

KNOWING PPP, BOT AND JV A LEGAL ANNOTATION

FORENSIC LAW AND POLICY STRATEGIES (FORENSIC SOLUTIONS)



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11 JANUARY 2011



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PREFACE

In the policy paper recently issued by Forensic Law and Policy Strategies or Forensic Solutions entitled ***The Country Needs a Stable PPP Policy***, we underscored that Public-Private Partnership is key to economic growth. We also stressed that PPP is not a new concept, nor is it unique to the Philippines. Developing countries all over the world turn to this method to maximize infrastructure development and minimize government's financial burdens.

The country needs PPP. The current administration's focus on PPP as the ideal platform for integrated national infrastructure development is on point. It is the best option for cash-strapped developing countries like the Philippines, where the potential for growth and industry is limited only by its capacity to set in place the necessary infrastructure to support economic activity.

With the release of this publication ***Knowing PPP, BOT and JV: A Legal Annotation***, Forensic Solutions aims to popularize PPP legalese, contribute to the discussion on PPP and advocate a stable PPP policy.

Information on the law, rules, jurisprudence and legislative deliberations on PPP, Build-Operate-Transfer Law and the 2008 NEDA Joint Venture Guidelines issued by the National Economic Development Authority is key to meaningful, public and effective participation.

As guide to the reader:

1. The sections of the BOT Law and 2008 NEDA JV Guidelines are in bold letters,
2. The sections of the BOT-IRR are in italics,
3. Jurisprudence are integrated in the notes,
4. The legislative deliberations of the Bicameral Conference Committee are found as footnotes to the appropriate sections of the BOT Law, and
5. Flowcharts and matrices are incorporated in the notes.

We look forward to more PPP, BOT and JV projects, and a stable PPP policy.

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11 January 2011





PART 1

OVERVIEW OF PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS

Concept of Privatization

In the Philippine context, privatization began with former President Ferdinand E. Marcos' Presidential Decree No. 2030,¹ which was issued as a measure to stem the country's enormous foreign debt by divesting government assets as part of its economic recovery program.

Former President Corazon C. Aquino continued this privatization policy with the issuance of Proclamation No. 50² and 50-A,³ which called for the "disposition of the large number of non-performing assets of the government financial institutions, and certain government-owned or controlled corporations which have been found unnecessary or inappropriate for the government sector to maintain." Privatization, at this early stage, referred solely to the transfer of ownership over certain identified assets from the government to the private sector.

In 1992, Former President Fidel V. Ramos issued Executive Order No. 37⁴ which restated the government's support for the privatization program of his predecessors. Executive Order No. 37 was the first to speak of the privatization of assets and activities, broadening its scope to encompass "such arrangements as sale of physical assets, leasing of assets, management and maintenance contracts or build-operate-transfer (BOT) schemes."⁵

With the enactment of several key legislation (e.g. BOT Law) and the issuance of relevant rules and regulations (e.g. 2008 NEDA Joint Venture Guidelines), privatization now covers a broad range of methods and models, including the sale and disposition of government owned real estate, and assets in the water and energy sectors among others, contracting out for services under the BOT Law or the Government Procurement Reform Act, and even economic activities and programs through the selection of joint venture partner.

¹ 4 February 1986.

² 8 December 1986.

³ 15 December 1986.

⁴ 8 December 1992.

⁵ Executive Order No. 37, Restating the Privatization Policy of the Government, §6 (1992).



Definition of Public-Private Partnerships (PPPs)

There is no single definition of Public-Private Partnerships (PPPs). PPP broadly refers to long-term, contractual partnerships between the public and private sector agencies, specifically targeted towards financing, designing, implementing, and operating infrastructure facilities and services that were traditionally provided by the public sector. These collaborative ventures are built around the expertise and capacity of the project partners and are based on a contractual agreement, which ensures appropriate and mutually agreed allocation of resources, risks, and returns.⁶

Available frameworks for PPPs

***Under the Philippine setting, there are six PPP frameworks. These are:*⁷**

1. Build-Operate-Transfer
2. Procurement
3. Joint Venture
4. Lease
5. Concession
6. Disposition or Divestment

Definition of Build-Operate-Transfer

A contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation maintenance thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, and operating and maintenance expenses in the project.

The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term which shall not exceed fifty (50) years: Provided, That in case of an infrastructure or development facility whose operation requires a public utility franchise, the proponent must be Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos.⁸

⁶ Department of Economic Affairs, Ministry of Finance, Government of India, and the Asian Development Bank, Facilitating Public-Private Partnership for Accelerated Infrastructure Development in India (Regional Workshop of Chief Secretaries on Public-Private Partnerships), Workshop Report, (December 2006).

⁷ Alberto C. Agra and Catherine L. Fong, Water Supply and Sanitation Development through Public-Private Partnerships, p.10 (21 June 2007).

⁸ Republic Act No. 7718 § 2 (1994).



The Build-Operate-Transfer (BOT) Law

Enacted in 1990, and amended in 1999, the BOT Law provides for several procedures for projects under several contractual arrangements: Build-and-Transfer (BT); Build-Lease-and-Transfer (BLT); Build-Operate-and-Transfer (BOT); Build-Own-and-Operate (BOO); Build-Transfer-and-Operate (BTO); Contract-Add-and-Operate (CAO); Develop-Operate-and-Transfer (DOT); Rehabilitate-Operate-and-Transfer (ROT); and Rehabilitate-Own-and-Operate (ROO).⁹

The BOT Law has two main modes: (1) solicited mode; and (2) unsolicited mode.¹⁰

Definition of Procurement

Procurement refers to the acquisition of Goods, Consulting Services, and the contracting for Infrastructure Projects by the Procuring Entity. Procurement shall also include the lease of goods and real estate. With respect to real property, its procurement shall be governed by the provisions of Republic Act No. 8974, entitled “An Act to Facilitate the Acquisition of Right-of-Way Site or Location for National Government Infrastructure Projects and for Other Purposes”, and other applicable laws, rules and regulations.¹¹

The Government Procurement Reform Act (GPRA)

The GPRA is the principal law on procurement. The law was enacted in 2003, and provides for a system of bidding to procure infrastructure, goods, or consulting services for the government. Unlike the BOT Law, the GPRA contemplates projects funded by the government or the public sector. The GPRA does not contemplate long-term agreements because it does not allow price resetting or other terms usually found in long-term agreements.¹²

The GPRA framework operates under an approved budget set by the agency/ local government unit (LGU) which cannot be changed once the process is initiated, because the funds involved are public in nature.¹³

⁹ Agra & Fong, *supra* note 9 at p.11.

¹⁰ *Id.*

¹¹ Republic Act No. 9184 or the Government Procurement Reform Act (hereinafter GPRA), § 3(n) (2002).

¹² Agra & Fong, *supra* note 9 at p.12.

¹³ *Id.*



Definition of Joint Venture

A contractual arrangement whereby two or more parties pool their assets in undertaking a particular activity, and agree to share in profits and losses. In the case of joint ventures undertaken under these guidelines, it is a private sector entity or a group of private sector entities on one hand, and a Government Entity or a group of Government Entities on the other hand, which contribute money/capital, services, assets (including equipment, land or intellectual property), or a combination of any or all of the foregoing. Parties to a JV share risks to jointly undertake an investment activity in order to accomplish a specific, limited or special goal or purpose with the end view of facilitating private sector initiative in a particular industry or sector, and eventually transferring ownership of the investment activity to the private sector under competitive market conditions.

It involves a community or pooling of interests in the performance of the service, function, business or activity, with each party having a right to direct and govern the policy in connection therewith, and with a view of sharing both profits and losses, subject to agreement by the parties. A JV may be a contractual JV, or a corporate JV.¹⁴

The 2008 NEDA Guidelines on Joint Ventures

Other than the general law on partnerships, there is no statute on joint ventures. But in order to address the increasing need for guidance in the formation of JVs, particularly those involving government-owned and -controlled corporations (GOCCs), then President Corazon C. Aquino issued Memorandum Order No. 266, which provided guidelines to govern minority investments of GOCC's in private corporations or JV Agreements with private entities.

However, in 2005, President Gloria Macapagal-Arroyo issued Executive Order (EO) No. 423, which mandated the NEDA, in consultation with the Government Procurement Policy Board (GPPB), to "issue guidelines regarding JV Agreements with private entities." It is in compliance with this directive that the JV Guidelines were drafted and approved.

The 2008 NEDA JV Guidelines pursuant to an EO did have the effect of supplanting a memorandum order. The 2008 NEDA JV Guidelines is, however, intended to prevail over MO 266.

¹⁴ 2008 JV Guidelines and Procedures for Entering into Joint Venture Agreements between Government and Private Entities (hereinafter 2008 NEDA JV Guidelines), § 5.4 (2008).



Definition of Lease

The contract of lease may be of things, or of work and service.¹⁵ In the lease of things, one of the parties binds himself to give to another the enjoyment or use of a thing for a price certain, and for a period which may be definite or indefinite. However, no lease for more than ninety-nine years shall be valid.¹⁶ In the lease of work or service, one of the parties binds himself to execute a piece of work or to render to the other some service for a price certain, but the relation of principal and agent does not exist between them.¹⁷

The general obligations of the lessor under the Civil Code are to: deliver the thing which is the object of the contract in such a condition as to render it fit for the use intended; and, maintain the lessee in the peaceful and adequate enjoyment of the lease for the entire duration of the contract. On the other hand, the lessee shall: pay the price of the lease according to the terms stipulated; and use the thing leased as a diligent father of a family, devoting it to the use stipulated.

Procedures for Lease Arrangements

The procedure for entering into lease agreements is generally the same, whether government is the lessor or the lessee. However, the role of government in the arrangement is still material. The specific applicable law and rules, and the relevant procedures will depend on the nature of government's participation. The government agency or corporation may enter into straight lease agreements through negotiations. The steps that must be taken vary depending on whether government acts as a lessor or lessee.

When government leases its own property, or when it acts as lessor, the selection of the lessee – whether another government entity or corporation, or a private party – may be done without conducting an open public bidding. The lessor-owner-government may lease its property through negotiations.

When the government leases out its property as lessor, this arrangement is not procurement per se and therefore, the Government Procurement Reform Act (GPRA) is not the applicable law. In this case, the government does not shell out public funds to “procure,” but instead it receives money as lease or rent. In this case, the applicable procedure is set forth in Executive Order No. 301 (1987).

This EO provides for decentralization of government contracts, leases included. Heads of agencies shall have the authority to determine the reasonableness of the terms of the lease and the rental rates thereof, and to enter into such lease contracts without need of prior approval from higher authorities, subject to compliance with the uniform standards or guidelines established by the Department of Public Works and Highways and to the audit jurisdiction of the Commission on Audit. The procedure is that simple. However, government entities may opt to follow the procedure outlined in the GPRA and its Revised Rules.

15 The New Civil Code of the Philippines, Republic Act No. 386, art. 1642 (1949).

16 *Id.* at art. 1643 (1949).

17 *Id.* at art. 1644 (1949).



There are certain instances when public and open bidding is required when government property leases its properties. When the arrangement is not a straight lease but actually another mode of privatization, negotiation is the exception, not the rule. For lease with option to purchase by the private proponent, for joint ventures wherein the equity of government is the advanced rentals on its properties, for grant of concessions of government rights coupled with lease, and for built-lease-transfer under the Build-Operate-Transfer Law, open competition or the conduct of a swiss challenge is required.

When government leases a privately-owned property or when government is the lessee, the GPRA is the governing law. The GPRA and its Revised Implementing Rules treat this arrangement under the rubric of negotiated procurement. “Negotiated Procurement” is a method of procurement of goods, infrastructure projects and consulting services, whereby the procuring entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant.

The lessee-government agency must conduct a cost-benefit analysis to assess the feasibility of entering into a lease contract for privately-owned real estate as against purchasing or leasing government-owned real estate. Notices shall be sent out and price quotations are evaluated.

In the case of a proposed lease of a vacant lot or other land spaces, the procuring entity shall determine the reasonableness of the proposed rate using a comparative price analysis. The government entity must also determine the reasonableness of the rate using either the computation based on the observed depreciation or straight line depreciation. Negotiations in this case, compared to negotiations when government is the lessor, entail a more rigid procedure.

Definition of Concession

Concession is generally understood to be an agreement between sovereign state and a private corporation, wherein the state in grants the private corporation the privilege of operating some public service, business or government function, or exercising some right which would otherwise be exclusive to the government. In to ensure the economic viability of the concession activity, the state usually offers the private entity incentives, such as reduced taxes. The resulting agreement ordinarily specifies rules under which the company can operate locally.

Under Republic Act No. 9136, a “Concession Contract” refers to the award by the government to a qualified private entity of the responsibility for financing, operating, expanding, maintaining and managing specific Government-owned assets.¹⁸

Features of Concession Approach

A concession approach to development is appropriate when there is a natural monopoly requiring long-term participation from the private sector with exclusive rights, and selected through open competition. The public assets are not disposed of and government regulates the tariff, ensures compliance with service obligations and is entitled to a concession fee.

¹⁸ Republic Act No. 9136, Electric Power Industry Reform Act (hereinafter EPIRA), §4(g) (2001).



In concession agreements, there is no sale or transfer of ownership of existing assets of government. What is vested with the concessionaires is the right to exclusive use of the assets and to introduce improvements thereon. What is privatized is the business of the public corporations. Aside from partnering with the private sector for the “sharing” of the government mandate, introduction of technical expertise and infusion of fresh capital, government earns from the concession. In consideration of the grant of concession or “franchise” to the concessionaires, the government corporations shall be entitled to concession fees.

Definition of Disposition or Divestment

Divestment shall refer to the manner or scheme of taking away, depriving, withdrawing of an authority, power or title. As opposed to investment which signifies the delivery of possession of anything to another, divestment connotes taking away and/ or withdrawal of such possession and title.¹⁹

Modes of Disposition and Divestment

Commission on Audit Circular No. 89-296 dated 27 January 1989 enumerates the modes of disposal or government assets and properties. The Circular reads:

“This Commission recognizes the following modes of disposal/divestment of assets and property of national government agencies, local government units and government-owned or controlled corporations and their subsidiaries, aside from other such modes as may be provided for by law.

1. Public Auction

Conformably to existing state policy, the divestment or disposal of government property as contemplated herein shall be undertaken primarily thru public auction. Such mode of divestment or disposal shall observe and adhere to established mechanics and procedures in public bidding, viz:

- a. adequate publicity and notification so as to attract the greatest number of interested parties; (vide, Sec. 79, P.D. 1445)
- b. sufficient time frame between publication and date of auction;
- c. opportunity afforded to interested parties to inspect the property or assets to be disposed of;
- d. confidentiality of sealed proposals;
- e. bond and other prequalification requirements to guarantee performance; and
- f. fair evaluation of tenders and proper notification of award.

