

STATEMENT OF THE FACTS

A. Aquino Administration

1. On June 7, 2013, then Secretary of National Defense, Voltaire Gazmin, issued Acquisition Decision Memorandum (ADM) No. 2013-019 for the acquisition of two (2) Frigate units for the Philippine Navy with an approved budget of Eighteen Billion Pesos (Php 18,000,000,000.00);
2. After the Pre-Procurement Conference on August 28, 2013, several Pre-Bid Conferences were conducted on October 11 and November 11 of the same year respectively;
3. Six (6) prospective bidders were declared eligible by the DND Special Bids and Awards Committee (DND-SBAC) on December 4, 2014, namely:
 - a. Daewoo Shipbuilding & Marine Engineering Co. Ltd. (DSME) of Korea;
 - b. Garden Reach Shipbuilders & Engineering (GRSE) of India;
 - c. Hyundai Heavy Industries Co. Ltd (Hyundai) of Korea;
 - d. Navantia S.A. (Navantia) of Spain;
 - e. STX France S.A. of France; and
 - f. STX Offshore & Shipbuilding Co. Ltd (STX O&S)
4. Thereafter, Secretary Gazmin issued the amended Acquisition Decision Memorandum (ADM) No. 2013-019-A mandating that the Frigate Acquisition Project shall be implemented as follows:
 - a. **Lot 1** - Procurement for Platform with Launchers with an approved budget of Sixteen Billion Pesos (Php 16,000,000,000.00) via two-stage public bidding; and
 - b. **Lot 2** - Procurement for Missiles and Munitions with an approved budget of Two Billion Pesos (Php 2,000,000,000.00) by means of Negotiated Procurement
5. The Submission and Opening of Bid Envelopes (SOBE) was conducted on March 17, 2016 and of the four (4) submitted bids, only GRSE and Hyundai were declared eligible to pursue the procurement;
6. Based on the submitted bids, the DND-BAC declared GRSE as the Lowest Calculated Bidder (LCB) and Hyundai as the second LCB subject to post-qualification processes;
7. After post-qualification, DND-BAC issued Resolution No. DND/PN-FAP-16-009, disqualifying GRSE due to its low Net Financial Contracting Capacity;
8. Pursuant to DND-BAC Resolution No. DND/PN-FAP-16-0010, the Post Qualification Team reported on June 14, 2016 that Hyundai is legally, financially, and technically capable to undertake the project and declared it to be "post-qualified" and the Lowest Calculated Responsive Bidder for Lot 1 with a submitted bid of Three Hundred Thirty-Six Million Nine Hundred Twelve Thousand Dollars (USD 336,912,000.00) or Fifteen Billion

Seven Hundred Forty Four Million Five Hundred Seventy One Thousand Five Hundred Eighty Four Pesos (Php 15,744,571,584.00) based on the prevailing foreign exchange rate of Php 46.732/1.00 USD;

B. Duterte Administration

9. After consultation and upon the recommendation of the DND-BAC, Secretary of National Defense Delfin Lorenzana approved and issued the Notice of Award (NOA) to Hyundai Heavy Industries Co. Ltd. The NOA was conformed to by the supplier on September 13, 2016;¹
10. Thereafter, workshops between the DND/PN and Hyundai for the finalization of the Contract, Building Specifications, and Ship General Arrangements were conducted on September 26-30, 2016;
11. On October 24, 2016, the Contract Agreement was executed at the Philippine Navy Headquarters;
12. Vice Admiral Mercado assumed as the Flag Officer in Command (FOIC) of the Philippine Navy on November 13, 2016;
13. A month after, or on December 13, 2016, the Department of National Defense (DND) issued the Notice to Proceed (NTP) to Hyundai and an advance payment was made on January 16, 2017 amounting to 15% of the Contract Price or USD 47,186,528.00;
14. On December 19, 2017, FOIC Mercado was relieved from his position by Secretary Lorenzana due to loss of trust and confidence in relation to the former's opposition to the frigate acquisition. It was alleged that FOIC Mercado was insisting on favoring Thales Netherlands instead of Hanwha Thales as the Combat Management System supplier, thereby delaying the frigate procurement. Rear Admiral Robert A. Empedrad assumed as acting Flag Officer in Command;
15. On January 15, 2018, in a privileged speech by Magdalo Partylist Representative, Gary Alejano, the alleged anomalies of the acquisition of the frigates as well as the irregular relief of Vice Admiral Ronald Joseph Mercado, were raised;
16. In several interviews, Admiral Mercado discusses some matters regarding the Frigate Acquisition Project (FAP) and has hinted his willingness to discuss the same in any investigative body;
17. As per information gathered from the Senate, a legislative inquiry will be conducted on the matter sometime in February.

