

Administrative legislation in the Philippine contractors' industry

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Despite the country's increasing efforts to open its markets and promote greater productivity and market efficiency, firms continue to face challenges that hamper their entry into and exit from various Philippine industries. This is especially true in the case of the contractors' industry, where the government still has to address several barriers, such as time-consuming and sometimes costly registration, business closure, and tax compliance requirements, high tax rates, and limitations in the movement of persons across borders and in foreign equity.

In terms of foreign equity limitations, only the Philippine Constitution and the Congress may establish them. In addition to clarifying the investment limitations in certain commercial activities, the former also mandates the latter to reserve certain areas of investments to Philippines citizens and regulate foreign investments in accordance with the country's goals and priorities.¹ However, in practice, there are certain instances when foreign equity limitations are not established by the Congress, but by an administrative agency. This constitutes administrative legislation, which is unconstitutional and invalid.

Among the instances of administrative legislation is the foreign ownership limitation in the contractors' industry in the Philippines. This *Policy Note* revisits the manner in which this came about and recommends appropriate steps the government should adopt to comply with existing Constitutional and statutory mandates on foreign ownership in the country.

As a background, this paper reviews the hierarchy of laws in the Philippines and examines which sets of laws have precedence over others. It also assesses the extent of their binding authority over all other laws, rules, and regulations emanating from them.

¹ Article XII, Sec. 10, Philippine Constitution. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least 60 per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investment. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos. In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos. The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

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To execute the mandate of the people, the Constitution authorizes the three equal branches of government, namely, the executive, legislative, and judicial, to exercise certain powers. It grants the legislative power to the Philippine Congress and the judicial power to one Supreme Court and lower courts. The executive power, on the other hand, is vested on the president of the Philippines.

In the exercise of their functions, the three branches of government issue binding declarations through statutes, rules and regulations, executive issuances, treaties, and judicial interpretations. However, these declarations must be consistent with the powers granted by the Constitution, whether made in the direct exercise of the power or delegated to some other entity, to be valid and binding.

Exercise of legislative powers by the president

For a time, and prior to the adoption of the 1987 Constitution, even the legislative power was vested

on the president of the Philippines. When former President Ferdinand Marcos declared Martial Law, for instance, he granted himself legislative powers primarily to suppress lawless violence, rebellion, and insurrection.² Subsequently, he abolished the National Assembly and replaced it with an Interim National Assembly under the 1973 Constitution. The said interim assembly still included him as a member and allowed him to continue exercising legislative powers.

In 1976, the government amended the 1973 Constitution and granted President Marcos a continuation of his exercise of legislative powers until the lifting of Martial Law. Through his issuance of Proclamation No. 2045, however, these powers continued to be in full force and effect even after he lifted Martial Law on January 17, 1981. When the Constitution was further amended in April 1981, it extended the hold of the president to legislative powers until 1986.

After the People Power Revolution, former President Corazon Aquino issued Proclamation No. 3 on March 25, 1986, promulgating a Provisional Constitution where the president was mandated to continue exercising legislative powers until a legislature is elected and convened under a new constitution. Aquino only lost her legislative powers when the 8th Congress was convened on July 27, 1987 under the 1987 Constitution.

Thus, from 1972 to 1976, the executive branch enjoyed exclusive legislative powers. From 1976 to 1986, it shared the legislative powers with the Batasang Pambansa and regained exclusive control of such powers from 1986 to July 1987. It was only on July 27, 1987 that the Congress redeemed its

² Proclamation 1081 (1972), pars. 23-24; See Proclamation No. 1104, issued on January 17, 1973, declaring the continuation of Martial Law.

exclusive power to legislate. As a consequence of these exclusive and concurrent exercises of legislative powers, the president's issuances have been considered as having the validity and binding effect of law, as if these were enacted by the Congress.

The power of subordinate legislation

While the power to legislate is vested in the Congress, it may properly delegate certain rule-making powers to administrative agencies tasked to implement the law under the power of subordinate legislation. To be valid, the Congress' delegation must establish a standard. This means that the enabling law must define legislative policy, mark its limits, map out its boundaries, and specify the administrative agency to apply it. This includes setting the standards and boundaries of foreign ownership restrictions in accordance with the Constitution.

The law must also indicate the circumstances under which the legislative command is to be effected. It is the criterion by which legislative purpose may be carried out. Thereafter, the designated administrative office may promulgate supplemental rules and regulations in pursuance of the above guidelines.³ Based on the delegated authority by the Congress through its enacted laws, it may also issue the implementing rules and regulations of the law.

Foreign equity limitations in the contractors' industry

The imposition of foreign ownership limitations in the contractors' industry, however, was not done in accordance with the above well-established hierarchy of laws and authorities.

The industry is governed by Republic Act (RA) 4566 or the Contractors' License Law. Under such

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law, contractors are required to secure licenses before they can engage in the contracting business. Applicants for contractors' licenses are bound to take the examinations required, have at least two years experience in the construction industry, and be conversant with the building and safety laws of the Philippines and the rudimentary administrative principles of the contracting business. A partnership or corporation may also qualify as a contractor through its responsible managing officer after the latter presents certain requirements to qualify. Meanwhile, the law did not make any distinction between a domestic and a foreign business entity.

Furthermore, the law authorized the then Philippine Licensing Board for Contractors (PLBC) under the Board of Examiner,⁴ now the Professional Regulation Commission (PRC),⁵ to issue the contractors' licenses. Specifically, the PLBC was authorized to "issue, suspend, and revoke licenses of contractors [and] investigate such violations of this act and the regulations thereunder as may come to its knowledge." With the approval of the president, it was also authorized to issue rules and regulations necessary to implement RA 4566, among others.

