

DOF LOAN WITH AUSTRALIA
DOJ Opinion No. 050, s. 2020
Nov. 16, 2020

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SUMMARY

This opinion was issued in response to a request on the DOJ's opinion on two (2) loan propositions from the Export Finance Australia ("EFA") for the government's procurement of six (6) OPVs for the Philippine Navy:

1. That it may be contracted under Presidential Decree (P.D.) No. 415;
2. That the Government of the Philippines may borrow an amount exceeding US \$300 million and with a tenor of more than ten (10) years from the Government of Australia.

On the first proposition, the DOJ opined that it is not an Official Development Assistance undertaking because its purpose is for procuring military equipment which does not pursue economic development, thus, failing to meet the first criteria to be considered an ODA. Accordingly, the law which applies is P.D. No. 415 which specifically applies to defense contracts.

As regards the second loan proposition, the DOJ discussed that it must not exceed US \$ 300 million and the terms of payment must not be less than ten (10) years. The DOJ also noticed that under the proposed Government-to-Government Arrangement, a designated supplier has already been identified to supply the six OPVs from Australia. Thus, it reiterated its previous opinion on the same subject which states that the determination that an agreement is an executive agreement, including a Government-to-Government arrangement, would exempt it from the competitive public bidding requirement under the prescribed procurement procedures between the parties or from the requirement under RA No. 9184 and its Revised Implementing Rules and Regulations.

DISCUSSION

Following the DOF's interpretation of Section 3 of PD No. 415, the President is authorized to enter into two (2) kinds of arrangements in behalf of the Republic of the Philippines:

Clause 1: the President of the Philippines is hereby authorized in behalf of the Republic of the Philippines, to contract such **loans, credits or indebtedness including supplier's credit, deferred payment arrangements** upon such terms and conditions as may be agreed upon with any local or foreign source or lender not exceeding Three hundred million United States dollars, or its equivalent in other foreign currencies at the exchange rate prevailing at the time of the contracting of the loans, credits, or indebtedness, suppliers credits and deferred payment arrangements and at terms of payment of not less than ten years; and

Clause 2: to enter into and conclude **bilateral agreements involving other forms of official assistance such as grants and commodity credit arrangement or indebtedness** as may be necessary with Government of foreign countries with whom the Philippines has diplomatic or trade relations or which are members of the United Nations, their agencies, instrumentalities or financial institutions or with reputable international organizations or non-governmental national or international lending institutions or firms extending supplier's credit or deferred payment arrangements.

The DOF is of the opinion that the proposed loan falls under the second clause which has no amount and term limit. Hence, the DOF is convinced that it could obtain the proposed US\$75 million loan with a 12-year tenor from the Government of Australia under PD No. 415. We, unfortunately, beg to differ.

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Meanwhile, we readily noticed under the attached Annex 2 of the proposed Government-to-Government (“G2G”) Arrangement that it will involve a three-tier

structure, and that a designated supplier has already been identified to supply the purported procurement of the six (6) OPVs from Australia, to wit:

1. The two governments, through duly appointed authorities will execute a Financing Cooperation Agreement establishing legal and institutional framework for financing cooperation, including procurement processes;
2. Supply Contract will be executed between the Department of National Defense (as implementing agency), and **Austal Limited** (as supplier); and
3. Facility Agreement will be executed by and between the Australian Government through Export Finance Australia (as Lender) and the Philippine Government through the Department of Finance (as Borrower) for the financing of the Project. (Emphasis supplied)

Relative thereto, we would like to reiterate this Department's previous opinion on the same subject which states that the determination that an agreement is an executive agreement, including a G2G arrangement, would not justify its exemption from the requirement of competitive public bidding under the prescribed procurement procedures between the parties or from the requirement of RA No. 9184 15 and its Revised Implementing Rules and Regulations (RIRR). The designation of Austal Limited as the supplier of the OPVs, in the absence of the required public bidding, may cause serious legal consequences.

As a matter of fact, Section 4 of RA No. 9184 specifically provides that it shall apply to the procurement of infrastructure projects, goods and consulting services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of Government, its department, offices and agencies, including government-owned and/or controlled corporations and local government units.