¹ A copy of the Notice of Award signed by SND Delfin Lorenzana addressed to Mr. Ki Yeong Sung and conformed to by the latter dated September 13, 2016 is herein attached as Annex “___” and made an integral part of this Opinion.

This Opinion is based on the foregoing facts and the issues to be discussed herein are as follows:

MAIN ISSUES

A.

WHETHER OR NOT “LINK 16-COMPATIBILITY OF THE COMBAT MANAGEMENT SYSTEM” IS STIPULATED IN THE CONTRACT.

B.

WHETHER OR NOT HYUNDAI HEAVY INDUSTRIES CAN VALIDLY SELECT THE SUPPLIER FOR THE COMBAT MANAGEMENT SYSTEM OVER THE PREFERENCE OF THE PHILIPPINE NAVY AND WHETHER SUCH SELECTION CONSTITUTES A VIOLATION OF THE GOVERNMENT PROCUREMENT ACT (RA 9184).

ABC OPINION

There is no provision in the Contract Agreement, particularly the Bidding Documents containing the Technical Specifications, that requires the compatibility of the Combat Management System with Tactical Data Link 16.

Considering that one of the principal issues with respect to the Frigate Acquisition Project (FAP) of the Philippine Navy is the compatibility of the Combat Management System with Tactical Data Link 16, this Opinion deems it best to scrutinize the transition of this particular technical specification considering that Vice Admiral Mercado asserts that “*the additional requirement that CMS shall be compatible with Link 16 was incorporated part of the Contract*” and his insistence on the same was allegedly the reason for his relief as Flag Officer in Command (FOIC) of the Philippine Navy.

With the foregoing, the following dates, events, and facts, relevant insofar as Combat Management System is concerned, must first be restated:

1. As early as December 4, 2013, Vice Admiral Mercado was already the Head of the Technical Working Group for the Frigate Acquisition Project of the Philippine Navy;
2. From technical discussions with the proponents in the months of March to May of 2014, until the approval by the Secretary of National Defense of the Final Technical Specifications of the Frigate in January of 2016, Vice Admiral Mercado was the head of the Technical Working Group;
3. On February 2, 2016, the Bids and Awards Committee issued a Supplemental Bid Bulletin and revised the technical specifications for the Combat Management System as follows:²

² SBB No. DND/PN-FAP-16-01 was issued on February 2, 2016 for the purpose of informing prospective bidders of the changes in the bidding documents as contained therein, among others. A copy of this Supplemental Bulletin is herein attached as Annex “___” and made an integral part of this Opinion.