It is understood that the Government reserves the right to reject any or all of the tenders.

¹⁹ Commission on Audit Circular No. 89-296 (27 January 1989).



2. Sale Thru Negotiation

For justifiable reasons and as demanded by the exigencies of the service, disposal thru negotiated sale may be resorted to and undertaken by the proper committee or body in the agency or entity concerned taking into consideration the following factors:

- a. There was a failure of public auction. As envisioned in this Circular, there is failure of public auction in any of the following instances:
 1. if there is only one offeror. In this case, the offer or bid, if sealed, shall not be opened.
 2. if all the offers/tenders are non-complying or unacceptable. A tender is non-complying or unacceptable when it does not comply with the prescribed legal, technical and financial requirements for pre-qualification.
- b. The negotiation may be conducted singly, i.e., on a one-on-one basis, or in group, provided that due communication between the offerors and the government is established with a view to ensuring that the government gets the best price.
- c. To avert possible confabulation among unscrupulous parties, a record of the proceedings of the negotiation must be maintained.
- d. It is understood that the price agreed upon at the negotiation shall not be lower than the floor price as fixed by the government or the highest offer submitted at the failed public auction whichever is higher.

Conformably to existing law and regulation, in the case of local government units, the Office of the Treasurer shall undertake the negotiated sale subject to approval by the proper Committee on Award. Where the acquisition or transfer cost of the property exceeds P5,000.00 in the case of provinces and cities, the approval of this Commission is required. In the case of municipalities, where the acquisition or transfer cost of the property is more than P3,000.00, the approval of the Provincial Auditor is required.

3. Barter, which is the direct exchange of commodities without the use of money and without reference to price or the exchange of goods of one character for goods of another, may be made with other government agencies or government- owned and/or controlled corporations. This shall be resorted to where there is an offer that would redound to the interest of and is advantageous to the government.

4. Transfer to Other Government Agencies

Where the property or assets involved are no longer serviceable or needed by the department, agency, corporation or local government unit concerned, they may be transferred to other government entities/agencies without cost or at an appraised value upon authority of the head or governing body of the said agency or corporation, and upon due accomplishment of an Invoice and Receipt of Property (Cf., Sec. 76, P.D. 1445).



5. Destruction or Condemnation

This mode shall be resorted to only when the unserviceable property has no commercial value, or is beyond economic repair, or there is no willing receiver, and/or the appraised value is less than the administrative cost of sale, subject to prior inspection by the Auditor concerned. Valueless property shall be condemned either by burning, pounding, throwing beyond recovery, and the like. The head of the department, agency and corporation and the local chief executive shall approve the disposition.”

Differences among PPP Modes

Projects under the three different frameworks may be differentiated according to purpose, source of financing, term of cooperation, ownership, fees, price escalation provisions, payments, proceeds, costs, incentives, and application, among others.

	Joint Venture	Lease	BOT	Disposition
Governing Law	2008 NEDA JV Guidelines	Executive Order No. 301 dated 26 July 1987	Republic Act No. 6957, as amended by Republic Act No. 7718	Commission on Audit Circular No. 89-296 dated 27 January 1989
Scope of Application	Joint undertaking only in activities directly and immediately related to and in furtherance of the primary corporate purpose of the Government Entity	<p>Refers to temporary occupation of a real estate on the basis of a contract executed with the entity that has absolute ownership over such real estate.</p> <p>The DPWH, with respect to the leasing of government-owned buildings or space for private use, shall formulate uniform standards or guidelines for determining the reasonableness of the terms of lease contracts and of the rental rates involved.</p>	The law provides that the general description of infrastructure or development projects are those normally financed and operated by public sector, but which will now be wholly or partially implemented by the private sector. This includes, among others, health facilities.	Divestment or disposal of property and other assets of all government entities/ instrumentalities, whether national, local or corporate, including the subsidiaries thereof



	Joint Venture	Lease	BOT	Disposition
Source of Funds	Government equity contribution shall only be less than 50% of the outstanding capital stock in the JV Company. Contribution may be through money, equipment, land, intellectual property or any thing of value	Private Sector	Financed by private sector, but shall be repaid by authorizing the private sector to charge and collect reasonable tolls, fees, rentals for the use of the project facility not exceeding those incorporated in the contract and, where applicable, the proponent may likewise be repaid in the form of a share in the revenue of the project or other non-monetary payments, such as, but not limited to, the grant of a portion or percentage of the reclaimed land, subject to the constitutional requirement with respect to the ownership of the land	Private Sector



	Joint Venture	Lease	BOT	Disposition
General Procedure	<ul style="list-style-type: none"> Competitive Selection Negotiated Agreements when: <ol style="list-style-type: none"> in receipt of an unsolicited proposal failure of competition when no proposals are received or no private sector participant is found qualified failure of competition when only a single interested party remaining 	The head of agency shall have the authority to determine the reasonableness of the terms of the lease and the rental rates thereof, and to enter into such lease contracts without need of prior approval by higher authorities, subject to compliance with the uniform standards or guidelines established by the DPWH (pursuant to Section 6 of EO 301) and to the audit jurisdiction of COA	Projects may be implemented through public bidding or direct negotiation with Swiss challenge.	<ul style="list-style-type: none"> As a general rule, sale or disposal of government property shall be through public bidding. For justifiable reasons, property may also be disposed by, among others, sale through negotiation.
Eventual Outcome	<p>Allows Private Sector to take over the undertaking</p> <p>Divestiture of ownership allowed and encouraged</p>	<p>Vacate the leased premises upon expiry of the lease period</p> <p>No transfer of ownership</p>	<p>Generally, the infrastructure or development project is transferred to the government after building and/ or operation thereof (depends on the contractual agreement) by the private sector project proponent</p> <p>Government retains ownership</p>	Transfer of ownership to Private Sector



	Joint Venture	Lease	BOT	Disposition
<i>Economic Considerations</i>	<p>Revenues realized in time</p> <p>Government and Private Sector entitled to revenues based on equity</p> <p>Share in revenues may reflect future conditions</p>	<p>Fixed lease price where lessee pays and lessor earns</p> <p>Lease revenues usually lower than sale price and realized in time</p>	<p>Private sector finances</p> <p>Government entitled to fixed fee or percentage of gross revenues</p>	<p>Government earns from sale</p> <p>Revenues realized within shortest period of time</p> <p>Revenues from sale price only; Price reflects only present conditions of property</p>
<i>Assumption of Risks</i>	<p>Sharing of risks based on equity; No prohibition for private sector to assume more risk</p>	<p>If government is the lessor, it may risk-free during term of lease</p>	<p>Risks assumed by private sector before transfer to government</p>	<p>Government indemnified from all risks, if contemplated</p> <p>Normally, disposition is on an "as-is-where-is" basis</p>

Differences among GPRA, BOT and JV

	GPRA	BOT	JV
<i>Purpose</i>	Procurement of goods and services within the budget cycle of the government agency/ LGU	Development of infrastructure projects through project finance and other financing modes	Joint undertaking of an enterprise
<i>Financing</i>	Generally, financed from public sector	Generally, financed from private sector	Joint financing from public and private sector
<i>Term</i>	Generally, short-term	Generally, long-term	Generally, short-term
<i>Ownership</i>	Transfer of Ownership from Private to Public of Procured Goods	Stays with Government	Allows take-over by private sector; divestiture is encouraged as soon as possible.



	GPRA	BOT	JV
<i>Fees</i>	Fixed fees. Attached to ABC (approved budget for the contract).	Fees may be adjustable in accordance with pre-determined parametric formulas.	No prescribed fees
<i>Price escalation</i>	Prohibits price escalation	Allows price escalation	---
<i>Payment / Proceeds</i>	Procuring entity will pay private entity	Operator/ contractor will remit fees to public entity	GE and Private partner share in the proceeds according to their proportionate ownership
<i>Approvals</i>	PhP500Million: Government Procurement Policy Board	PhP300Million: NEDA-ICC	Head of Agency
<i>New Concept/ Technology</i>	Not required; If intellectual property, no bidding.	Required if unsolicited	Not required
<i>Incentives</i>	Prohibits incentives	Provides incentives for large capital investments	No incentives
<i>Application</i>	Applies to all Government Entities; Exempts from its coverage those projects falling within BOT law.	Applies to all Government Entities	Limited to GOCCs, GCEs, GICPs, GFIs, and SUCs. (LGUs under separate guidelines)
<i>Income</i>	None	Fees	Income/ Dividends
<i>Approval Period</i>	30 days	30 days	Internal
<i>Overall Period (est.)</i>	200 days	250– 410 days	75– 165 days



Differences between BOT Law and 2008 NEDA JV Guidelines

Aspects	BOT Law	2008 NEDA Joint Venture Guidelines
Arrangements	Combination of Build/ Operate/ Transfer/ Lease/ Rehabilitate/ Add/ Develop/ Own/ Management/ Supply/ Construct/ Finance	Joint Venture (continuing/ ongoing concern/ operation/ management)
Government Support	Normally financed and operated by the public sector but contractually (wholly or partly) implemented by the private sector	Government support as a rule; but seen as not needed when period expires or even before period expires
Transfer to Government	Government owns Project	As a rule, private sector takes over Project; Government encouraged to divest
Share in Revenues	Optional sharing (fixed fee and/or percentage in gross revenues)	Inherent in JVs
Government Contribution	Government contribution not required but project may be financed partly from direct government appropriations and/ or from ODA of foreign governments or institutions not exceeding 50% of the project cost	Money, capital, services, assets including equipment, land or intellectual property or anything of value (subject to 3rd party valuation); Less than 50% of outstanding capital stock of JV Company
Approvals required	NEDA-ICC; OP; DOF/ DBM approvals may be required	Governing Board or duly authorized representative; No NEDA-ICC required; General Rule, no OP, DOF, DBM approvals
Project Period	Not exceed 50 years	Generally, short-term; but no prohibition on long term, depending on the size, nature and scope of the proposed JV activity
Financing	Private Sector Proponent	Joint between Government Entity and Private Sector Proponent



Aspects	BOT Law	2008 NEDA Joint Venture Guidelines
<i>Incorporation by Government</i>	Not contemplated	Government Entity has option to incorporate (JV Company) or Contractual/ Unincorporated JV
<i>Public Audit</i>	Revenues and receipts of government subject to COA audit	Not required
<i>Types of Projects</i>	Infrastructure and Development normally financed and operated by the public sector; Listing in Law (not exclusive)	Any project or undertaking (must not be in NEDA/ DTI/ BOI Negative List)
<i>Prioritization of Project</i>	Prior-to-bid/ negotiation approval of list of priority projects (depending on amount by NEDA; Local Development Councils)	Prior approval not required; List of JV projects need not be pre-approved
<i>Approval of Contracts</i>	Prior-to-award/ solicitation approval by NEDA-ICC (if National Government undertaking required)	No higher approvals required; Office of the President approval required only if provided in Charter
<i>Track Record of Private Sector</i>	Completed a similar or related project	Completed a similar or related project costing at least 50% of the JV activity
<i>Financial Proposals</i>	Depending on arrangement: Proposed user tolls/ fees/ rentals/ charges; amortization payments	Government Entity determines the equity participation
<i>Bidding Parameters</i>	Lowest present value of fees/ charges; or present value of the proposed schedule of amortization payments	Highest benefit/ revenues to Government Entity
<i>Negotiations</i>	Direct Negotiation after 2 failed biddings (solicited mode)	Limited Negotiations after 1 failed bidding (Annex "A": Competitive Selection)
<i>12% Reasonable Rate of Return</i>	Prior-to-negotiation/ comparative proposal approval by NEDA-ICC for public utility monopolies	No requirement for imposition of Rate of Return



Aspects	BOT Law	2008 NEDA Joint Venture Guidelines
<i>Unsolicited Proposal (UP)</i>	Requirements: New concept or technology/ not priority project; No direct government guarantee; No comparative/ competitive proposal received; NEDA-ICC clearance before negotiations	No such requirements; JV allowed for any project
<i>UP: Treatment of more than 1 proposal</i>	Use first in time approach, i.e., 1st complete proposal evaluated and decided upon before evaluating 2nd	Not defined (Interpretation: discretion of head of agency)
<i>UP: Definition of "Complete" Proposal</i>	Proposal contains feasibility study, company profile and the basic contractual terms	Not defined (Interpretation: sufficiency to negotiate)
<i>UP: Exclusionary Rule</i>	Conferment of "Original Proponent" status (cannot entertain other proposals until solicitation of comparative proposals)	Issuance of "Certificate of Acceptance" (cannot negotiate with others)
<i>UP: NEDA-ICC Clearance</i>	Required prior to negotiation with original proponent	Not required
<i>Effect of Failure of Bidding</i>	Rebid	Rebid at discretion of the Head of the Government Entity, Annex "B" (Limited Negotiations) or Annex "C" (Competitive Challenge)
<i>Processing Period</i>	250 to 410 days	90 to 165 days

Solicitation of a JV Partner is not considered Procurement

The selection of a JV Partner under the 2008 NEDA JV Guidelines, especially under Annex "A," bears some similarity with the procurement process under the GPRA, the same is not "procurement" within the ambit of the GPRA. What is chosen under Annex "A," "B," or "C" or the 2008 NEDA JV Guidelines is a partner in an ongoing undertaking, whereas what is chosen in a procurement under the GPRA is a one-time supplier of goods or services.



Advantages of a JV, compared to the other PPP modes

- 1. Sharing of Profit, Losses and Risks** – Unlike other modes of public-private partnerships, where government bears *all*, if not most, of the risk, in JVs, the risk is shared with the private sector participant. Hence, in theory, use of Government funds and resources are maximized since its equity participation is a “minority” participation, and it is the private sector which takes a “lead” in the investment.
- 2. Government Entity generates income and dividends** – In procurement under the GPRA, no income or dividends are earned, and Government spends for the project. In certain BOT contracts, fees are paid. In JV arrangement, Government’s earnings are in proportion to its investment.
- 3. Arrangement largely contractual** – The parameters for setting up a JV is less stringent than the rules under the BOT law and the GPRA.
- 4. Duration of partnership dependent on purpose** – The flexibility of Government exit is unique to JV arrangements. In BOT and GPRA contracts, it is private sector participation which ceases, and Government takes over the project/ property.
- 5. No OP/ NEDA-ICC/ DOF/ DBM approvals** – Stringent agency approvals from the Office of the President (OP), National Economic Development Authority (NEDA) – Investment Coordination Committee (ICC),²⁰ Department of Finance (DOF) and Department of Budget Management (DBM) are *generally* not required for JV project, save for some narrow exceptions.
- 6. Period shorter than GPRA and BOT** – The process in selecting a JV partner is abbreviated primarily because Government approvals are not required, and accountability for the project rests largely on the Head of the Government Entity involved.

