citizens.

[12] To **purchase**, **acquire**, **own**, lease, sell and convey **real properties such as lands**, buildings, factories and warehouses and machineries, equipment and other personal properties as may be necessary or incidental to the conduct of the corporate business, and to pay in cash, shares of its capital stock, debentures and other evidences of indebtedness, or other securities, as may be deemed expedient, for any business or property acquired by the corporation.

[13] SEC Memorandum Cricular No. 15, Series of 2003.