ORIGINAL	REVISED
Combat Management Systems	Combat Management Systems
<p>a. The shipboard navigational, meteorology, sensors, electronic warfare systems, guns, missiles and torpedo systems, command and control and communication systems must be integrated to the CMS in order to have a common operating picture among sensors tracks, weapons availability and responsive battle management.</p>	<p>a. The CMS shall integrate the shipboard navigational, surveillance and meteorological sensors, electronic warfare systems, guns, missiles and torpedo systems, command and control and communication systems in order to have a common operating picture among sensors tracks, weapons availability and responsive battle management.</p>
<p>b. The system is designed to coordinate sensors for anti-surface, anti-air and anti-submarine threats. It provides local command and control, exchange data and telegraphic to provide communications to other ships and aircraft, and as well as weapons direction/control. In addition, it should be designed for the acquisition, processing and presentation of data acquired by sensors, but it can also be used for other functions like receive data sensors on board and also from off-board sensors via data link including raw radar/ESM data and a network for video signals form the Fire Control Director.</p>	<p>b. The system is designed to coordinate sensors for anti-surface, anti-air, anti-submarine and electronic warfare threats. It provides local command and control, exchange data and telegraphic information to provide communications to other ships and aircraft, and as well as weapons direction/control. In addition, it should be designed for the acquisition, processing and presentation of data acquired by sensors, but it can also be used for other functions like receive data sensors on board and also from off-board sensors via data link including raw radar/ESM data and a network for video signals from the Fire Control Director.</p>
<p>c. The system should incorporate a high degree of automation through computerized embedded doctrine but must allow the Commanding Officer to maintain positive control over weapons release.</p>	<p>c. The system should incorporate a high degree of automation through computerized embedded doctrine (threat management) but must allow the Commanding Officer to maintain positive control over weapons release.</p>
<p>d. It should produce an up-to-date picture of the tactical situation within the vicinity of both the ship and the task group. It should identify and conduct potential threat evaluation, ECM/ECCM management, and aircraft control, conduct ASW, ASuW, and AAW operations, tactical data link, and data bank management, assess readiness of ship defenses and execute specific tactical procedures. It should process data faster, in large quantities to present a more detailed picture, provide data amplification readout area for operator selected targets including racks for recording. It shall include video simulation for training.</p>	<p>d. It should produce an up-to-date picture of the tactical situation within the vicinity of both the vessel and the task group. It should identify and conduct potential threat evaluation and recommendation, ECM/ECCM management and aircraft control, conduct ASW, ASuW and AAW operations, tactical data link, and data bank management, assess readiness of vessel defenses and execute specific tactical procedures. It should process data fast and in large quantities to present a more detailed picture, provide data amplification readout area for operator selected targets including racks for recording. It shall include video simulation for training.</p>
<p>e. The system should have central processing units with at least one (1) as back-up and redundancy of network cabling systems in the event of system failure to include operator Multi-Function Consoles. The system operators should be able to access all functions of the system but with log in access authority for security. The control of the primary gun, secondary gun and missile systems could be controlled either via the CMS or Fire Control Console (FCS).</p>	<p>e. The system should have central processing units with at least one (1) as back-up and redundancy of network cabling systems in the event of system failure to include operator Multi-Function Consoles. The system operators should be able to access all functions of the system but with log in access authority for security. The control of the primary gun, secondary gun and missile systems could be controlled either via the CMS or Fire Control Console (FCS).</p>
	<p>f. The CMS must be of proven design that is being used by at least one (1) frigate or a similar type of naval vessel from the country of origin or being used by at least one (1) frigate each from two (2) foreign countries.</p> <p>Derivatives of existing CMS are considered as long as it meets the PN frigate capability requirement.</p> <p>Prototypes or still in-development CMS are not allowed</p>
<p>f. The CMS must be readily upgradeable according to new technologies and requirements.</p>	<p>g. The CMS must be readily upgradeable according to new technologies and requirements.</p>

4. Supplemental Bid Bulletin Nr. DND/PN-FAP-16-03 was subsequently issued and in response to requests for copies of Technical Forms (Statement of Technical Compliance) by GRSE, DSME, Navantia, and Hyundai Heavy Industries, reference to the attached Sample A was made, the contents of which are replicated below:

SAMPLE FORM A (REVISED TECHICAL TENDER)

