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MEMORANDUM

For: **Vivant Foundation Inc.**

Date: May 22, 2019

Subject: Restrictions and Requirements for Foreign Contractors to Undertake the Engineering, Procurement, Construction, and Commissioning of Solar Photovoltaic Facilities in the Philippines

This Memorandum has been prepared pursuant to the request of **Vivant Foundation, Inc.** (the “Foundation”) to guide it in the selection of an Engineering, Procurement, Construction, and Commissioning (“EPC”) Contractor (“EPC Contractor”) for the tender for Project Renewable Energy for Livelihood and Youth (“Project ReLY”). Project ReLY aims to build and provide solar photovoltaic facilities to identified areas in the Provinces of Bohol, Cebu and Palawan (the “Solar Facilities”). Since Project ReLY will be funded by the European Union (the “EU”) through the European Commission to the Philippines as part of the Access to Sustainable Energy Programme, the tender will be open to international EPC Contractors.

Thus, this Memorandum will discuss if there are nationality restrictions or prohibitions against an international EPC Contractor for Project ReLY, and if there are such other applicable requirements to undertake the EPC contract.

Is the business of an EPC Contractor a nationalized industry?

Article XII, Section 2 of the Constitution considers that the exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least 60% of whose capital is owned by Filipinos.

The undertaking of an EPC Contractor for Project ReLY’s solar will involve design, engineering, procurement of materials and equipment, testing and commissioning of the Solar

Facilities. The ERC Contractor will not own and operate the Solar Facilities. Rather, it will be the owner that will be engaged in the exploration, development, and utilization of natural resources. For this reason, the owner must be at least 60% Filipino-owned and must enter into a Solar Energy Service Contract with the State, through the Philippine Department of Energy (“DOE”), which is the agreed form of production-sharing agreements that is mandated under the Constitution.

Moreover, under the Eleventh Regular Foreign Investment Negative List (List A) issued on October 29, 2018, even locally-funded public works, as long as it is foreign-assisted and required to undergo competitive bidding, exempts the contractor from the 60% Filipino ownership requirement.

In sum, Project ReLY may award the EPC contract to a qualified international tenderer.

Having cleared that an international tenderer may undertake the EPC contract, we have identified the following as requirements for an international EPC Contractor:

(A) Foreign Corporation Registration

A foreign contractor that is a corporation must be registered with the Securities and Exchange Commission (“SEC”) before it can undertake the engineering, design, procurement, construction, installation and commissioning of the Solar Project.

Republic Act No. 11232 (“RA 11232”) mandates that a foreign corporation must obtain a license from the SEC before it can transact business in the Philippines:

“Section 140. Definition and Rights of Foreign Corporations. - For purposes of this Code, a foreign corporation is one formed, organized or existing under laws other than those of the Philippines’ and whose laws allow Filipino citizens and corporations to do business in its own country or State. It shall have the right to transact business in the Philippines after obtaining a license for that purpose in accordance with this Code and a certificate of authority from the appropriate government agency.”

(B) The Preference for Filipino Labor

Section 2 (a) of Republic Act No. 6957 known as the Build-Operate-Transfer Law (as amended by Republic Act No. 7718) explicitly allows foreign contractors to participate in tenders for projects which are foreign-funded or foreign-assisted and required to undergo international competitive bidding. But, the same section also mandates that Filipino labor shall be employed or hired in the different phases of construction where Filipino skills are available:

“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 a 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: Provided, further, That in the case of foreign contractors, Filipino labor shall be employed or hired in the different phases of construction where Filipino skills are available: Provided, finally, That projects which would have difficulty in sourcing funds may be financed partly from direct government appropriations and/or from Official Development Assistance (ODA) of foreign governments or institutions not exceeding fifty percent (50%) of the project cost, and the balance to be provided by the project proponent.

Section 12.7 of the Implementing Rules and Regulation of RA 6957 further specifies that the hiring of labor shall be in accordance with existing labor laws, rules and regulations:

“In the case of foreign Contractors, Filipino labor shall be employed in the different phases of the Construction works where Filipino skills are available. Hiring of labor shall be subject to existing labor laws, rules and regulations.”

(C) Special Contractor’s License

A foreign EPC Contractor must secure a Special License from the Philippine Contractors Accreditation Board (“PCAB”) in accordance with Republic Act No. 4566 (as amended by Presidential Decree No. 1746); otherwise, the PCAB may secure a writ of injunction, without bond under Section 34. Moreover, the unlicensed contractor may also be guilty of misdemeanor, and shall, upon conviction, be sentenced to a nominal fine between Five Hundred Pesos (Php500.00) and Five Thousand Pesos (Php5,000.00).

It must be emphasized that under the Implementing Rules and Regulations of RA 4566 (the “IRR”), the foreign EPC Contractor will only be issued a Special License from PCAB which is valid only for a single undertaking or project, and must be renewed annually,¹ subject to the EPC Contractor’s compliance with the following requirements:

- a. The project is foreign financed/ internationally-funded and that international bidding is allowed under the Bilateral Agreement entered into by and between the Philippine Government and the foreign/International Financing Institution;²
- b. The foreign contractor is duly licensed or accredited contractor by the appropriate government agency of its home country;³
- c. The foreign contractor has a registered resident alien representative in the Philippines duly authorized to act for and in its behalf;⁴
- d. The foreign contractor has appointed and authorized a Filipino resident agent to accept summons and other legal processes;⁵

¹ See Section 3.1 (b) and Section 3.2 (b) of the IRR.

² Section 4.6 (e) f of the IRR.

³ Section 4.6 (e) e of the IRR.

⁴ Section 4.6 (e) c of the IRR.

⁵ Section 4.6 (e) d of the IRR.

- e. The foreign contractor is duly allowed by the Board of Investments to undertake construction projects in the Philippines;⁶
- f. The foreign contractor has employed at least one Sustaining Technical Employee who meets the minimum requirements for the category and classification applied for;⁷ and
- g. The foreign contractor has met the financial and technical requirements for the category and classification applied for.⁸

(D) Immigration Requirements

It is expected that the foreign EPC Contractor will employ foreign nationals, who must secure the appropriate work visa from the Philippine Bureau of Immigration and an Alien Employment Permit (“AEP”) from the Department of Labor and Employment in accordance with Department Order No. 186, Series of 2017, which prescribes the rules of the issuance of AEP.

-Nothing follows-

⁶ Section 4.6 (e) g of the IRR.

⁷ Section 4.1. (a) of the IRR.

⁸ Section 4.1 of the IRR.