However, unlike professional licenses, these licenses are not limited to individuals but may also be extended to partnerships, corporations, associations,

⁴ RA 546 (June 17, 1950)

⁵ PRC was created into a national government agency by Presidential Decree 223 (June 2, 1973).

³ Edu v. Ericta, G.R. No. L-32096, October 24, 1970



The contractors' industry is involved in building construction or other activities that are similar for all types of construction in the Philippines. Despite the country's efforts to open its markets and promote greater productivity and market efficiency, firms within the said industry continue to face challenges that hamper their entry into the Philippine market, such as the presence of a foreign equity limitation. Although it is unjustified under the existing laws, the said limitation remains in the regulations and creates an environment of unpredictability, which, in turn becomes a barrier to entry for potentially more efficient market players. (Photo: Rejinel Valencia/PIDS)

and other organizations. They are issued to authorize the licensees, whether individual or corporate entity, to engage in three classifications of business activity, namely, general engineering contractor, general building contractor, and specialty contracting.

In addition, the law excluded registered civil engineers and licensed architects performing services

in their professional capacity from securing this license. Such exclusion indicates that the license was not intended as a professional license but as a permit to engage in the contracting business.

Through his legislative powers, President Marcos issued Presidential Decree (PD) 1746 in 1980, creating the Construction Industry Authority of the

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Philippines (CIAP) as an attached agency of the Department of Trade and Industry (DTI). The said decree also abolished the PLBC and transferred its authority to the Philippine Contractors Accreditation Board (PCAB), which now serves as the implementing arm of the CIAP. Among the powers and objectives of the PCAB under PD 1746 is “To establish criteria for the classification and categorization of contractors which accurately reflect their contracting capacity and performance capability.”⁶ This stated objective indicates the intent of the legislator, then President Marcos, not to treat a contractor’s license as a professional license but simply a permit to engage in the contracting business based on one’s contracting capacity and capability.

In 1989, PCAB adopted the implementing rules and regulations (IRR) governing the licensing of constructors in the Philippines to implement RA 4566, as amended. The action was later affirmed by the CIAP and approved by the Office of the President.

Under the said IRR, a regular license should only be reserved and issued to constructor-firms of Filipino sole proprietorship or partnership/corporation with at least 70 percent⁷ Filipino equity participation and duly organized and existing under Philippine laws. The IRR, however, does not specify the rationale behind this rule, which does not actually appear in RA 4566 and PD 1746.

In 2011, PCAB issued Board Resolution No. 605, thereby imposing a 60-40 Filipino-foreign equity requirement for regular contractor’s license. Through the said resolution, the agency argued that the

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construction contracting is a practice of profession and therefore must comply with the provisions of the Constitution, which allows only Filipino nationals to engage in. However, this rationale suffers from the following defects:

1. The PCAB is now under DTI and not under the PRC. As such, its licenses cannot be described as a license to practice profession, as the professional regulation body does not govern it.
2. The Contractors’ License Law, as amended, authorizes the issuance of licenses to business entities engaged in the business of contracting, and not in the exercise of a profession. It does not also limit foreign ownership in businesses engaged in contracting. Thus, we can see no statutory basis for any regulatory issuance to limit foreign ownership in these businesses, pursuant to the rule on subordinate legislation as discussed above.

Clearly, the IRR of RA 4566 and the PCAB Board Resolution No. 605-2011 were issued beyond the authority granted by law and the Constitution to PCAB. This amounts to administrative legislation, which, as posited earlier, is unconstitutional and invalid.

Without the administrative issuances mentioned above, the contractors’ industry can only be subject to the general provisions of the Foreign Investments Act, as amended. The said act allows 100 percent

⁶ PD 1746, Section 2(d)

⁷ Adjusted to 60 percent under the Omnibus Investment Code, Chapter III, Book II, Article 48

As long as the 60-40 ownership requirement remains in the regulations despite the absence of justifications under existing laws, it creates an environment of unpredictability in the interpretation of Philippine laws, which, in turn becomes a barrier to entry for potentially more efficient market players.

foreign equity ownership in Philippine industries that meet the following conditions:

1. Export enterprises that export at least 60 percent of their output or products purchased domestically; and
2. Domestic enterprises with
 - (a) USD 200,000 or more paid-in capital or
 - (b) USD 100,000 or more paid-in capital, if they deal in advanced technology as determined by the Department of Science and Technology or employ at least 50 employees.

Recommendations

Based on the discussion above, the government needs to revisit and amend the IRR of RA 4566 and the PCAB Board Resolution No. 605-2011, among other PCAB issuances relating to foreign ownership

limitations in the contractors' industry, that are inconsistent with the mandate of RA 4566, as amended, and the Constitution. After all, they are only a result of administrative legislation, which, again, is unconstitutional and invalid.

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This call for the amendment of the abovementioned policies is timely given the recent issuance of Memorandum Order No. 16. Through the said memorandum, President Rodrigo Duterte ordered the National Economic and Development Authority and its member-agencies to take immediate steps to axe existing restrictions on foreign participation in certain areas or activities, including contracts for the construction and repair of locally funded public works. The said memorandum is pursuant to the government's zero to 10-point socioeconomic agenda, which includes increasing competitiveness and ease of doing business by relaxing the constitutional restrictions on foreign ownership, among others. 📄

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