**STATEMENT OF COMPLIANCE
TO TECHNICAL SPECIFICATIONS**

The bidder must state in the last column "Comply" or "Not Comply" against each of the individual parameters of each Specification stating the corresponding performance parameter of the equipment offered. Statements of "Comply" or "Not Comply" must be supported by evidence in a Bidders Bid and cross-reference to that evidence. Evidence shall be in the form of manufacturer's un-amended sales literature, unconditional statements of specification and compliance issued by the manufacturer, sample, independent test data etc., as appropriate. A statement that is not supported by evidence or is subsequently found to be contradicted by the evidence presented will render the Bid under evaluation liable for rejection. A statement either in the Bidders statement of compliance or the supporting evidence that is found to be false either during Bid evaluation, post-qualification or the execution of the Contract may be regarded as fraudulent and render the Bidder or supplier liable for prosecution subject to the provisions of ITB Clause 3.1(a)(ii) and/or GCC Clause 2.1(a)(ii).

I T E M	SPECIFICATIONS	STATEMENT OF COMPLIANCE (COMPLY/NOT COMPLY)
14	WEAPONS and SENSORS (Minimum)	
	<p>a. The CMS Shall integrate the shipboard navigational, surveillance and meteorological sensors, electronic warfare systems, guns, missiles and torpedo systems, command and control and communication systems in order to have a common operating picture among sensors tracks, weapons availability and responsive battle management.</p>	
Combat Management Systems	<p>b. The system is designed to coordinate sensors for anti-surface, anti-air, anti-submarine and electronic warfare threats. It provides local command and control, exchange data and telegraphic information to provide communications to other ships and aircraft, and as well as weapons direction/control. In addition, it should be designed for the acquisition, processing and presentation of data acquired by sensors, but it can also be used for other functions like receive data sensors on board and also from off-board sensors via data link including raw radar/ESM data and a network for video signals from the Fire Control Director.</p>	
	<p>c. The system should incorporate a high degree of automation through computerized embedded doctrine (threat management) but must be allow the Commanding Officer to maintain positive control over weapons release.</p>	
	<p>d. It should produce an up-to-date picture of the tactical situation within the vicinity of both the vessel and the task group. It should identify and conduct potential threat evaluation and recommendation, ECM/ECCM management, and aircraft control, conduct ASW, ASuW and AAW operations, tactical data link, and data bank management, assess readiness of vessel defenses and</p>	

		<i>execute specific tactical procedures. It should process data fast and in large quantities to present a more detailed picture, provide data amplification readout area for operator selected targets including racks for recording. It shall include video simulation for training.</i>	
		<i>e. The system should have central processing units with at least one (1) as back-up and redundancy of network cabling systems in the event of system failure to include operator Multi-Function Consoles. The system operators should be able to access all functions of the system but with log in access authority for security. The control of the primary gun, secondary gun and missile systems could be controlled either via the CMS or Fire Control Console (FCS)</i>	
		<i>f. The CMS must be of proven design that is being used by at least one (1) frigate or a similar type of naval vessel from the country of origin or being used by at least one (1) frigate each from two (2) foreign countries.</i> <i>Derivatives of existing CMS are considered as long as it meets the PN frigate capability requirement.</i> <i>Prototypes or still in-development CMS are not allowed.</i>	
		<i>g. The CMS must be readily upgradeable according to new technologies and requirements.</i>	

5. Thereafter, clarifications were raised by the proponents and a Supplemental Bid Bulletin was issued on March 9, 2016. The following entries pertain to clarifications on Combat Management Systems, to wit:³