²⁰ As reported in media, there is a proposal to subject joint venture projects to NEDA approval.



Characterization of a JV under the 2008 NEDA JV Guidelines

The characteristics under the 2008 NEDA JV Guidelines are:

1. A JV is contractual arrangement;
2. It involves a private sector entity or a group of private sector entities on one hand, and a Government Entity or a group of Government Entities on the other hand;
3. Parties to the JV contribute money/ capital, services, assets (including equipment, land, intellectual property, property or anything of value), or a combination of any or all of these;
4. Parties share risks to undertake an investment activity responsive to national development goals and objectives and not included in the JV negative list, when formulated, in order to accomplish a specific, limited or special goal or purpose;
5. Private sector initiative in a particular industry or sector is facilitated;
6. Transfer of ownership of the investment activity to the private sector under competitive market conditions is contemplated;
7. Parties intend to share both profits and losses, subject to agreement; and
8. A JV may be a contractual (unincorporated) JV, or a corporate JV.

JV is a form of Partnership

There is no precise definition of JVs under Philippine Law; hence, resort is made to the common law concept of JVs. Most opinions in common law jurisdictions differentiate a partnership as a business vehicle which contemplates a general business with some degree of continuity, while the JV is formed for the execution of a single transaction, and is thus of a temporary nature. The Philippine Supreme Court has stated that this observation is not entirely accurate in the Philippine context. Under our Civil Code, a partnership may be particular or universal, and a particular partnership may have for its object a specific undertaking.²¹ Hence, under Philippine law, a JV is a form of partnership and should thus be governed by the general law on partnership.²²

21 Information Technology Foundation of the Philippines, et al., v. Commission on Elections, et al., G.R. No. 159139 (13 January 2004) (Ynares-Santiago, Concurring) *citing* Aurbach, et. al. v. Sanitary Wares Manufacturing Corporation, et. al., G.R. No. 75875 (15 December 1989) 180 SCRA 130 (citations omitted).

22 *Id.*; See also Primelink Properties and Development Corporation et. al., v. Ma. Clarita T. Lazatin-Magat, et. al., G.R. No. 167379 (27 June 2006) *citing* Aurbach v. Sanitary Wares (180 SCRA 130) (citations omitted).



A public corporation is not created when a JV Company is formed

The intention of the drafters of the 2008 NEDA JV Guidelines is that a private corporation is formed, hence the requirement that Government's participation is less than 50% of the outstanding capital stock. The 2008 NEDA JV Guidelines precede from MO 266, which is the issuance governing minority investments of Government. Hence, the formation of a public corporation or a GOCC was never contemplated.

The government entity involved remains a government entity. It is only the particular project, activity or undertaking subject of the JV that is placed in private hands, or "privatized;" or, if assets are involved, the ownership of the assets are likewise passed to the private JV Company. If privatization of the government entity itself is intended, other laws and issuances are applied to the privatization, not the 2008 NEDA JV Guidelines.





PART 2

REPUBLIC ACT NO. 6957 (1990) (AS AMENDED BY REPUBLIC ACT No. 7718 [1994])

AN ACT AUTHORIZING THE FINANCING, CONSTRUCTION, OPERATION AND MAINTENANCE OF INFRASTRUCTURE PROJECTS BY THE PRIVATE SECTOR, AND FOR OTHER PURPOSES

SEC. 1. Section 1 of Republic Act no. 6957 is hereby amended to read as follows:

“SECTION 1. *Declaration of Policy.* - It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government. Such incentives, aside from financial incentives²³ as provided by law, shall include providing a climate of minimum

23 *Amending BOT Act: Conference Committee Report on Senate Bill No. 1586/ House Bill No. 10943, Record of the Senate, Volume IV, No. 72 (19 April 1994).*

SENATOR MACAPAGAL: There is a third major change, Mr. President, and that is on investment incentives. Both the Senate and the House versions did not provide for investment incentives.

So what we have done, we have agreed to the House version but it will be under the general incentives scheme of the Board of Investments.

Bicameral Conference Committee on Public Works (21 March 1994).

THE CHAIRMAN (SEN. REVILLA). Is there other comments?



SEN. MACAPAGAL. So you are giving up the tax exemption.

THE CHAIRMAN (REP. ORTEGA). Section 11 ang tax exemption. Tay muna. Everything that will be directly use....

REP. DIAZ. No, kasi ang problema dito is this eh. You have expanded the definition of a BOT project to include the market, to include the bus terminal and all of those stuff. tVe' are no longer talking of mega, mega, and we are not going to open up a cubic....

THE CHAIRMAN (REP. ORTEGA). Taxes sa mga kung ano ano dyan. So, how do we word the restriction on the importation of tax-free equipment?

SEN. MACAPAGAL. Whaot that one should be that one.

REP. PAYUMO. Directly in proportion to project cost.

REP. DIAZ. It ahs there two elements. (1) What project will qualify; and (2) to what extent, because it says all, all importation.

SEN. MACAPAGAL. Why don't you make it eligible for BOI, to be registered witht he BOI, and let the BOI takes care of that because there are safeguards in the BOI fiscal incentive system.

REP. DIAZ. Because there is not three additional incentives there.

SEN. MACAPAGAL. Kaya nga.

REP. DIAZ. Not provided there.

SEN. MACAPAGAL. So BOT projects approved.

REP. DIAZ. Will BOT projects still register with BOI?

SEN. MACAPAGAL. If they want incentives right now, if their activity is in the investment priority supply, like industrial estates.

REP. DIAZ. Otherwise you do a BOT project, you will never edge over a non-BOT project.

THE CHAIRMAN (REP. ORTEGA). I think that is the idea of this BOT amendment eh, to give a slight edge over a non-BOT project.

THE CHAIRMAN (SEN. REVILLA). Eh para yan sa cooperative, lahat pumapasok.

SEN. MACAPAGAL. Oo, that's why you have the floor.

THE CHAIRMAN (REP. ORTEGA). Hindi, huwag natin tanggalin yon additional incentive but for the safeguard.

SEN. MACAPAGAL. So BOT Project approved by the ICC that are....

THE CHAIRMAN (SEN. REVILLA). One billion and above.

SEN. MACAPAGAL. Oo, something like that, shall be registered with the BOI for incentives. And let the BOI take care of admonishing the incentives.

THE CAHIRMAN (REP. ORTEGA). Okay, what do you say?

REP. DIAZ. Pag nilagay mo sa law, walang implementing, it's the way it's worded.

THE CHAIRMAN (REP. ORTEGA). Okay, where do we put that thing?

REP. DIAZ. Sa tax exemption?

THE CHAIRMAN (REP. ORTEGA). Section 11, sa tax exemption.

SEN. MACAPAGAL. What are the cause of typical BOT, like we don't want public markets to be listed in the BOI no? So that's 30 million.



THE CHAIRMAN (SEN. REVILLA). For example, Horizontal construction like roads.

SEN. MACAPAGAL. Not municipal roads, barangay roads, huwag naman.

REP. DIAZ. Among project ang qualified sa tax exemption?

SEN. MACAPAGAL. Wala.

REP. DIAZ. Di, may mga equipment from foreign assisted.

MR. ENCARNACION. Foreign assisted lang.

THE CHAIRMAN (SEN. REVILLA). Pagkatapos ditto bibigyan natin ng preference exemption.

THE CHAIRMAN (REP. ORTEGA). Eh kung ganoon din, they can import anything tax-free, but they have to re-export also. Why don't just cover the BOI regulation.

SEN. MACAPAGAL. But not all, see. What's the ball park figure for a major infrastructure project? One billion?

REP. DIAZ. A power plant can not be lower than P1 billion.

REP. PAYUMO. Yes, like the mini-hydros. Yan nga ang problema ngayon eh.

REP. DIAZ. I think we should not involve with those things.

SEN. MACAPAGAL. So BOT projects with a project cost of P1 billion and above shall be eligible for fiscal incentives as provided for by the Omnibus Investment Code.

REP. PAYUMO. Okay. Kasi right now, the investment incentives code might not have limited priority areas.

SEN. MACEDA. Right.

THE CHAIRMAN (REP. ORTEGA). So, paano natin ipapasok ngayon?

REP. DIAZ. Yon sa tax exemptions, ilagay na lang natin, Fiscal Incentives. BOT projects in excess of P1 billion shall be eligible for fiscal incentives as provided by the Omnibus Investment Code. Amended ba yon, wala pa?

SEN. MACAPAGAL. Wala pa.

THE CHAIRMAN (REP. ORTEGA). Okay na yan.

REP. DIAZ. No incentives pa.

SEN. MACAPAGAL. We have BOI already.

REP. DIAZ. If we could cover yon mga ex-pats, everything. Now look over all those things.

REP. PAYUMO. Ide-delete natin yon paragraph? REP. DIAZ. Is there any other incentives?

SEN. MACAPAGAL. Incentives na lang, without the word "Fiscal".

THE CHAIRMAN (REP. ORTEGA). Additional incentives.

REP. PAYUMO. Because the omnibus includes raw materials.

SEN. MACAPAGAL. Raw materials for export oriented.

THE CHAIRMAN (REP. ORTEGA). Kaya tanggalin na lang natin ang...

SEN. MACAPAGAL. Remove the word fiscal, ano?

THE CHAIRMAN (REP. ORTEGA). Wala na. Additional incentives. B-O-T projects in excess ...

SEN. MACAPAGAL. Incentives thus:



government regulations and procedures and specific government undertakings in support of the private sector.”²⁴

REP. DIAZ. Marami kasi 'yan eh.

SEN. MACAPAGAL. Hindi. Tanggalin mo na 'yong additional because incentive has a technical term eh. 'Yong BOI incentives na nga 'yon.

REP. DIAZ. Kung gusto mo BOI incentives...

SEN. MACAPAGAL. Puede rin.

REP. DIAZ. .. bilang title.

SEN. MACAPAGAL. Hintay muna. Board of Investments Incentives o kaya Investment Incentives.

THE CHAIRMAN (REP. ORTEGA). Ayos na. Mas kuwan pa 'yan.

REP. PAYUMO. This is in addition to any other incentives that...

SEN. MACAPAGAL. No. The Statement of Objectives... That is calling on what the Senate version says.

REP. PAYUMO. Among others.

SEN. MACAPAGAL. Oo. 'Di ba it is already in the Statement of Policy? Look at the Senate version Section one.

REP. DIAZ. But we have to qualify all the incentives they are to register. So, if I were a B-O-T Operator I have to register.

SEN. MACAPAGAL. By its so, you'll be automatically eligible to register.

REP. PAYUMO. So here they just register and they automatically get exempted.

SEN. MACAPAGAL. Oo. Shall be eh.

- 24** Amending BOT Act: Conference Committee Report on Senate Bill No. 1586/ House Bill No. 10943, Record of the Senate, Volume IV, No. 72 (19 April 1994).

Senator Revilla: xxx

Mr. President, because of our gargantuan budgetary deficit, the problem of financing infrastructure has been a major stumbling block to the economic progress of the Philippines. That the flow of financial resources from the Philippines in the form of principal and interest payments to its creditors has sapped, much of our economy's financial strength is, I would say, in a sorry state indeed. To temper the foreign debt problem, the Administration has resorted to domestic borrowings and budget-cutting measures. Hence, adequate financing for development projects has not been generated.

The BOT scheme, including its variants, has emerged as a viable alternative in reducing the financing problems of the developing countries. A greater level of private sector participation in the financing, construction and/or operation of infrastructure and development projects is also an effective strategy for implementing privatization, which is one of the anchor policies of the Medium-Term Philippine Development Plan.

Indeed, the BOT scheme could very well serve as a major instrument in the development of our country. Under the BOT scheme, power plants can be built by the private sector. Roads and highways can also be built by the private sector. Public markets can likewise be built by the private sector. The BOT scheme harnesses the economic initiative of the private sector in building prosperity for the greater number.

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Senator Macapagal: Mr. President, the first major change is on the approvals process.

If we will recall, in our Senate version, we had a very long discussion about the approvals process. If we are going to trace it from the very first bill as we revised it - the bill that was passed in the previous Congress - BOT projects had to be approved by Congress. This was supposed to be one of the difficulties of the old BOT projects - that they had to be approved by Congress.

Therefore, in our version, as passed by the Senate, in Section 4, we approved a different approval process. Section 4 of the bill that we passed in the Senate says: "All infrastructure agencies...shall PREPARE ANNUALLY infrastructure programs WHICH SHALL BE SUBMITTED TO THE INVESTMENT COORDINATION COMMITTEE OF THE NATIONAL ECONOMIC AND



DEVELOPMENT AUTHORITY FOR REVIEW AND APPROVAL OF THE SAME ON THE BASIS OF NATIONAL DEVELOPMENT GOALS." This was the general rule that we passed.

Further, however, it says, if the projects will not require government financing, the projects will be submitted to the ICC of the NEDA for information. So, it is where projects require government financing or direct government guarantee that the ICC will have approvals.

This particular provision was revised in the Conference Committee Report. If we will look at Section 4 of the Conference Committee Report which we are submitting now, it now says: "All concerned government agencies, including government-owned and controlled corporations and local government units, shall include in their DEVELOPMENT programs those priority projects...under the provisions of this Act."

There are various paragraphs now that spell out which will be the approving agency. First, the national projects costing up to P300 million shall be submitted to the ICC of the NEDA for approval. If it is more than P300 million, it will go up to the NEDA Board for approval. For local projects between P200 and P300 million, they will also go to the ICC; between P50 million and P200million, it will be the Regional Development Councils; between P20 million and P50 million, it will be the Provincial Development Councils.

For local projects up to P2 million, it will be the Municipal Development Councils. For city projects up to P50 million, it will be the respective City Development Councils.

That is one major change that has been made, Mr. President, as far as the Senate version and the Conference Committee version are concerned.

SENATOR MACEDA: Mr. President, on that point, did we discuss this devolution of approvals of local projects here in the Senate? Or is this something that came out only in the Conference Committee?

SENATOR MACAPAGAL: Mr. President, we did discuss local projects on the Floor. In fact, my recollection is that the local government units were supposed to submit annual infrastructure programs for review and approval on the basis of National Government goals. So, in our Senate version, the local government units would have to submit their general program to the ICC of the NEDA.

