



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

OFFICE OF THE GENERAL COUNSEL

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SEC-OGC Opinion No. 14-21
Foreign Corporation; Doing Business

PARAS AND MANLAPAZ

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Sir:

This refers to your letter-request for legal opinion dated February 9, 2009 concerning questions of your client, AP TRANS S.A., a foreign corporation under the laws of Belgium, regarding the necessity of obtaining by a foreign corporation of a license to do business under the Corporation Code.

Briefly, you stated that your client is a foreign corporation under the laws of Belgium; and that on December 19, 2008, it entered into a contract, after undergoing the required government bidding process, with the Light Rail Transit Authority (LRTA), a wholly-owned government corporation, relative to the LRT-1 North Extension Project - EMS-3: Automated Fare Collection System (EMS-3:AFCS). You further declared that AP TRANS S.A. has not engaged, nor it will be engaged in any other business activity within the Philippines other than the aforesaid project.

In summary, your queries are: (a) Considering the fact that it has already entered into only one (1) contract to be performed in the Philippines with no intention to continue any other commercial dealings in the Philippines, whether AP TRANS S.A. is engaged in an isolated transaction in the Philippines and is deemed not engaged in doing business in the Philippines; and (b) whether AP TRANS S.A. is exempt from obtaining license to do business in the Philippines?"

Section 3 (d) of the Foreign Investments Act (FIA), as amended, defines the meaning of “doing business”:

“d. 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;”

(Emphasis and underscoring supplied)

The primary purpose of the license requirement is to compel a foreign corporation desiring to do business within the Philippines to submit itself to the jurisdiction of the courts of the state and to enable the government to exercise jurisdiction over them for the regulation of their activities in this country.¹ If a foreign corporation operates a business in the Philippines without a license, and thus does not submit itself to Philippine laws, it is only just that said foreign corporation be not allowed to invoke them in our courts when the need arises. “While foreign investors are always welcome in this land to collaborate with us for our mutual benefit, they must be prepared as an indispensable condition to respect and be bound by Philippine law in proper cases.”²

¹ *Eriks Pte., Ltd. v. CA*, G.R. No. 118843, February 6, 1997, 267 SCRA 567.

² *Granger Associates v. Microwave Systems, Inc.*, G.R. No. 79986, September 14, 1990, 189 SCRA 631.

This Commission opines that AP TRANS S.A. is a foreign corporation doing business in the Philippines.

AP TRANS S.A. has actively participated in the bidding (and was subsequently awarded) the LRTA Project for the EMS-3:AFCS. Relative thereto, it has been held by the Supreme Court that participating in the bidding process constitutes "doing business" because it shows the foreign corporation's intention to engage in business here.³ The bidding for the concession contract is but an exercise of the corporation's reason for creation or existence.⁴ As further explained by the Supreme Court in *European Resources and Technologies Inc. and Wenceslao v. Ingenieurburo Birkhan + Nolte Ingiurgesellschaft mbh and Heers & Brockstedt GmbH & Co.*:⁵

"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.

"Consequently, the German Consortium is doing business in the Philippines without the appropriate license as required by our laws. **By participating in the bidding conducted by the CDC for the operation of the waste management center, the German Consortium exhibited its intent to transact business in the Philippines.** Although the Contract for Services provided for the establishment of a local corporation to serve as respondents' representative, it is clear from the other provisions of the Contract for Services as well as the letter by the CDC containing the disapproval that it will be the German Consortium which shall manage and conduct the operations of the waste management center for at least twenty-five years. Moreover, the German Consortium was

³ *Hutchison Ports Philippines Ltd. v. SBMA, et al.*, G.R. No. 131367, 31 August 2000, 339 SCRA 434.

⁴ *Ibid.*

⁵ G.R. No. 159586. July 26, 2004, 435 SCRA 246.

allowed to transact with other entities outside the CSEZ for solid waste collection. Thus, it is clear that the local corporation to be established will merely act as a conduit or extension of the German Consortium.”

(Emphasis and underscoring supplied; citations omitted)

The active participation of AP TRANS S.A. in the bidding process is evidently acknowledged in Paragraph 2 of the Contract dated December 19, 2008 between LRTA and AP TRANS S.A., which you attached in your letter-query.

Thus, that AP TRANS S.A. has actively participated in a government bidding process for the LRTA Project makes the said foreign corporation as “doing business” in the Philippines, in line with its main business of selling, designing and installing automated ticketing and fare collection machines and equipment, as can be seen in their corporate website.⁶

Moreover, based from the Bidding Documents, in particular Item 2.2., page 6 of Special Conditions of the Contract, the duration of the whole work is to be completed in twenty-two (22) months. Such period of duration exceeds the 180-day period as provided for in the FIA. 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 AP TRANS S.A.’s representatives in the Philippines leads to the reasonable presumption that they will be in the country from the commencement of the project until its end. After all, it is only logical to expect that it will be the representatives and agents of AP TRANS S.A. who will supervise, control and implement the different phases of the project.

Lastly, it is worth stressing that this opinion is not new to you. Previously, you already sought a similar opinion from this Commission which also involved the same LRT-1 North Extension Project albeit with a different foreign corporation (DAXI) and subject of contract (for EMS-4: Trackworks).⁷ In the said opinion, this Commission opined that the foreign corporation is doing business considering that (1) the Work Schedule of the project would exceed the 180-day period as provided for by the Foreign Investments Act; and (2) the mere fact that

⁶ <http://www.aptrans-group.com/>. Retrieved on July 17, 2014, 15:30; <http://www.prodatamobility.com/index.php?page=afc-mobility-products>. Retrieved on July 17, 2014, 15:30.

⁷ SEC Opinion 09-18, July 24, 2009, addressed to Paras and Manlapaz Law Office.

the foreign corporation participated in the bidding process under Philippine laws would make such foreigner company as doing business here.

It shall be understood that the foregoing opinion is rendered based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the courts, or upon the Commission in other cases of similar or dissimilar circumstances.⁸ If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.


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⁸ SEC Memorandum Circular 2003-15.