A. Answers to Queries of Proponents

Proponent(s)/Reference	Queries	Answers
STX Korea/ACCRA Letter dated 29 February 2016	Clarification Nr. 17 The CMS must be of proven design that is being used by at least one (1) frigate or a similar type of naval vessel from the country of origin or being used by at least one (1) frigate from two (2) foreign countries. Please provide a definition of the "similar" and/or the parameters to be used to determine similarity.	The CMS with the proven design shall be capable to integrate the following capabilities: (a) Anti-Air Warfare(AAW) (b) Anti-Surface Warfare (ASuW) Anti-Submarine Warfare (ASW) and (d) Electronic Warfare (EW) Operations
	Clarification Nr. 18 Please provide details on the term "upgradeable" as there are numerous conditions that can be considered. Does the upgrade refer to the CMS core technology, or to the whole system including the sensors and weapons?	Refer to Item 14, Para g of Combat Management System (Page 27) of the Revised Technical Specifications. ⁴

6. As early as June 2016, after Hyundai was declared as the Lowest Calculated Responsive Bid (LCRB), the TWG also post-qualified **BOTH** NS-ICMS

³ Supplemental Bid Bulletin Nr. DND/PN-FAP-16-05, March 9, 2016.

⁴ Paragraph g of the Revised Technical Specifications indicates as follows:

"The CMS must be readily upgradeable according to new technologies and requirements."

(Hanwha) and TACTICOS (Thales). As alleged by VADM Mercado, TDL Link 16 was not yet part of the Technical Specifications at this time;

7. On August 18, 2016, the Notice of Award was signed by SND Lorenzana and conformed to by Hyundai's Ki Yeong Sung on September 13, 2016;
8. Subsequently, in the workshops conducted during the last week of September, VADM Mercado claims that the TWG recommended and Hyundai agreed that the "CMS shall be compatible with Link 16";
9. The Contract Agreement was signed on October 24, 2016 by SND Lorenzana and Vice President Kisin Chung of Hyundai and incorporated in the Contract Agreement is the Technical Specifications in the Bidding Documents, which provides for the following entries in relation to the Combat Management System;

Section VII. Technical Specification⁵

Combat Management System	a. The CMS shall integrate the shipboard navigational, surveillance and meteorological sensors, electronic warfare systems, guns, missiles, and torpedo systems, command and control and communication systems in order to have a common operating picture among sensors, tracks, weapons availability and responsive battle management.
	b. The system is designed to coordinate sensors for anti-surface, anti-air, anti-submarine and electronic warfare threats. It provides local command and control, exchange data and telegraphic information to provide communications to other ships and aircraft, and as well as weapons direction/control. In addition, it should be designed for the acquisition, processing and presentation of data acquired by sensors, but it can also be used for other functions like receive data sensors on board and also from off-board sensors via data link including raw radar/ESM data and a network for video signals from the Fire Control Director.
	c. The system should incorporate a high degree of automation through computerized embedded doctrine (threat management) but must allow the Commanding Officer to maintain positive control over weapons release.
	d. It should produce an up-to-date picture of the tactical situation within the vicinity of both the vessel and the task group. It should identify and conduct potential threat evaluation and recommendation, ECM/ECCM management, and aircraft control, conduct ASW, ASuW and AAW operations, tactical data link, and data bank management, assess readiness of vessel defenses and execute specific tactical procedures. It should process data fast and in large quantities to present a more detailed picture, provide data amplification readout area for operator selected targets including racks for recording. It shall include video simulation for training.
	e. The system should have central processing units with at least one (1) as back-up and redundancy of network cabling systems in the event of system failure to include operator Multi-Function Consoles. The system operators should be able to access all functions of the system but with log in access authority for security. The control of the primary gun, secondary gun and missile systems could be controlled either via the CMS or Fire Control Console (FCS)
	f. The CMS must be of proven design that is being used by at least one (1) frigate or a similar type of naval vessel from the country of origin or being used by at least one (1) frigate each from two (2) foreign countries. Derivatives of existing CMS are considered as long as it meets the PN frigate capability requirement. Prototypes or still in-development CMS are not allowed.
	g. The CMS must be readily upgradeable according to new technologies and requirements.

⁵ Item 14, *Weapons and Sensors (Minimum)*, Section VII. Technical Specification, Bidding Documents.

Section 17.4 of IRR-A of RA 9184, further mandates that:

...xxx...