SENATOR MACEDA: Yes, Mr. President. I just want to clarify this. I am not absolutely against it. And I hope that in due time, it works out well.

We have a situation where local government officials are elected only for three years. In practice, I would suppose in more than half of the municipalities, cities and provinces, the mayor, if he is a strong and efficient one, controls the Municipal Development Council, and the governor, more or less, controls the Provincial Development Council.

I am not really sure whether in the context of the next few years we are ready for this particular provision where, in effect, any mayor or governor can go into a lot of BOT. Certainly, because of their desire to perform and to get projects done, they would go into BOT on almost any infrastructure project.

If we will recall, up to this point in time, whether it is PNB, DBP or now the Premium, we have had a very, very bad experience with public market projects being constructed by loans from financing institutions.

I am just a little worried that this devolution up to Municipal and City Development Council levels may really open up cities and municipalities to a lot of obligations, so that future incoming mayors, city mayors and provincial governors will suddenly find – just like we in the National Government find ourselves today – that their predecessors had really gone into a lot of BOTs which eventually have to be repaid.

If these were discussed on the Floor of the Senate, I would have limited the approvals process to the Regional Development Councils. I am a little surprised that the approvals have been brought down all the way down to the Municipal Development Council.

I can tell the Sponsor for sure that on that level it is more than 50 percent. I would say, probably 70 or 80 percent of Municipal Development Councils are controlled by the municipal mayors.

We will, of course, expedite a lot of local BOT, municipal BOT projects. But the other side of that question is that we will open up municipalities, cities and provinces into a lot of loans and legal obligations to be repaid in due time.

SENATOR MACAPAGAL: Mr. President, may I point out three things in response to the observations made by the Gentleman from Ilocos Sur, Manila, and Laguna. Firstly, although the approvals process has been brought down, the scope of the approval also has been made stricter because in the Senate, when we passed the approvals process at the national level, it was approval



RULE 1 - PRELIMINARY PROVISIONS

Section 1.1 – Policy. It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the Construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government.

In line with the foregoing, these Revised IRR seek to identify specific incentives, support and undertakings, financial or otherwise, that may be granted to Project Proponents, provide a climate of minimum Government regulations, allow reasonable returns on investments made by Project Proponents, provide procedures that will assure transparency and competitiveness in the bidding and award of projects, ensure that Contractual Arrangements reflect appropriate sharing of risks between the Government and the Project Proponent, assure close coordination between national government and Local Government Units (LGUs), and ensure strict compliance by the Government and the Project Proponent of their respective obligations and undertakings and the monitoring thereof, in connection with or relative to Private Sector Infrastructure or Development Projects to be undertaken under this Act and these Revised IRR.

Sec. 1.2 - Coverage. These Implementing Rules and Regulations (IRR) shall cover all Private Sector Infrastructure or Development Projects, as hereunder defined, undertaken by Agencies/ LGUs in accordance with such contractual arrangement or scheme authorized under and pursuant to R.A. No. 6957, as amended by R.A. No. 7718.

For LGU projects, concerned LGUs may formulate additional guidelines/procedures not in conflict with this Act and these Implementing Rules and Regulations and pertinent provisions of R.A. No. 7160 (Local Government Code of 1991) and its implementing rules and regulations.

of a program which can, in fact, be in very generic terms. But here, although the approvals process has been devolved, it is these projects now that have to be approved. So a list of projects is quite specific as compared to a program. In that sense, there is greater control.

Secondly, Mr. President, there are limits. Though it is devolved, it is the relatively small project that will be approved at the local level. As I said, they are projects and not general listings of programs.

SENATOR MACEDA: Yes. The limits, Mr. President, let us say, for municipal is P20 million. But that is for one project. So, the mayor may have one market for P20 million, one bridge for P20 million, one municipal highway for P20 million, one storage plant for P20 million, and the like. The limit is per project.

SENATOR MACAPAGAL: Yes, Mr. President.

The third point that I wanted to make is that, in fact, if anybody would be worried about the power of the local governments, it should have been the Congressmen who are usually more involved in political power play at the local level. Their introducing this very specific schedule of approvals, I think, in their minds, tightened up the controls rather than keeping it very generic because under our Senate version, as long as the general program is approved at the ICC level, there is no more approvals process at the local level or any other level.

So, it is under a general program, national program approved by the ICC and only on the basis of consistency with national goals which is very general. Within that, then the local governments have very great flexibility, and probably much greater flexibility under the Senate version than under the version of the Conference Committee.



Notes:

1. The BOT Law was enacted to solve the government's inability to finance infrastructure, which is a major stumbling block to the economic progress of the Philippines.

Agan v. Philippine International Air Terminal, Co., Inc.

G.R. No. 155001, 5 May 2003

One main impetus for the enactment of the BOT Law is the lack of government funds to construct the infrastructure and development projects necessary for economic growth and development. This is why private sector resources are being tapped in order to finance these projects. The BOT law allows the private sector to participate, and is in fact encouraged to do so by way of incentives, such as minimizing the unstable flow of returns, provided that the government would not have to unnecessarily expend scarcely available funds for the project itself.

2. Republic Act No. 7718 is a curative statute, which makes valid that which before its enactment was invalid. Thus, doubts and procedural lapses engendered and committed under Republic Act 6957 were cured by Republic Act No. 7718.²⁵

Tatad v. Garcia

G.R. No. 114222, 6 April 1995

Petitioners claim that the contract is defective because it follows a build-lease-transfer scheme which was not defined nor recognized in Republic Act No. 6957 and its implementing rules and regulations. The petitioners further assail the validity of the award of contract of the basis of direct negotiation.

The issues are rendered rendered moot and academic by Republic Act No. 7718. Section 3 of this law authorizes all government infrastructure agencies, government-owned and controlled corporations and local government units to enter into contract with any duly prequalified proponent for the financing, construction, operation and maintenance of any financially viable infrastructure or development facility through a build-operate-transfer, build-and-transfer, build-lease-transfer, build-own-operate, contract-add-operate, develop-operate-and-transfer, rehabilitate-operate-and-transfer and rehabilitate-own-operate.

25 Francisco S. Tatad, et al. v. Hon. Jesus B. Garcia, Jr., et al., G.R. No. 114222 (6 April 1995).



Republic Act No. 7718 is a curative statute intended to provide financial incentives and a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector. A curative statute makes valid that which before enactment of the statute was invalid. Thus, whatever doubts and alleged procedural lapses that the parties may have engendered and committed in entering into the questioned contracts, these have now been cured by Republic Act No. 7718.

3. Private sector infrastructure or development projects under the BOT Law shall be implemented in accordance with the Implementing Rules and Regulations of R.A. No. 6957, as Amended by R.A. No. 7718, “An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes,” as amended by R.A. No. 7718 (the “BOT Law IRR”) issued by the committee created under Section 11 of the BOT Law. For local government projects, local government units may formulate additional guidelines/ procedure not in conflict with the BOT Law and the Local Government Code.²⁶
4. BOT projects are eligible for fiscal and non-fiscal incentives under the Omnibus Investments Code, although unsolicited BOT projects are generally not entitled to income tax holiday. BOT projects that cost at least Php 1 billion may be granted pioneer status with non-pioneer incentives.²⁷
5. Projects undertaken under the BOT Law are considered national government projects under Republic Act No. 8974²⁸ and Republic Act No. 8975.²⁹
6. Republic Act No. 8974 provides that the government may acquire real property needed as right-of-way, site or location for any national government project through donation, negotiated sale, expropriation or any other mode of acquisition as provided by law. The law also provides guidelines for acquisition, and requires compliance with environmental and resettlement laws.³⁰ Republic Act No. 8974 includes projects undertaken by government owned and controlled corporations.³¹

26 Implementing Rules and Regulations for Republic Act No. 6957, as amended, (hereinafter BOT Law IRR) § 1.2.

27 Memorandum Order No. 314 Promulgating the 2010 Investments Priorities Plan (30 April 2010).

28 Entitled *An Act to Facilitate the Acquisition of Right-of-Way, Site or Location for National Government Infrastructure Projects and for Other Purposes* (2000).

29 Entitled *An Act to Ensure the Expedious Implementation and Completion of Government Infrastructure Projects by Prohibiting Lower Courts from Issuing Temporary Restraining Orders, Preliminary Injunctions or Preliminary Mandatory Injunctions, Providing Penalties for Violations Thereof, and for Other Purposes* (2000).

30 Republic Act 8974, §§ 3 - 9 (2000).

31 *Metropolitan Cebu Water District v. J. King and Sons Company, Inc.*, G.R. No. 175983 (16 April 2009).



7. Republic Act No. 8974 amended Rule 67 of the 1997 Rules of Civil Procedure. The rule is that upon filing of the expropriation complaint, the plaintiff has the right to take or enter into possession of the real property involved if he deposits with the authorized government depositary an amount equivalent to the assessed value of the property for purposes of taxation. An exception to this procedure is provided by Republic Act No. 8974, which requires the payment of one hundred percent (100%) of the zonal value of the property to be expropriated to entitle the plaintiff to a writ of possession.³²
8. Republic Act No. 8975 prohibits courts from issuing temporary restraining orders, preliminary restraining orders, preliminary injunctions and preliminary mandatory injunctions for the following:
 - (a) acquisition, clearance and development of the right-of-way and/or site or location of any national government project;
 - (b) bidding or awarding of contract/ project of national government projects;
 - (c) commencement, prosecution, execution, implementation, operation of national government projects or its applicable contract;
 - (d) Termination or rescission of any such national government projects/ contract; and
 - (e) The undertaking or authorization of any other lawful activity necessary for national government projects/contract.

The prohibition shall, however, not apply if the injunction is issued by the Supreme Court, or in case of extreme urgency involving a constitutional issue such that, unless a temporary restraining order is issued, grave injustice and irreparable injury will arise.³³ Republic Act 8975 superseded Presidential Decree No. 1818.³⁴

9. The BOT Center was created as the successor of the Coordinating Council of the Philippine Assistance Program (CCPAP), the agency mandated to coordinate and monitor projects being implemented under the BOT Law.³⁵ The BOT Center was later renamed the Public-Private-Partnership (“PPP”) Center.³⁶

³² Section 4(a); See also *Metropolitan Cebu Water v. J. King and Sons* (2009) and *Republic of the Philippines v. Gingoyon*, G.R. No. 166429, (19 December 2005).

³³ Republic Act 8975 §§ 2-3 (2000).

³⁴ Entitled *Prohibiting Courts from Issuing Restraining Orders or Preliminary Injunctions in Cases Involving Infrastructure and Natural Resource Development Projects of, and Public Utilities Operated by, the Government* (1981); See also *GV Diversified International, Incorporated v. Court of Appeals*, G.R. No. 159245 (31 August 2006).

³⁵ BOT Law IRR, supra note 26 at § 1.3(e).

³⁶ Executive Order No. 8 (2010).



SEC. 2. Section 2 of the same Act is hereby amended to read as follows:

“SEC. 2. Definition of Terms. - The following terms used in this Act shall have the meanings stated below:

(a) Private sector infrastructure or development projects - The general description of infrastructure or development projects normally financed and operated by the public sector but which will now be wholly or partly implemented by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be authorized by the appropriate agency/LGU pursuant to this Act. Such projects shall be undertaken through contractual arrangements as defined hereunder and such other variations as may be approved by the President of the Philippines.

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.³⁷

37 *Bicameral Conference Committee on the Disagreeing Provisions on S.B. No. 1586 and H.B. No. 10943 (23 March 1994).*

SENATOR TATAD. Dito sa lines 25 and 26 down - "provided finally that projects which would have difficulty in sourcing funds maybe finance partly, etc., etc.", I just want to have a correct understanding of what is meant here which would have difficulty in sourcing funds.

MR. CHAIRMAN (CONGRESSMAN ORTEGA). Congressman Payumo, can you explain this further?

SENATOR MACAPAGAL. Page 2, line 26.

SENATOR TATAD. QQ 26.

CONGRESSMAN PAYUMO. Mr. Chairman, the House original version that marginal attractive projects but that was changed to projects which will have difficulty in sourcing funds because it is possible that a road is still yet to build traffic and there is no BUT proponent that will take that on now, but to be specific let us take the case of the Flagship North Expressway in Subic of the President. There is a segment there Expressway West, there is a segment there from Pulilan swerving to Bataan and Subic which in the Wilbur Smith study, the traffic is not sufficient and the financial returns standing alone as a separate segment is very long but the economic returns is high enough to make it a desirable socio-development project. It traverse Masantol-Macabebe- which right now are the river towns. But there is a portion that is lucrative, the Balintawak to Pulilan existing expressway where there is a way a lot of traffic but when that was decided by the DPWH, they said do not build that as a separate segment because that is allowing the BOT contractor to cream the project. They will really grab that because the IRR of that is thirty five to forty percent in five so we said we will piggy back the non-lucrative segment going to Subic. But if you do that it may trimmed down the IRR of the whole system low enough that the BUT contractor or proponent may not take it off. Fortunately of this particular one it can still take the Pulilan-Lubao segment, but the one going to Subic if that is added



on will really bring down the internal rate so low that no one if its forced to take that on will not take it. And so the government may, for example, the segment going to Subic a portion of that by appropriation or if they can get low concessionaire rate, in fact subsidizing the project.

SENATOR TATAD. You mean the project is not attractive enough.

CONGRESSMAN PAYUMO. Yes at that point in time. But from the point of view of the government even if its subsidizing ten percent, twenty percent at least the seventy percent or eighty percent there is a BOT taker rather than the whole stretch. Now the reason na gagawing whole system iyon is because the whole, from Balintawak all the way to Subic would be one whole highway. So that is the rational there, Mr. Chairman.

CONGRESSMAN DIAZ. Mr. Chairman, you see the BOT, the scheme really is a way of financing so that the government does not borrow and appropriate everything. So in a situation especially in the marginal area, the less developed provinces, the ones we want to open up, like Samar and all these things, they will not be very attractive for the commercial firms. But adding up little bit of a teether, sweeteners so to speak, the icing on the cake, then the project may attract takers and so for one fifth of the project cost we are able to save the seventy five percent. That is the rational. Otherwise we are really depriving the lesser developed areas a chance to tap this particular source of financing. This is really a financing mechanism.

SENATOR ALVAREZ. Mr. Chairman, I came from dormant community that subsidy is a little bit too high?

CONGRESSMAN DIAZ. It does not have to be fifty percent. We are putting a cap so that if you need seventy five percent to be attractive for a BOT then you no longer qualify in this particular scheme.

