

Joint Foreign Chambers of the Philippines

American Chamber of Commerce of the Phils., Inc. ♦ Australian-New Zealand Chamber of Commerce (Phils.), Inc.
Canadian Chamber of Commerce of the Phils., Inc. ♦ European Chamber of Commerce of the Phils., Inc.
Japanese Chamber of Commerce & Industry of the Phils., Inc. ♦ Korean Chamber of Commerce of the Phils., Inc.
Philippine Association of Multinational Companies Regional Headquarters, Inc.

October 30, 2017

HON. ARSENIO M. BALISACAN

Chairman

Philippine Competition Commission

12 Josemaria Escriva Drive,

Ortigas Center, Pasig City

Dear Chairman Balisacan:

The undersigned foreign chambers of commerce thank the Philippine Competition Commission (PCC) for issuing a position paper on House Resolution 898 on *Inquiring into the Desired Economic Policy Direction of the Philippines with regard to Foreign Participation in the Ownership and Operation of Corporations and Firms engaged in the Business of Construction of Buildings and Others*. The JFC is well-aware of the issue of discriminatory licensing practices of the Philippine Contractors Accreditation Board (PCAB) at the Department of Trade and Industry (DTI). We agree with your position that the nationality-based restrictions imposed by the PCAB are a significant barrier to entry of foreign contractors in the construction industry.

In addition to the above issue, the JFC advocates ending other forms of discrimination against foreign providers of goods and services to the public sector in the Philippines.

One legal source of the discrimination in bidding in government contracts is the 81-year old so-called “**Flag Law**” or **CA 138** An Act to Give Native Products and Domestic Entities the Preference in the Purchase of Articles for the Government, which is referenced in Section 4 of RA 9184 or the Government Procurement Reform Act and gives “preference in awarding contracts for such works to Filipino or American contractors and domestic entities when the lowest bid of a domestic bidder is not more than fifteen per centum in excess of the lowest foreign bid.” The reference to “American” ended many decades ago. This law was cited by the Supreme Court as the legal basis for its decision to reverse the award of the Manila Hotel privatization to the Genting Group of Malaysia in favor of a local bidder.

Other similar restrictions are found in:

1. **CA 541 of 1940** – An Act to Regulate the Awarding of Contracts for the Construction and Repair of Public Works Contracts which states in Section 1:

“SECTION 1. All branches, offices, and subdivisions of the Government and all government-owned or controlled companies, authorized to contract and make disbursements for the construction or repair of public works, shall give preference in awarding contracts for such works to Filipino or American contractors and domestic entities when the lowest bid of a domestic bidder is not more than fifteen per centum in excess of the lowest foreign bid. Provided, however, that for the construction of land, air, and sea-coast defenses, arsenals, barracks, depots, hangars,



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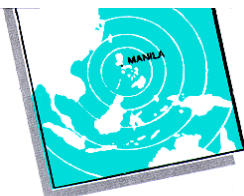
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landing fields, quarters, hospitals, and all other buildings and structures required for the national defense of the Philippines, no foreign bids shall be allowed.” As in CA 146, the reference to “American” ended many decades ago.”



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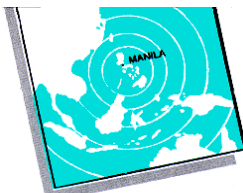
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2. **RA No. 5183 of 1967** – An Act Regulating the Award of Contracts for the Supply to, or Procurement by, Any Government-Owned or Controlled Corporation, Company, Agency, or Municipal Corporation Material, Equipment, Goods, and Commodities and states in Section 1:

“SECTION 1. No contract, either through a public bidding or negotiated contract for the supply to, or procurement by, any government-owned or controlled corporation, company, agency or municipal corporation of materials, equipment, goods and commodities shall be awarded to any contractor or bidder who is not a citizen of the Philippines or which is owned by Filipino citizens, except, as to a citizen, corporation or association of a country the laws or regulations of which grant similar rights or privileges to citizens of the Philippines. In the latter case, the Flag Law shall continue to be applicable.”

3. **Letter of Instructions No. 630 of 1977** – This Marcos-era document still on the website of the Government Procurement Board states in paragraph 1:

“1. Unless specifically authorized by the President of the Philippines in exceptional cases, bidding award or negotiations of primarily civil works contracts shall be limited to Filipino individuals and to corporations, partnership, or associations seventy five percent (75%) of the capital of which is owned by citizens of the Philippines;”

4. **RA 7718 of 1994** – An Act Amending Certain Sections of RA 6957, Entitled “An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector ...” in Section 2(a) states:

“SECTION 2(a)... For the construction stage of these infrastructure projects, the project proponent may obtain financing from foreign and/or domestic sources and/or engage the services of a foreign and/or Filipino contractor. Provided, that in case an infrastructure or a development facility’s operation requires a public utility franchise, the facility operator must be Filipino or if a corporation, it must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos.”

The five restrictions above are cited in the current FINL (Executive Order No. 184 dated May 29, 2015); consequently potential foreign suppliers are discouraged and become disinterested in bidding on Philippine government public works contracts.

However, it should be noted that Philippine jurisprudence has established that foreign companies can design, build, own, maintain, and repair a franchised public utility but cannot operate such.

The JFC welcome Point 3 of the Socio-economic Agenda that targets improved national competitiveness and the removal of restrictions on foreign participation in the economy.



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The success of the ambitious “Build, Build, Build” program involving total Philippine national government spending of more than PhP7 trillion (US\$136 billion) is expected to require larger construction capacity and skills than are available among domestic firms alongside the continuing high pace of construction of private sector projects. Thus augmenting the domestic industry with foreign firms and foreign professionals will accelerate the “Build, Build, Build” program and support the higher 7-8% GDP growth targets of the government.

We hope that the Philippine Competition Commission will take a position on these antiquated laws restricting foreign firms from bidding on government procurement and construction projects.

With best regards,



AUSTRALIAN-NEW ZEALAND

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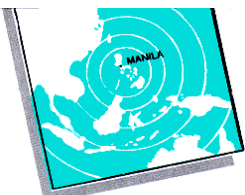
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