...xxx...

The specifications and other terms in the bidding documents shall reflect minimum requirements or specifications required to meet the needs of the procuring entity in clear and unambiguous terms. The bidder may submit an offer which provides for superior specifications and/or better terms and conditions to the Government at no extra cost. However, these shall not be given any bonus, credit or premium in the bid evaluation.

...xxx...

...xxx...

As to this point, the following points are raised:

First, it must be pointed out that the contract is between the Department of National Defense (DND) and Hyundai Heavy Industries (HHI). Hence, any condition set forth in the contract is expected only from the parties thereto considering that it is a meeting of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service. In this case and particularly with respect to the Combat Management System, it is Hyundai Heavy Industries that has the obligation to deliver a CMS that is compliant with the technical specifications. Such obligation remains with Hyundai and the dissolution of the Hanwha Thales joint venture does not affect such obligation.

Second, even if we treat all the grounds of the Philippine Navy to prefer Thales of Netherlands as gospel truth, such only remains to be a preference and is not a valid ground to disqualify Hanwha if the latter is compliant with the technical specifications. It must be pointed out that the purpose of post-qualification proceedings is to determine whether the **bidder concerned complied with and is responsive to all the requirements and conditions for eligibility, the bidding of the contract, as specified in the bidding documents.**

Section 34.2 of IRR-A of RA 9184 lays down the criteria for post qualification as follows:

34.2 The post-qualification shall verify, validate and ascertain all statements made and documents submitted by the bidder with the Lowest Calculated Bid/Highest Rated Bid, using non-discretionary criteria, as stated in the Invitation to Apply for Eligibility and to Bid and the Instructions to Bidders. These criteria shall consider, but shall not be limited to, the following:

- a. **Legal Requirements.** *To verify, validate and ascertain licenses and agreements submitted by the bidder and the fact that he is not included in any Government "blacklist." For this purpose, the GPPB shall maintain a consolidated file of all manufacturers, suppliers, distributors, contractors and consultants "blacklisted" by the Government or any of its procuring entities.*
- b. **Technical Requirements.** *To determine compliance of the goods, infrastructure projects or consulting services offered with the requirements of the contract and bidding documents, including, where applicable: (i) verification and validation of the bidder's stated competence and experience, and the competence and experience of the bidder's key personnel to be assigned to the project, for the procurement of infrastructure projects and consulting services; (ii) verification of availability and commitment, and/or inspection and testing, of*

equipment units to be owned or leased by the bidder, as well as checking the performance of the bidder in its ongoing government and private contracts (if any of these on-going contracts shows a reported negative slippage of at least fifteen percent (15%), or substandard quality of work as per contract plans and specifications, or unsatisfactory performance of his obligations as per contract terms and conditions, at the time of inspection, and if the BAC verifies any of these deficiencies to be due to the contractor's fault or negligence, the agency shall disqualify the contractor from the award), for the procurement of infrastructure projects; (iii) verification and/or inspection and testing of the goods/product, after-sales and/or maintenance capabilities, in applicable cases, for the procurement of goods; and (iv) ascertainment of the sufficiency of the Bid Security as to type, amount, form and wording, and validity period.

- c. **Financial Requirements.** To verify, validate and ascertain the bid price proposal of the bidder and, whenever applicable, the required bank commitment to provide a credit line to the bidder in the amount specified and over the period stipulated in the Instructions to Bidders, to ensure that the bidder can sustain the operating cash flow of the transaction. For the procurement of infrastructure projects, this shall cover as well, the bidder's stated net worth and liquid assets, net working capital, the value of all outstanding or unfinished works under ongoing contracts including awarded contracts yet to be started, and the bidder's NFCC, whenever applicable.

Evidently, the verification of compliance by the TWG for both Hanwha Thales and Thales Tacticos is based on non-discretionary criteria of compliance or non-compliance with the Technical Specifications. Again, it is the ability of Hyundai, and not Hanwha or Thales, to comply with the technical specifications for the combat management system that is crucial and subject to post-qualification processes.