MR. CHAIRMAN (CONGRESSMAN ORTEGA). Para sa Pampanga lang ito Sonny para mag-branch out iyong mga highways.

SENATOR ALVAREZ. What is the reasonable rate for BOT programs?

CONGRESSMAN DIAZ. It depends on what type. For example roads. If you open up an expressway tomorrow in an area like Sierra Madre going to Cagayan Valley, the traffic is not so heavy, it would take time for trade and all of that so you will be losing money in the initial term. Unfortunately when you build a road you build all of the roads. You have to finish the entire line.

SENATOR ALVAREZ. I asked that question because would it be possible that the capital subsidy or the capital support system of the private sector will be geared so that the approximate rate of return which is reasonable because if one segment, a private sector investment, let us say thirty percent, now the private sector, let us say fifty five percent, and the public sector capital support is 45%, what would be the rate of return for the 55%?

REP. DIAZ. My feeling, Mr. Senator is, well, I'll leave that to that 'point in time'. Anyway, because this requires an appropriation, Congress, at that 'point in time', whichever will be members of Congress, can define the rules and conditions on how they are giving this ceiling, 'no, because it will have to go to the GAA.

THE CHAIRMAN (REP. DIAZ). Whatever is the percentage of the support will have to pass Congress.

REP. DIAZ. Matse-check natin, e. If we are going to fix a rule and write what would be an adequate...

SEN. ALVAREZ. No, I'm not suggesting that. I just want us to be able to appreciate what we are doing here; that we are not, in effect, bringing subsidy into -unnecessary subsidy or perhaps...

THE CHAIRMAN (REP. ORTEGA). It's the other way around, Sonny, e, the other way around; because this is supposed to be done by government. Wala tayong pera, so ini-imbiba natin ngayong pumasok ang private sector; "Gawin nga ninyo itong dapat gawin ng gobyerno dahil wala kaming pera.

But in this case, in this particular case, baka naman wala tayong makumbidang pumasok na private sector at mabigat na. Businesswise, sasabihin nating, "pumasok kayo, kalahati lang o 60% Lang o 70% lang. So, actually, we are not subsidizing; only, pinapapasok natin to that extent. It is the private sector that is subsidizing the government in BOT projects.

SEN. ALVAREZ. Dahil alam mo kasi, the description(?) will be, somebody who puts the package together, and then a 50% public sector component would like its support from .the public sector. So, we also have to design measure for the private sector investment; we will not look like as if this is a bonanza, because this is usually a source of graft. Palakasan 'yan, e; kung sino ang makakakuha ng public sector financing.

Siguro, we understand that that social issue will come about, then we can begin to design kung ano ang possible design so that, while we will allow the private sector to come in, what will be the meets and bounds.



REP. PAYUMO. Yeah, Mr. Chairman. The way I conceive of the process, this is how it will happen.

The segments that are pinpointed by the feasibility study, as not too attractive, may be pinpointed. But in the bidding process, their ir(ponents are really good and their proposal, such items as, if they made only, say, ten percent public sector, twenty percent or thirty percent, necessarily -- and then, also the tolls and the fees that they will charge, and all of this will be present valued, the lowest will be the winner.

So, when we say up to fifty percent, it doesn't mean that government will subsidize fifty percent.

In the bidding process, one can only -- if it is systems and so on, he needs only so much, and the others fifty, then talo 'yung fifty, because in the evaluation of the proposals the winner will be the one that makes...

SEN. ALVAREZ. So, you allow the market forces to play?

REP. PAYUMO. Yes.

THE CHAIRMAN (REP. ORTEGA). And may I add that after all is said and done, and then there is need, for the government coming to some extent -- fifty percent or whatever it is -- it needs an appropriation; that will have to pass through both the House and the Senate.

REP. PAYUMO. But it's best that it is brought up, Mr. Chairman; so that, from the record, during the discussion here, the Public Works, at least, will be guided by the intention of the authors, because they can also interpret as they can pluck in(?) the fifty percent and so on.

SEN. ALVAREZ. Ipasok natin lahat 'yung savings ni Director dito, fifty percent savings. Baka pag pasok ng savings, ang rate of return niyan, e, one hundred percent na.

REP. PAYUMO. Yeah, but they will now have proposal, so we put it on record the...

REP. DIAZ. The best defense here is that, being an appropriation, it would be the power of Congress. Now, we cannot really preempt, at that point in time, whoever is in Congress, to pass judgment, unless...

SEN. OSMENA. The practical thing here is that there will be another lumpsum appropriation, counterpart funds for...

REP. DIAZ. Hindi. Ang mangyayari kasi noon is, what we'd have difficulty....Hindi siguro makakalusot sa Senado 'yun, so...

SEN. ALVAREZ. You are the financial engineers here, you gentlemen.

REP. DIAZ. At saka maganda, it's on the record. It's on the record 'no; because I see the appropriations sometimes necessary because -- I'm just thinking of a project, we're talking of building a dam, and I hear it from a lot of the private sector proponents; they feel the government should build the road first, sometimes. Why? Because the road, it's not possible to bring equipment up unless you have the road. And the road entails right-of-way and all of these things. But the road will not be built if the government will not appropriate funds. So, these are combinations, so this would fall into this scheme, that project is difficult to finance, maybe, not just because of the return, but because there are squatters in that particular area. And generally, you may need some appropriation on the part of government, to take over the right of way and relocate squatters, and all of that. These are going to fall under this...

SEN. ALVAREZ. Although that may be a part, 'no, where the government proceeds in the construction of a structure before the main B-O-T is going to be constructed.

REP. DIAZ. Yes.

SEN. ALVAREZ. Under the provision of this particular rule, that may not be the case. It may be that, government will come in almost simultaneously with co-mingled appropriations; the whole infrastructure is not set apart. Maaring twenty percent infrastructure...

REP. DIAZ. I don't see how the government can co-mingle, if it is a national government agency. They will have to build a certain section or a bridge for specific facility. I don't think government will allow a co-mingling of -- unless there is a government corporation that will do it. But the national government, perhaps, will not enter into -- I don't think the DPWH can do a joint-venture road project.



SEN. ALVAREZ In that particular case where one is pre-conditioned for the other. Itong case mo naman, which is a continuing road network, and a segment of it is practicable, the computation will be for the whole road network, which is a one-billion road network, then the government will build five hundred, or half of it, ano, maximum government contribution, and the other half of it will have to be provided by the private sector component. But since it's one whole, co-mingle ang construction niyan. Hindi ba puedeng ganoon?

THE CHAIRMAN (REP. ORTEGA). Kaya nga, Sonny; baka nga hindi pumasok 'yung private investor, because of your counting as a whole. But one portion, is profitable enough. Puede na for this particular section, walang government participation. Only on that portion na hindi attractive, ang mayroon. So, ipagpalagay na, 'yung attractive portion will cost one billion, the non-attractive portion will cost one billion, so, the government can come in not for one whole of the total project, but only one half of that portion which is not attractive.

SENATOR ALVAREZ. Kaya nga. If we do that we will negate the concept that we are introducing.

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MR. CHAIRMAN (CONGRESSMAN ORTEGA). Kung one hundred percent ang gagastusin ng gobyerno or thirty or twenty. That is what I mean. Its a matter of how you look at: it. The government is not subsidizing the project, we are asking precisely the private sector to subsidize government, if you want to put it that way. Kaya nga to what extent?

SENATOR ALVAREZ. Wait, my sympathies are all for that.

CONGRESSMAN PAYUMO. Mr. Chairman, it can also happen this way. A portion of the non-lucrative segment can be built separately by the government from direct appropriation and then linked it up upon completion with the But in effect its the same in effect the government subside the whole system.

SENATOR ALVAREZ. Siguro, what I want to be clarified here iyong concept kasi of sourcing of funds

SENATOR TATAD. Mr. Chairman, from the illustration, I can see the point and I fully accept the concept. My only concern is the minute we write this provision into the law, what is to prevent some people from describing a project as something in which the private sector is not sufficiently interested and therefore government funds must come in. I think this is the issue that we must confront here, there must be some standards, I dont think if we can write it.

CONGRESSMAN DIAZ. The same way that instead of saying that it should be the BOT who will appropriate one hundred percent of the whole thing, in other words, there is really no predetermined criteria on fund allocation. And when you talk of marginally difficulty in sourcing funds, as a general rule, those located to developed areas of the country will be easier to finance, as a general rule, because the traffic will be there, basic infrastructure will be there, the telephone will be there, peace and order is generally viable. As a general rule, it is the less developed provinces that will have problems and even in the allocation of GAA funds, the less developed provinces like Catanduanes won't have the _____. Of course, they always have a very good representatives, but that is going to be the problem and so the flow of development becomes lapsed. The more developed areas like Metro Manila get more the assistance and will get the BUT, that is the problem.

SENATOR TATAD. I do not dispute your proposition as established by which project would be funded by the government, etc. but here we really have the BUT proponent except that the funding will be provided partly by government. So if there is any kind of volution that comes in, it becomes very easy for somebody without any connections with the financial institutions to get the project going, its because he will be assured fifty percent niyan manggaling sa gobyerno.

CONGRESSMAN DIAZ. My suggestion there is when we define GAA, this type of subsidy for BUT projects, that's when the rule should probably be done not in this law but in the appropriation measure where there special appropriation law or a special provisions of the GAA.

SENATOR TATAD. In the meantime will you consider a possible rewording, probably to bring it closer to what we want to see. Instead of what appears here about - "provided finally that in cases where no proponent is willing to assume the total risk of the project for profitability, financing maybe provided by direct government appropriation or from foreign government institutions not exceeding fifty percent.

CONGRESSMAN DIAZ. So first, you must establish that nobody is willing to join in the normal course. How do we establish that. We announce bidding over and when nobody picks it up, is that sufficient or by understanding. I am trying to get my mind on what you are trying to do because in implementing that provision people will have to understand what it is.

SENATOR TATAD. Yes, that could be one way of doing.

CONGRESSMAN DIAZ. In other words, there is a project in Samar which is very important, you announce and publicized it in papers, nobody picks it up.



SENATOR TATAD. Pre-qualification.

CONGRESSMAN DIAZ. If nobody is interested would that be sufficient now to trigger out this particular case?

SENATOR TATAD. Probably the 'ICC looks at it, profitability is low therefore, probably this is something that we can list.

CONGRESSMAN PAYUMO. Mr. Chairman, in cases like this the proof of putting is in bidding. Kung talagang walang interesado, no one would bid, but if we make it a two step process, madedelay lang. But with the market forces at play, those who are interested in the project, even if we say up to fifty percent sa presently worded, if they are interested enough in the project, they will try to bid and then include in their proposal to what extent public sector they need. If they go the whole half and ask fifty then they will lose project to somebody who may just ask ten, twenty or thirty, so the competition is also place there.

MR. CHAIRMAN (CONGRESSMAN ORTEGA). Sa bidding mismo ilalagay nila kung gaano ang kailangan nilang ibigay ng gobyerno para sila ma-interes. So let us say, one bidder will say, we need a fifty percent participation of the government, the next bidder will say, the same thing pero ako twenty percent lang ang ibibigay ng gobyerno, iyon ang mananalo.

SENATOR ALVAREZ. We are back to our savings. This is the capital junction, I need twenty percent capital to funds here. . Sabi ni Rene kanina, if infrastructure is worth, I think what you are trying to describe here a joining of capital, twenty percent, thirty percent.

MR. CHAIRMAN (CONGRESSMAN ORTEGA). Kaya nga may kaunting flexibility. Instead of not saying the government will come in at ten percent or twenty percent, case to case na naman ito kasi. But as I said iyong better offer, lesser participation of the government, that means to say the subsidy of the private sector is bigger.

CONGRESSMAN PAYUMO. And the word in favor the fifty percent is a combination of direct government appropriation on ODA.

[Simultaneous talking]

MR. CHAIRMAN (CONGRESSMAN ORTEGA). Okay no ito, with that explanation on the spirit of this provision.

CONGRESSMAN DIAZ. Then we don't touch on this anymore.

SENATOR TATAD. Siguro Kong ano na lang, page 3 lines one and two, after "cost" comma (,) "the balance to be provided by the project proponent", just to straighten up.

REP. DIAZ. "the balance to be provided by the proponent".

So, medyo malasado ng kaunti 'yung...

SEN. TATAD. 'Yung "not exceeding"; between "not exceeding" and "up to" which is the required.

SEN. OSMENA. Who is going to determine the project has difficulty in sourcing funds?

THE CHAIRMAN (REP. ORTEGA). Sa bidding mismo.

REP. DIAZ. Initially, the feasibility studies will show it; but it can only be tested in the bidding.

THE CHAIRMAN (REP. ORTEGA). It can work this way, Sonny, ano.

Okay, this is a prtrject we want to put in under BOT; so we ask for proposal for this. So, several people will come in. One will say, "Okay, I will undertake that, but the government will have to help me out to the extent of twenty percent, because otherwise, our feasibility studies say, it will be very hard.

Somebody else will come in and say, "I need the help of the government to the extent of fifty percent." So, we can say that if, without this help from the government, they will not come in. And of course, the better offer is the one that is asking for less appropriation from our government.

SEN. OSMENA. Everybody will ask for appropriation.

THE CHAIRMAN (REP. ORTEGA). No, not necessarily. Because a proponent can come in and say, "I will undertake this one hundred percent.

If it is a profitable venture, if you will be asking for government support, and I will not, then it can be awarded to me. If it is a profitable venture, pag-aagawan pa.



SEN. OSMENA. You are assuming that there is competition.

THE CHAIRMAN (REP. ORTEGA). Yes.

SEN. OSMENA. It is not always...

THE CHAIRMAN. Not always the case, Sonny, but if it is really a joint project with a good feasibility study, there will be proponents, for sure.

(Informal discussion)

SEN. OSMENA. The others have not even been notified yet. The purpose of a public advertisement is to invite proponents. The others have not been--but the others are already inside. Westmont was 'only given...

REP. DIAZ. Because the difference between Aramco and Westmont, Aramco is more of a strategic partner. They have the oil, Westmont does not have the oil. And second, I don't see a situation where Saudi Arabia will declare war on us, that Malaysia might. So, 'yun ang mga...

SEN. OSMENA. "Strategic partner" is a term that was designed to justify the entry of Aramco. Lutong macao na 'yan, e.

REP. DIAZ. Mas natatakot ako sa Malaysia. Kayang-kaya tayong talunin.