All in all, the Technical Specifications pertaining to the Combat Management System, are set forth in clear and unambiguous terms in the Bidding Documents. In the case at bar, considering that there is no specific provision mandating compatibility of the CMS with TDL 16, any disqualification of a CMS supplier for not being compliant with the same, is baseless. In other words, even assuming that the conclusion of RADM Mercado that Naval Shield of Hanwha is not TDL 16 compatible, such is rendered immaterial since such requirement is not specified in the Technical Specifications.

In addition, it must be pointed out that if the premise of VADM Mercado that such Link-16 compatibility was incorporated in the contract, it is highly irregular for the Philippine Navy to merely insist on Thales based on preference. If the contention is true, the Philippine Navy should have pointed out specific provisions in the contract that expressly mandated Link-16 compliance instead of citing why Thales is more advantageous. However, as previously pointed out and established, such requirement is not found in any provision in the contract.

As to the Tactical Data Link, the Technical Specifications allows the proponent to provide its tactical data link and merely requires that the vessel be fitted with a space ready for the installation of Link 16 and 22.

At this juncture, it would be best to discuss the Technical Specifications pertaining to Tactical Data Link and a perusal of the Bidding Documents would reveal the following entries, to wit:

Section VII. Technical Specification⁹

Tactical Data Link	<p>The vessel shall be:</p> <ol style="list-style-type: none"> 1. Provided with proponent’s tactical data link and appropriate radio for tactical communications 2. <u>Fitted with a space and ready for the installation of Link 16 and 22</u> (Emphasis and underscoring supplied.)
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It is noteworthy to mention that this is the **only** portion of the entire contract that mentions “Link 16 and 22”. Considering that this falls under an entirely separate item in the Statement of Compliance to Technical Specifications, it likewise must be considered separate and distinct from the specifications pertaining to combat management system. Hence, any assertion that the contract requires the CMS to be compatible with Link 16, is again disproved by the provisions cited above.

In addition, a careful scrutiny of the provision cited above would also reveal that minimum specifications required is for the vessel to be **provided with proponent’s tactical data link** and **fitted with a space and ready for the installation of Link 16 and 22.**

To again state the obvious, there is no mention of compatibility with Link 16 and 22 insofar as the first specification is concerned. As stated, the minimum specification for Tactical Data Link is merely for the vessel to be provided with the proponent’s tactical data link. Hence, if the proponent provides a tactical data link not compatible with Link 16 or 22, such would still be compliant with this specification PROVIDED that the vessel shall be fitted with a space that is ready for the installation of Link 16 and 22.

Without intending to obfuscate the phraseology used or argue with the choice of words by the authors of the Technical Specifications, the only observation intended to be raised here is that even the particular portion of the Bid Document pertaining to Tactical Data Link is wanting of an express declaration requiring compatibility with Link 16 and 22. Moreover, there seems to be a disconnect as the importance given to compatibility with Link 16 belatedly raised considering that the very parties raising such concerns now, had early participation in this procurement. If it is their expert opinion that higher standards for the CMS would be truly advantageous and beneficial to the Philippine Navy, these individuals should have incorporated these as early as the preparation of the Technical Specifications. All these considered, it is now more difficult to sustain any assertion that compatibility of the CMS with Link 16 was incorporated in the contract.

The Contract Agreement establishes that the obligation of Hyundai Heavy Industries is an alternative obligation as far as the delivery of the Combat Management System (CMS) is concerned.

⁹ Item 12, *Weapons and Sensors (Minimum)*, Section VII. Technical Specification, Bidding Documents.

One of the controversies raised by Hon. Gary Alejano in his privileged speech is with respect to the notation in the Maker's List that states as follows:

...xxx...

...xxx...