REP. PAYUMO. Mr. Chairman, back to the point, I want to address, the point of Senator Osmeria - in case there is no competition, and only one submits a proposal then it shows that it is really so marginally -- a marginal project that no one is interested; but still, we are protected by the wordings, "may finance up to" only. So, it's not a given, mandatory that 'in case there is only one proponent, perforce, we have to give fifty percent. It is still the option of the...

SEN. OSMENA. The B-O-T projects, which Gloria and I, on the floor went over this a long time, is really a private sector initiative. But here, we are already thinking it with government participation.

REP. DIAZ. I think it is the reverse. As I said, these are really projects that the government should be undertaking. But because we don't wanna borrow money anymore, we're doing a different route of financing. We're asking them, "You come in and for the period, under different variations, you can just do it on a turn-key, build and transfer; or you can run it, and then until you recover your investment, give it to us -- the build-operate-and-transfer - and so on down the line.

SEN. OSMENA. Precisely, 'ano, either the government undertakes it or the private sector undertake it. But in this provision, you are already marrying the two concepts.

REP. DIAZ. We're actually providing in this provision, we're widening the field because I don't think we want to do another amendment six months from now, we might as well widen the field. And once we are able to catch a lot of fish, then at saka tayo maglagay ng...

THE CHAIRMAN (REP. ORTEGA). At saka may safety fund dito sa ano, e; may appropriation pa.

SEN. OSMENA. Wala, maniwala ka; papasok sa likod 'yan: counterpart fund for...

REP. DIAZ. But there is a natural limit to that, e. In other words, the GAA's fund is not unlimited; there is only so much we can give to this. And there, I think, you will have two hundred congressmen fighting for their own specific...

REP. PAYUMO. Mr. Chairman, even on B-O-T projects, the bottomline is, the private sector will only come in if it's profitable for them, if the rate of return is sufficient and attractive to them. We cannot force them.

The roads, at least, can be split, up. There is a way to do it. This portion, public sector; this, puede. E, kung hindi attractive ang whole segment? But there may be projects, Mr. Chairman, that may not lend itself to splitting. It may be an indivisible plant or a dam that may not be attractive as is, but if given a kicker of twenty percent or whatever, maybe, the rate of return will be better. But we have also...

REP. DIAZ. It's not also just the money, e; and if you analyze a lot of the projects under the PAP, the right-of-way is a common denominator, it's a common problem. And here, you need some government money to unclog that, because private sector will not want to touch relocation of squatters or townsites.

SEN. OSMENA. E, di gawin na lang ng gobyerno.

REP. DIAZ. 'Yung buong project?



(b) Build-operate-and-transfer - A contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation maintenance thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, and operating and maintenance expenses in the project. The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term which shall not exceed fifty (50) years: Provided, That in case of an infrastructure or development facility whose operation requires

THE CHAIRMAN (REP. ORTEGA). Hindi nga kaya, e.

REP. DIAZ. Hindi nga kaya.

SEN. OSMENA. ODA naman ang gagamitin, e.

THE CHAIRMAN (REP. ORTEGA). Hindi nga kaya, boss, e. Hindi kaya.

REP. DIAZ. Ang problema natin sa ODA, even the counterpart money, we don't have enough. That's really the sad scenario; the funders could have given us more, but we don't have the peso counterpart. So, what we're trying to do now is to see what, if it's a private sector who will put up the counterpart, and we'll just put up a smaller percentage; then, that gives us flexibility. What we're really looking in is really alternative.

REP. PAYUMO. Let's say a power-generating plant, B-O-T project, you can do it other way; the public sector can come in partly, or the whole project is undertaken by the private sector. But to get the sufficient return for him, the price that he sells would be higher. So, if the public sector comes in, it has also the effect of lowering the tolls, the fees and the charges and since these will all be reflected in the first proposal, the works that submit the overall better package will win.

Bicameral Conference Committee on Public Works (21 March 1994).

SEN. MACAPAGAL. In that case may I propose to go back to Section 2-A. In the House bill we have a term marginally feasible, in the House bill. And in the Senate version, it is small and medium. That's as far as financing schemes are concerned. So, I just wanted to point out that in the minds of B-O-T investors that's a big difference, and we should address that.

THE CHAIRMAN (REP. ORTEGA). We have coined a definition of this marginal

REP. PAYUMO. Mr. Chairman, in what I read, we already deleted that marginally feasible. We used the words which would have difficulty in sourcing funds, may be financed partly from direct government appropriations and/or from official development assistance, thereby doing away with the wordings of the House and, also in effect, the wordings of the Senate or the small and medium. The compromise phrase we used is: Which would have difficulty in sourcing funds.

THE CHAIRMAN (REP. ORTEGA). Because it could be a bigger project than small and medium and yet the sourcing of funds would be quite hard considering the lower prevailing cost of capital. So, kailangan ding pasukan ang government assistance.

REP. DIAZ. I think, what is envisioned here would be a possible projects in the lesser developed areas of the country. We might not be financially viable on a normal basis so it would require some assistance...

SEN. ALVAREZ. Public support.

REP. DIAZ. ... from appropriations or from ODA funds to make it possible. xxx

REP. DIAZ. But we will delete "small and medium:

REP. PAYUMO. Di-nelete na natin yung "small and medium."

REP. DIAZ. So, we will delete "small and medium, that projects which would have difficulty in sourcing funds".

SEN. ARROYO. Yes, correct, correct.

REP. DIAZ. "small and medium" delete. So that it would be "that projects which would have difficulty in sourcing funds".



a public utility franchise, the proponent must be Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos.³⁸

38 Bicameral Conference Committee on the Disagreeing Provisions on S.B. No. 1586 and H.B. No. 10943 (23 March 1994).

SEN. TATAD. Okay. May I now therefore humbly ask for a reconsideration of the position taken by the panels on Page 3, lines 22 to 25? The issue here is, the ownership of a facility that requires a public utility franchise.

Our understanding in the Senate, as reflected in our deliberations is that, the owner of a public utility franchise must be a Filipino; and the history of public franchises in this country will confirm that – that no franchise has been awarded to any foreigner or any corporation controlled by a foreigner. And that the operation of a franchise, flows from the ownership; it is a continuing act.

Now, if you are going to split ownership and utilization or operation, then ownership is the higher right, higher than utilization or operation.

Okay. Now, if a foreigner may not operate a public franchise, even more so, he may not own a public. Malinaw naman siguro 'yan, ano? Okay. We just want to make that very clear para the confusion is avoided.

THE CHAIRMAN (REP. ORTEGA). So, how would you suggest the wording of this particular provision to make it clear?

SEN. TATAD. "Provided that in case of an infrastructure or development facility, whose operation requires a public utility franchise, the proponent must be Filipino; or if a corporation must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent, by Filipinos."

THE CHAIRMAN (REP. ORTEGA). In other words, we just make clear the constitutional provision.

SEN. TATAD. Yeah, precisely.

REP. DIAZ. No. There are two things that, I think, we have to clarify. This term "must be in accordance with the constitution", I'm trying to understand the working draft, e. You want to add the "Provided further"? In other words it already....

SEN. TATAD. We want to delete it, Rene, ano?

REP. DIAZ. No, it's not deleted.

SEN. TATAD. No, I'm proposing that we...

THE CHAIRMAN (REP. ORTEGA). I-spell mo 'yung constitutional provision.

REP. DIAZ. That's why, we're trying to understand...

SEN. TATAD. We're trying to suggest that Senate provision, to make this very clear.

THE CHAIRMAN (REP. ORTEGA). Ito na 'yung exact working ng constitutional provision.

SEN. MACAPAGAL-ARROYO. Hindi; ang gusto ni Kit, 'yung Senate wording.

REP. DIAZ. Hindi. Kasi, what is throwing me off is, the way it is worded right now without the Senate wording, ano, is it stops. "Provided that the ownership facility structure or the project proponent of an infrastructure facility whose operation requires a public utility franchise, must be in accordance with the constitution."

This is the way this final draft is worded.

SEN. TATAD. Yeah, okay.

REP. DIAZ. Now, what you are proposing is that we remove the parenthesis here. Because there's a parenthesis here, e; which means it was taken out, e. Tama ba itong ginawa ng staff na ito? I am going by what is amended, as against the original law. "Provided, that in the case of corporate investors..."

THE CHAIRMAN (REP. ORTEGA). I remember this. We stopped at "Constitution" and delete the rest.

SEN. TATAD. Now, what I am proposing is that, we substitute, Rene, this phraseology contained in our version.



THE CHAIRMAN (REP. ORTEGA). In lieu of this deleted portion?

SEN. TATAD. In lieu of what we just read, 'yung binasa mo. Mas malinaw 'yan; it will remove all confusions, kasi, doon nanggagaling ang problema, e.

THE CHAIRMAN (REP. ORTEGA). So, mag-umpisa dito sa "Provided" ng line 22?

REP. DIAZ. I can see the difference here; because, remember, you were distinguishing sa proponent as against an operator. If you were to adopt this version, then Hopewell is knocked-out; they cannot be a project proponent.

SEN. TATAD. No, only for public utility franchises, na BOT.

REP. DIAZ. Well, that's why.

SEN. TATAD. Sa BT, wala silang problema, because they built and it is transferred immediately.

REP. DIAZ. No. But if they are a project proponent, they can be--does a project proponent have to be the owner of a facility?

SEN. TATAD. Sa BOT, yes. He will build and operate, e.

THE CHAIRMAN (REP. ORTEGA). Kung build-transfer and operate, pu-puede pa?

REP. DIAZ. Dito sa isang definition.

SEN. TATAD. If he will build and upon completion transfer, wala siyang problema.

REP. DIAZ. Build and transfer?

SEN. TATAD. Oo. Pero 'yung B-O-T, Rene,--because he owns, e.

REP. DIAZ. I understand, because it's in this first part.

SEN. TATAD. Until it is transferred, he owns it, e. 'Yun ang kuwan.

REP. DIAZ. Puede, puede.

REP. PAYUMO. At saka, Rene, the Hopewell, they can run it also B-O-T; Hopewell can run-it also, because it's not a franchise. It's an activity, it's only a power generation.

SEN. TATAD. Yeah, kung non-franchise, wala tayong problema, it will effect only when you need a franchise.

REP. DIAZ. Puede sa B-O-T definition.

(Arrival of Sen. Osmena)

THE CHAIRMAN (REP. ORTEGA). My other favorite Senator.

So, how does it read now?

REP. DIAZ. We delete line 22.

THE CHAIRMAN (REP. ORTEGA). Line 22 up to 25?

REP. DIAZ. After the "Provided", you delete "that", all the way to "constitution" and then substitute this.

THE CHAIRMAN (REP. ORTEGA). 'Yung naka-yellow. Ano 'yung naka-yellow, can we read it?

REP. DIAZ. Hindi, kasi build-operate-transfer scheme din ito, e; you have to reiterate it here. Tama si Senator. Because the build-operate-transfer scheme, in the first part, it says, "operates".

THE CHAIRMAN (REP. DIAZ). Comments from the principal author. Kung okay na 'yan, tapos na.

SEN. TATAD. B-O-T, public utility. So that, public utility If its public utility, you don't need that.



CONGRESSMAN DIAZ. So we have to reduce the context of the first paragraph because its clear that the previous lines, its clear that the project proponent maintains ownership until it may transfer to the government at the end of the fixed term, So because of that

SENATOR TATAD. Its a public utility ...

CONGRESSMAN DIAZ. They cannot own even if somebody else is operating. That is ownership by itself even though somebody else is operating. Parang nobody can own Meralco or PLDT even though PILTEL will be the maybe the designated operator.

Ang pinag-uusapan kasi natin ang Meralco. I think they don't like the ...

SENATOR TATAD. When I was in Bacolod, there was brownout for two hours. Nagbrabrownout na.

SENATOR MACAPAGAL. Because during the Ways and Means meeting about the amendment that Sonny Alvarez made.

SENATOR TATAD. We insisted that public utility projects BOT should be owned only by Filipinos. We made that very clear. We went back to the general provision that it should be consistent with the Constitution and provided that the foreigner can't own.

CONGRESSMAN PAYUMO. In which case, its a reiteration of page 2, line 16 up to 21, we just want to reiterate that under BOT.

SENATOR TATAD. Yes, because on page 2, we are defining private sector infrastructure development projects. We are just

CONGRESSMAN DIAZ. You are stating it in clear terms the constitutional provision, they are there already, in accordance with the Constitution, we are just making it sure that the foreigners reading this law will realize that he has to look for a joint venture partner. And it should be the Filipino who will have sixty percent and that will be the project proponent.

SENATOR TATAD. No objections. Thank you very much. We can move. Okey.

Bicameral Conference Committee on Public Works (21 March 1994).

SEN. ALVAREZ. Yes, but how do you interpret the Constitution, the Constitution only provides for operations by Filipinos.

THE CHAIRMAN (REP. OTEGA). Operations that have to do with public utilities.

SEN. MACAPAGAL. Mr. Chairman, may I answer? In the House version there is no difference between the operator and the proponent.

SEN. ALVAREZ. So, that is very strict?

SEN. MACAPAGAL. Yes.

SEN. ALVAREZ. But by golly, if you are going to power treat it this way, you might cripple our/construction program. Many of the power systems that came in are wholly owned by foreigners. Only the operation according to the Constitution, we study this particular provisions because of my LRT investigation. In case of utilities, only the operation need be controlled and owned by Filipinos, 60% Filipino citizens, precisely because of the magnitude of investments. Whys; does the House version require ownership in operation by Filipinos or only operation?

SEN. MACAPAGAL. Yes, for public utilities, ownership and operation.

REP. DIAZ. No, no, no. This is subject to constitutional restraint, which means what the Constitution says.

SEN. MACAPAGAL. No, but since you don't differentiate ownership and operation.

SEN. ALVAREZ. Section 2(b) of the Senate version. You know, Madam Chairman, I am concerned with this because we might be frustrating what precisely we intend to do with the BOT. BOT is designed in order that we can allow foreign capital where there is none, or there is not much from our own countrymen. And then we are going to apply very nationalistic standards, we will inhibit the entry of foreign capital. We have about 15,000 megawatt more to organize.

xxx



The build-operate-and-transfer shall include a supply-and-operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government so requires, operates the facility providing in the process technology transfer and training to Filipino nationals.

(c) Build-and-transfer - A contractual arrangement whereby the project proponent undertakes the financing and construction of a given infrastructure or development facility and after its completion turns it over to the government agency or local government unit concerned, which shall pay the proponent on an agreed schedule its total investments expended on the project, plus a reasonable rate of return thereon. This arrangement may be employed in the construction of any infrastructure or development project, including critical facilities which, for security or strategic reasons, must be operated directly by the Government.

(d) Build-own-and-operate - A contractual arrangement whereby a project proponent is authorized to finance, construct, own, operate and maintain an infrastructure or development facility from which the proponent is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users: Provided, That all such projects, upon recommendation of the Investment Coordination Committee (ICC) of the National Economic and Development Authority (NEDA), shall be approved by the President of the Philippines. Under this project, the proponent which owns the assets of the facility may assign its operation and maintenance to a facility operator.

SEN. ALVAREZ. Operator only, Filipino citizenship?

REP. PAYUMO. Yes.

SEN. ALVAREZ. Yes.

THE CHAIRMAN (REP. ORTEGA). Okay yan, ayos na. That's the intention.

SEN. ALVAREZ. Of the Constitution, oo.

REP. PAYUMO. May we also, Mr. Chairman, offer an observation that in the Senate version, the financing scheme only applies to BOT; in the House version it applies all variations of BOT, including BT and so on. So, if the Senate....

SEN. ALVAREZ. Well, we are already out of utilities, Mr. Chairman. We are now talking of another scheme, okay.

REP. PAYUMO. Your Section 2(b), to move it up so that it applies to all schemes, not just on BOT, your 2(b).

THE CHAIRMAN (REP. ORTEGA). To BOT and all other similar schemes.

REP. PAYUMO. The other variations.

THE CHAIRMAN (REP. ORTEGA). The variations.

REP. DIAZ. In other words, don't make as a qualifications only to BOT, any project.

SEN. ALVAREZ. That would be more liberal.

REP. DIAZ. In any project we will allow 100% financing, provided where the law requires 60% Filipino operation.

SEN. ALVAREZ. Good, that's more liberal.



(e) Build-lease-and-transfer - A contractual arrangement whereby a project proponent is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the government agency or local government unit concerned on a lease arrangement for a fixed period after which ownership of the facility is automatically transferred to the government agency or local government unit concerned.

(f) Build-transfer-and-operate - A contractual arrangement whereby the public sector contracts out the building of an infrastructure facility to a private entity such that the contractor builds the facility on a turn-key basis, assuming cost overrun, delay and specified performance risks.

Once the facility is commissioned satisfactorily, title is transferred to the implementing agency/LGU. The private entity, however, operates the facility on behalf of the implementing agency/LGU under an agreement.

(g) Contract-add-and-operate - A contractual arrangement whereby the project proponent adds to an existing infrastructure facility which it is renting from the government. It operates the expanded project over an agreed franchise period. There may, or may not be, a transfer arrangement in regard to the facility.

(h) Develop-operate-and-transfer - A contractual arrangement whereby favorable conditions external to a new infrastructure project which is to be built by a private project proponent are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates such as higher property or rent values.

(i) Rehabilitate-operate-and-transfer - A contractual arrangement whereby an existing facility is turned over to the private sector to refurbish, operate and maintain for a franchise period, at the expiry of which the legal title to the facility is turned over to the government. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.

(j) Rehabilitate-own-and-operate - A contractual arrangement whereby an existing facility is turned over to the private sector to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity.

(k) Project proponent - The private sector entity which shall have contractual responsibility for the project and which shall have an adequate financial base to implement said project consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project.

(l) Contractor - Any entity accredited under the Philippine laws which may or may not be the project proponent and which shall undertake the actual construction and/or supply of equipment for the project.



(m) Facility operator - A company registered with the Securities and Exchange Commission, which may or may not be the project proponent, and which is responsible for all aspects of operation and maintenance of the infrastructure or development facility, including but not limited to the collection of tolls, fees, rentals or charges from facility users: Provided, That in case the facility requires a public utility franchise, the facility operator shall be Filipino or at least sixty per centum (60%) owned by Filipino.³⁹

(n) Direct government guarantee - An agreement whereby the government or any of its agencies or local government units assume responsibility for the repayment of debt directly incurred by the project proponent in implementing the project in case of a loan default.

(o) Reasonable rate of return on investments and operating and maintenance cost - The rate of return that reflects the prevailing cost of capital in the domestic and international markets: Provided, That in case of negotiated contracts, such rate of return shall be determined by ICC of NEDA prior to the negotiation and/or call for proposals: Provided, further, That for negotiated contracts for public utility projects which are monopolies, the rate of return on rate base shall be determined by existing laws, which in no case shall exceed twelve per centum (12%).⁴⁰

39 Amending BOT Act: Conference Committee Report on Senate Bill No. 1586/ House Bill No. 10943, Record of the Senate, Volume IV, No. 72 (19 April 1994).

Senator Macapagal: xxx

In one provision, previous to the provision that was questioned by Senator Tatad - because Assistant Secretary Pablo put the phrase "FACILITY OPERATOR" which is the subject of the question of Senator Tatad - the staff of the Technical Committee, for purposes of consistency, also put the phrase "FACILITY OPERATOR" in the very provision that Senator Tatad had wanted to make sure that the project proponent would be the 60-40. So, when it appeared, it was "FACILITY OPERATOR" that had to be 60-40, to which Senator Tatad vehemently protested.

Now, in the Technical Committee meeting of the Senate Committee on Public Works, the staff admitted that in that very specific provision that was questioned by Senator Tatad, it was they who put it in, but as an honest mistake. In trying to be consistent with the previous wording, they also put "FACILITY OPERATOR"; that there was no 60-40 provision in the wording that had supposedly been put by Assistant Secretary Pablo.

I told them, "But were you not aware that we called a last Committee meeting just on this very issue? So, how could anyone make a mistake that this was not a very sensitive issue?"

Their answer was, "Because we had wanted to ratify the Committee Report on the last day of session before the break."

There was only one provision missing. They were working without the written transcript. So, they were working, according to them, from memory of what transpired. They said that they had made this mistake, but that they had shown the copies to the Committee Secretariat. They admitted their error but, of course, they insisted that it was an honest mistake.

40 *Bicameral Conference Committee on Public Works* (21 March 1994).

SEN. MACAPAGAL-ARROYO. xxx. The House version does not provide for a ceiling.

REP. DIAZ. Ceiling of?

SEN. MACAPAGAL-ARROYO. On reasonable return on investments.

xxx

SEN. MACAPAGAL-ARROYO. Ah, alright. Well, I guess although this is a Senate version, I wanted to make sure that you are accepting a 12 percent cap on public, you see. Because you're saying you're adopting the Senate version.

REP. DIAZ. We have not accepted that. In the Senate version that is 0, that is 0 in the Senate version. The reasonable rate of return where you're putting a cap of 12 percent is 0.



SEN. MACAPAGAL-ARROYO. Ah, okay. Ah, you're just talking about the definitions of the various schemes?

REP. DIAZ. Yes.

SEN. MACAPAGAL-ARROYO. Ah, okay.

REP. DIAZ. But if you want to discuss the rates of return since we're already there, it was in the original version in the House, but I move for its deletion. The reason being you want to liberalize the whole thing, if we put a cap of 12 percent, what is the rational of the .12 percent on utilities? That's the Public Service Act of 1930's, I think.

REP. PAYUMO. Mr. Chairman, that's already on 0 of the Senate version.

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REP. DIAZ. On letter 0, Mr. Chairman, we would like to propose that given again the intention of the law of the amendment to this BOT law that we make the... we propose the House version. Because to put a rate may not consider again the marketplace. For example, in the Senate version, a rate ceiling of 12 percent was placed. And I think the reason for this is the Public Service Law which was passed perhaps before we were all born. And at that time because of money was, what, 6 percent?

REP. PAYUMO. Twelve percent is the legal rate of interest.

REP. DIAZ. That was the usury rate before. And given a rate of return for a risky project must be much, much more than cost of money of the interest that you can place in the bank. In other words, if I can get 15 percent for the money market and you're gonna offer me a 15 percent ceiling in terms of maximum profit I can make it a project, I'll tell you goodbye, I'll just put my money in the market, I have no headache.

So, generally, the rate of return I would be looking for where there is a possibility of losing my principal either would be much, much higher than 15, perhaps 25, perhaps 30 percent. And that is why we are proposing that such rates of return, the wording of the House version says: "for negotiated contracts, such rates of return that reflect the prevailing cost of capital in the domestic and international markets which the project proponent may tap to finance the project". If we are talking of credit and equity, we have to consider prevailing cost of money in that area. Like here in not so recent, in fairly recent history, the cost of money in the Philippines is quite high, there were times when we were borrowing at 30 to 40 percent. But assuming an average I think it would be imprudent to... or would. not be prudent to assume certainly not 12 because you cannot even borrow money at 12 percent today.

SEN. MACAPAGAL-ARROYO. Oo, but we were talking here about public utilities. Because the 12 percent doesn't apply to non-public utilities.

REP. DIAZ. But if you look at the public utility... the nature of a public utility is a very capital intensive subject to a lot of government regulations in terms of rates and all and yet we require a maximum rate of return of 12 percent. In other words... you are asking people to build power plants, railroads, for example.

SEN. MACAPAGAL-ARROYO. The independent power plants are not covered by the Public Service Act.

REP. DIAZ. If you are Meralco, if you are going into distribution, say, in Visayas, if you are to go into -- would shipping be a public utility?

SEN. MACAPAGAL. Oo, but shipping right now is subject to...here, again, the reason why I am giving very much for this is that this is on for amendment ...(simultaneous speaking)

CONG. DIAZ. May we know what is the public utility that is being envisioned by the Senate panel? What for example?

SEN. MACAPAGAL. These are those that are defined in the Public Service Act.

CONG. DIAZ. Which is basically what?

CONG. PAYUMO. Water, power utility, transportation. SEN. MACAPAGAL. But not the generation, that is not...

CONG. DIAZ. So, okay, electric utility, distribution. So, companies that are like Meralco. Water, like MWSS.

SEN. MACAPAGAL. Right now they do. They do live under the Public Service Act.

CONG. DIAZ. That is precisely why we are getting the type of service.



SEN. MACAPAGAL. But you see, we cannot use this law, this bill, to amend the Public Service Act. Because if you are going to allow a higher rate of return and what is provided in the Public Service Act, you are amending the Public Service Act. But we have to address the Public Service Act separately that is why we have bills filed to amend the Public Service Act.

CONG. DIAZ. But let's go by principle. Is there anything wrong about reviewing the Public Service Act?

SEN. MACAPAGAL. Then we should review the Public Service Act, but not use this. This is not an amendment to the Public Service Act. What this is simply reiterating is that....

CONG. DIAZ. But I think if this is a latter amendment, this will prevail.

SEN. MACAPAGAL. But that is precisely the point.

CONG. DIAZ. Because you see, the 12% pertains more to rates that they...you see, if you operate already a public utility, the 12% rate of return reflects the rate. The rate will charge the public.

SEN. ALVAREZ. Share monopoly.

CONG. DIAZ. Because you are a monopoly.

SEN. MACAPAGAL. I talked to Ben Press today and I explained to them the problem about the 12%. So, they said that they could accept a compromise that says - for public utility projects enjoying monopoly privileges, then they would accept the 12% cap.

CONG. DIAZ. Then you won't get the railroad. I don't see anybody coming in building a railroad. (simultaneous speaking)

SEN. ALVAREZ. That 12% is envisioned for the lifetime of the utility. The 12% that we are imposing here is to bring to life the utility and these are all. If I am going to put up a utility, I'll operate it for 25 years and then a renewable charter, I will be limited to 12%. That may be reasonable. If I put up a utility, I will be limited to 12%, I will build it.

CONG. DIAZ. We might again, by putting a figure, make this bill ...

SEN. ALVAREZ. Impotent.

CONG. DIAZ. Unattractive. That is the danger that I see it. Because by putting a figure in a law that has no relation to prevailing cost of money, that has no relation to the cost of capital, to the country of origin or even here in the Philippines -- now, perhaps Ben Press has their own reason. They got a lot of money through...

SEN. ALVAREZ. So, Ben Press will not allow anybody to enter the market because they are there already. Because they are already established.

SEN. MACAPAGAL. No, in fact, they were those who expressed concern about this 12%. I explained to them, you know, the reason behind it and how it is difficult to -- now, the source, I told them - well, if you want I'll remove the 12 already and talk to Maceda, that was his amendment. So, rather than talk to Maceda...(simultaneous speaking) compromise.

CONG. ORTEGA. They'd rather agree to this. (Laughter) They'd rather agree to it, and finally this is limited to monopolistic....

CONG. ROXAS. Madam Chairman, if I may ask. The 12% rate of return that you talked about is 12% of what? 12% of the project cost, 12% of the equity invested therein?

SEN. MACAPAGAL. Well, if you look at the definition, reasonable rate on investments and operating and maintenance costs.

CONG. ROXAS. So, it is 12% return on sales. There are many definitions of the 12%. In other words, are you saying here that after all of the revenue, after deducting of all their expenses, it could be 12% na lang? Or, are you saying it is 12% of their equity invested, or is it 12% of the total project cost?

SEN. MACAPAGAL. Well, if you see the title, it is - reasonable rate of return on investments and operating and maintenance cost.

SEN. MACAPAGAL. Ah, okay, usually it is return on rate base.

CONG. ROXAS. Return on...what you are thinking of here is 12% on the entire total assets of the project. Because return on rate base is 12% of the entire asset base. And the asset, if that asset is 50% financed, you are talking of about 24% on equity. Di ba? If it is 70% base /financed you are talking of 36% on equity.



CONG. ORTEGA. You will allow appraisal.

SEN. MACAPAGAL. You see, 12% is reasonable.

CONG. ROXAS. No, in that case, it is high. Depending on how you define it.

SEN. MACAPAGAL. That's why, that's why it is reasonable. It is reasonable from the point of view of the investors, Mike.

CONG. ROXAS. My two-cents worth on this 12% is that difficult to legislate a number given the changing needs of our country as well as the changing nature of the financial market at the height of the power brown outs. Maybe, I don't know, but maybe we would have given somebody thirty percent just to have a power plant in place automatically, di ba?

SEN. MACAPAGAL. This particular provision does not legislate a number. It reiterates current legislation, in order to clarify that this is not amending the Public Service Act.

CONG. DIAZ. That is precisely why we want to attract investment in public utilities.

SEN. MACAPAGAL. But it would be very difficult to amend the BOT law to amend the Public Service Act. It is not logical.

CONG. ORTEGA. The proposed amendment directly amending the provision of the Public Service Act. Kanya-kanyang

CONG. DIAZ. What is the ten percent on the Public Service Act based on the...is it return on investment or return on rate base?

CONG. ROXAS. It is return on rate base.

CONG. DIAZ. Sa return on rate base....

CONG. ROXAS. Mataas ito.

CONG. DIAZ. That is why i-clarify ito.