REMARK

1. *The final selection of maker to be Ship Builder's sole right as long as the equipment/system shall fulfil the owner's requirements in building specification and other design & build aspects.*
2. *If the owner's preferred maker is technically and commercially competitive, then selection of owner's preferred maker can be considered.*
3. *Above maker list to be strictly confidential.*

...xxx...

...xxx...

Reference is made to the previous points raised and the same are incorporated in this discussion insofar as they are relevant that:

- a. The contract is between the DND and Hyundai; and
- b. There is no provision that requires compatibility of the Combat Management System with Link 16;

Without intending to be redundant, it must be reiterated that the Technical Specifications provide for the minimum requirements of the procurement on a per-item basis. Thus, with respect to Combat Management Systems, those criteria set forth in the Technical Specifications, without reference to brand names, are the minimum standards to be met.

In the case at bar, the incorporation of the List of Major Equipment/Subsystem in the Contract Agreement, would render the obligation of Hyundai as an alternative obligation insofar as the Combat Management System is concerned.

In cases of alternative obligations, the right of choice belongs to the debtor, unless it has been expressly granted to the creditor.¹⁰ Thus, even in the absence of the notation complained of by Hon. Alejano cited above, the selection as to which prestation to deliver rests with Hyundai. Considering further that the CMS suppliers were *post-qualified* by the TWG, it only presupposes that either TACTICOS or NAVAL SHIELD, complies with the technical specifications of the bidding documents.

Therefore, in the event that Hyundai delivers either model as specified in the Maker's List, such would render fulfillment of its obligation. Necessarily, any assertion that proprietary interests governed over the technological preference of the Philippine Navy is misleading considering that both models were post-qualified by the TWG. More importantly, such selection does not constitute any violation of the Government Procurement Reform Act (RA 9184).

¹⁰ Article 1200, New Civil Code.

ABC RECOMMENDATION

It is our understanding that the fruition of the Frigate Acquisition Project (FAP) would be a milestone for the Philippine Navy as it entails its very first acquisition of warships with such combat and other capabilities. The following conclusive observations are most respectfully raised in support of this recommendation:

1. There is no provision in the Contract Agreement, Bidding Documents, or Technical Specifications that expressly require the Combat Management System to be compatible with Link 16 or 22;
2. The individuals raising concerns as to the acquisition, with respect to the alleged disadvantageous incompatibility of the CMS with Link 16, are the very same individuals that were in the position to incorporate such specification in the early stages of the procurement;
3. The bases cited in support of the preference to a particular CMS supplier, including technological advantages, are beyond the minimum standards set forth in the Technical Specifications;
4. Considering that both CMS models were post-qualified by the TWG, the delivery of either model will satisfy the minimum requirements set forth by the Technical Specifications; and
5. The selection of Hyundai as to the supplier for the CMS is legal considering the notation in the maker's list and the alternative nature of the obligation. Hence, such selection even if contrary to the preference of the Philippine Navy, is still lawful and in accord with Philippine Procurement Laws.

Based on the foregoing, ABC opines that since there has been no material breach of the provisions of the contract, its due execution and compliance with the undertakings stated therein, is strongly recommended.

In entering into this contract, the Procuring Entity and its representatives such as the Bids and Awards Committee through the Technical Working Group, were in a position to freely dictate the highest standards for all components of the project to the advantage of the end-user, the Philippine Navy. To raise these concerns after the execution of this contract and to advocate its cancellation altogether, under a false veil of nationalism and concern for the Philippine Navy, is simply bad faith. It must be stressed that obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.¹¹

As discussed, the best evidence of the intention of the contracting parties is the contract itself. Considering what is stated in the contract is contrary to the mere allegations of those in opposition thereof, it is submitted that there is no material breach of the same from either side and no violation of RA 9184 can be observed. Again, the cancellation of the contract is unwarranted and would expose the Department of National Defense (DND) to contractual breach and damages.

¹¹ Article 1159, New Civil Code.