CONG. ROXAS. So, why not just have a provision that says, that it shall not contravene provisions in the Public Utilities Act, di ba? Di tapos. Whatever is there, it is...

CONG. ROMERO. For the negotiated contracts, such rate....

CONG. DIAZ. But in the case of public utilities, it must be consistent.

CONG. ORTEGA. That reiterates the Public Service Act.

CONG. ROXAS. it might solve your problem.

CONG. ROXAS. So if that is used to amend it, this automatically changes also.

CONG. DIAZ. And add that - Provided further that in the case of public utility, is

SEN. MACAPAGAL. Well, I remember that in the debate, it was established that there are different statutory rates for different types of public utilities under different laws and the highest return was selected as the ceiling.

CONG. DIAZ. Which is 12?

SEN. MACAPAGAL. Oo.

CONG. DIAZ. On rate base? Pero ang hirap wala raw sa law iyong ten percent...

CONG. ROXAS. Ano ba iyon?

CONG. DIAZ. Sa rate base.

CONG. ROXAS. Saan mahahanap iyon?

CONG. DIAZ. In other words, the law is silent of the 12% so the premise is not exactly...In other words, if the intention of the Senate is to follow the law, according to Ted Encarnacion, that particular number is not in the law. That was the court ruling. So, really even in the Public Service Act, it would seem that there is no number.



CONG. ORTEGA. Eh, paano kung Supreme Court decision iyan na hanggang ngayon is still being upheld?

CONG. DIAZ. So, therefore, if we put this law that will ...

SEN. MACAPAGAL. Oo, return on rate base of 12% is reasonable.

REP. PAYUMO. The way we define' is not' ano eh.

REP. DIAZ. Will - you write something in the law, knowing how difficult it is....

SEN. MACAPAGAL. Okay, why don't we put, "provided for public utilities the rate of return on rate base.

REP. PAYUMO. But if it is not provided in the law, Senator, why do you want to put?

SEN. MACAPAGAL. Because it was the intention of the Senators that they don't want to use this bill to be a basis for what they perceived would be unreasonable in rates being charged consumers.

REP. PAYUMO. Mr. Chairman.

THE CHAIRMAN (SEN. REVILLA). Congressman Payumo.

REP. PAYUMO. We proposed to accept Senator Macapagal's proposal to add word, "rate base", but also to restrict it to public utilities which are monopolies.

SEN. MACAPAGAL. Okay.

REP. PAYUMO. And under-negotiated, not bidding. And also those under-negotiated contract which are not biddedl whis should also apply to protect the following:

REP. DIAZ. Utility lang itong sa kanila, because payag sila dito sa NEDA. Pumapayag ang Senate sa NEDA. Pumapayag ang Senate sa NEDA.

SEN. MACAPAGAL. Oo, foreign negotiated.

REP. DIAZ. Let's limit it only to public utilities which are monopolies. I think that's fair.

THE CHAIRMAN (REP. ORTEGA). Okay, can we have the provision now finally worded.

"Reasonable rate of return on investments and operating and maintenance cost. A rate of return that reflects the prevailing cost of capital in domestic and international market⁹, provided that in case of negotiated contracts, such rate of return shall be determined by the ICC of the NEDA Board prior to the negotiation and/or proposal provided for public utility projects. The rate of return (insert on rate base), shall be determined by existing laws....

SEN. MACAPAGAL. Excuse me. That's for public utility project which are monopolies.

THE CHAIRMAN (REP. ORTEGA). Which are monopolies, okay. The rate of return on base shall be determined by existing laws, which in no case shall exceed 12 percent. Provided, further, that in case of non-public utility projects, the rate of return shall not exceed the rate set by the ICC of the NEDA. Ano puwede na yon?

Any other comments on that provision as it aprs. SEN. MACAPAGAL. Yes, yes. A matter of style, we can remove that last provided, because that's already in the second sentence.

REP. DIAZ. Just reservation, Mr. Chairman, greater in Section 13 o16 the implementing rules on monitoring, we would like to propose some amendment on basically the composition.... we will not change the it ICC1 we want to expand/a little bit which will be the same body that will do that. But I can explain that later.

THE CHAIRMAN (REP. ORTEGA). Now, we cna go back and have an omnibus motion later on to correct.

REP. PAYUMO. Mr. Chairman.

THE CHAIRMAN (SEN. REVILLA). Congressman Payumo.

REP. PAYUMO. Since we already talked about existing laws, have been cleared by existing laws, can we delete "which in no case shall exceed 12%," because it is already under existing laws, understood.



(p) Construction - Refers to new construction, rehabilitation, improvement, expansion, alteration and related works and activities including the necessary supply of equipment, materials, labor and services and related items.”

Sec. 1.3 - Definition of Terms. For purposes of these Implementing Rules and Regulations, the terms and phrases hereunder shall be understood as follows:

- (a) Act** - shall mean Republic Act No. 6957, as amended by Republic Act No. 7718.
- (b) Agency** - Refers to any department, bureau, office, commission, authority or agency of the national government, including Government-Owned or -Controlled Corporations (GOCCs), Government Financial Institutions (GFIs), and State Universities and Colleges (SUCs) authorized by law or their respective charters to contract for or undertake Infrastructure or Development Projects.
- (c) Amortization** - The regular, periodic repayment of principal and payment of interest of a debt for a definite period of time, at the maturity of which the entire indebtedness is paid in full.
- (d) Approving Body** - The entity authorized to approve projects proposed under this Act and in accordance with Sections 2.7 and 2.8 of these Revised IRR.
-

SEN. MACAPAGAL. No.

THE CHAIRMAN (REP. ORTEGA). Precisely, the idea of the Senator is they want to see a definite figure. Di bale, kuwan, yan 12% is really limited to kmonopolies.

SEN. MACAPAGAL. I would not accept it.

THE CHAIRMAN (REP. ORTEGA). Limited to monopoly naman eh, from the way the provisions is worded. REP. DIAZ. You define it as rate base?

THE CHAIRMAN (REP. ORTEGA). Yes, rate base, at saka limited to monopolies. Yon provided further ang tanggalin na. Glor, will you have a look at that last provided, so period na sa 12.

SEN. MACAPAGAL. Oo.

xxx

THE CHAIRMAN (REP. ORTEGA). Di okay na. Ano, anong isiningit? "Provided further that for negotiated contracts for public utility projects which are monopolies, the rate of return on rate base shall be determined by the existing laws, which in no case shall exceed 12%."

Di ayos, it can not be more than/ anything than that.

Oh, letter P.

REP. PAYUMO. Mr. Chairman, I propose we accept the Senate version. The definition of contracts.



- (e) **BOT Center** - The successor of the Coordinating Council of the Philippine Assistance Program (CCPAP), the agency mandated under Section 12 of the Act, to coordinate and monitor projects implemented under the Act, pursuant to Administrative Order No. 67 (s. 1999), as amended by Administrative Order No. 103 (s. 2000) and Executive Order No. 144 (s. 2002).
- (f) **Contractual Arrangements** - Refers to any of the following contractual arrangements or schemes, as well as other variations thereof, as may be approved by the President, by which infrastructure and/or development projects may be undertaken pursuant to the provisions of these Revised IRR:
- i. **Build-and-transfer (BT)** - A contractual arrangement whereby the Project Proponent undertakes the financing and Construction of a given infrastructure or development facility and after its completion turns it over to the Agency or LGU concerned, which shall pay the Project Proponent on an agreed schedule its total investment expended on the project, plus a Reasonable Rate of Return thereon. This arrangement may be employed in the Construction of any Infrastructure or Development Projects, including critical facilities which, for security or strategic reasons, must be operated directly by the Government.
 - ii. **Build-lease-and-transfer (BLT)** - A contractual arrangement whereby a Project Proponent is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the Agency/LGU concerned on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to the Agency/LGU concerned.
 - iii. **Build-operate-and-transfer (BOT)** - A contractual arrangement whereby the Project Proponent undertakes the Construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The Project Proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the Project Proponent to recover its investment, and operating and maintenance expenses in the project. The Project Proponent transfers the facility to the Agency/LGU concerned at the end of the fixed term that shall not exceed fifty (50) years. This build operate- and-transfer contractual arrangement shall include a supply-and-operate scheme which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government so requires, operates the facility providing in the process technology transfer and training to Filipino nationals.
 - iv. **Build-own-and-operate (BOO)** - A contractual arrangement whereby a Project Proponent is authorized to finance, construct, own, operate and maintain an infrastructure or development facility from which the Project Proponent is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users; provided,



That all such projects upon recommendation of the Investment Coordination Committee (ICC) of the National Economic and Development Authority (NEDA), shall be approved by the President of the Philippines. Under this project, the proponent who owns the assets of the facility may assign its operation and maintenance to a Facility operator.

- v. ***Build-transfer-and-operate (BTO)*** - A contractual arrangement whereby the Agency/LGU contracts out the Construction of an infrastructure facility to a private entity such that the Contractor builds the facility on a turnkey basis, assuming cost overruns, delays, and specified performance risks. Once the facility is commissioned satisfactorily, title is transferred to the implementing Agency/LGU. The private entity however operates the facility on behalf of the implementing Agency/LGU under an agreement.
- vi. ***Contract-add-and-operate (CAO)*** - A contractual arrangement whereby the Project Proponent adds to an existing infrastructure facility which it is renting from the Government and operates the expanded project over an agreed Franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the Project Proponent.
- vii. ***Develop-operate-and-transfer (DOT)*** - A contractual arrangement whereby favorable conditions external to a new infrastructure project which is to be built by a Project Proponent are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates such as higher property or rent values.
- viii. ***Rehabilitate-operate-and-transfer (ROT)*** - A contractual arrangement whereby an existing facility is turned over to the Project Proponent to refurbish, operate and maintain for a Franchise period, at the expiry of which the legal title to the facility is turned over to the Government. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.
- ix. ***Rehabilitate-own-and-operate (ROO)*** - A contractual arrangement whereby an existing facility is turned over to the Project Proponent to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its Franchise, it can continue to operate the facility in perpetuity.



- (g) **Construction** - Refers to new construction, rehabilitation, improvement, expansion, alteration, and related works and activities including the necessary design, supply, installation, testing and commissioning of equipment, systems, plants, materials, labor and services and related items needed to build or rehabilitate an infrastructure or development facility.
- (h) **Contractor** - Refers to any entity accredited under Philippine laws, or that should be accredited under Philippine laws in accordance with Section 5.4 (a.v) hereof, which may or may not be the Project Proponent and which shall undertake the actual Construction and/or supply of equipment for the project.
- (i) **Development Program** - Refers to national, regional or local government plans or programs included in, but not limited to, the Medium-Term Philippine Development Plan (MTPDP), the Regional Development Plans and Local Development Plans.
- (j) **Direct Government Guarantee** - Refers to an agreement whereby the Government or any of its Agencies/LGUs guarantees to assume responsibility for the repayment of debt directly incurred by the Project Proponent in implementing the project in case of a loan default.
- (k) **Facility Operator** - Refers to a company registered with the Securities and Exchange Commission (SEC), which may or may not be the Project Proponent, and which is responsible for all aspects of operation and maintenance of the infrastructure or development facility, including but not limited to the collection of tolls, fees, rentals or charges from facility users; provided, that in case the facility requires a public utility Franchise, the Facility Operator shall, no later than the commencement of operation of the facility, comply with the nationality and ownership requirements under the Constitution and other applicable laws and jurisprudence.
- (l) **Franchise** - Refers to a certificate, permit or other form of authorization required to be obtained by a Facility Operator from a Regulator prior to operating a Public Utility Project.
- (m) **Government Undertakings** - Refers to any form of contribution and/or support provided under Section 13.3 of these Revised IRR, which the Government or any of its Agencies/LGUs may extend to a Project Proponent.
- (n) **Head of Agency/LGU** - Shall be defined as: (i) the head of the agency or body, for national government agencies (NGAs) and the constitutional commissions or offices, and branches of government; (ii) the Governing Board or its authorized official/managing head/Chief Executive Officer of GOCCs, GFIs, or SUCs; or (iii) the Sanggunian or its authorized official or the local chief executive, for LGUs.
- (o) **ICC** - Refers to the Investment Coordination Committee of the National Economic and Development Authority (NEDA) Board.



- (p) **Investment Incentives** - Refers to any form of contribution and/or support, which the Government or any of its Agencies/LGUs including GOCCs may extend to the Project Proponent in accordance with Section 13.2 of these Revised IRR.
- (q) **IRR** - Shall mean these Revised Implementing Rules and Regulations.
- (r) **List of Priority Projects** - Refers to the list of Private Sector Infrastructure or Development Projects approved in accordance with Section 2.3.
- (s) **Local Government Units (LGUs)** - Refer to provincial, city, municipal and/or barangay government entities.
- (t) **Negotiated Contracts** - Refers to contracts entered into by the Government for convenience even if broader tendering would have been possible. This type of contract may be resorted to only in cases prescribed under Rule 9.
- (u) **PBAC** - Refers to the Pre-qualifications, Bids, and Awards Committee established in accordance with Rule 3 of these Revised IRR.
- (v) **Private Sector Infrastructure or Development Projects** - The general description of Infrastructure or Development Projects normally financed, and operated by the public sector but which will now be wholly or partly financed, constructed and operated by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroad and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, public markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may otherwise be authorized by the appropriate Agency/LGU pursuant to the Act or these Revised IRR. Such projects shall be undertaken through Contractual Arrangements as defined herein, including such other variations as may be approved by the President of the Philippines.
- (w) **Project Cost** - Refers to the total cost to be expended by the proponent to plan, develop and construct the project to completion stage including but not limited to cost of feasibility studies engineering and design, Construction, equipment, land and right-of-way, taxes imposed on said cost, and development cost.
- (x) **Project Loan** - Refers to all loans and/or credit facilities extended by financial institutions, multi-lateral lenders, export credit agencies, and all other third party lenders to the project company and/or Project Proponent for the development and/or operation of the project.

Foreign loans/foreign currency loans to be incurred by the project company shall be in accordance with prevailing Bangko Sentral ng Pilipinas (BSP) regulations.



- (y) **Project Proponent** - Refers to the private sector entity which shall have contractual responsibility for the project and which shall have an adequate track record in the concerned industry as well as technical capability and financial base consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project to implement the said project.
- (z) **Public Utility Projects** - Refers to projects or facilities that provide public services as defined under the Public Services Act, as amended, and for which a Franchise is required.
- (aa) **Reasonable Rate of Return** - Refers to the rate of return that a Project Proponent shall be entitled to, as determined by the Approving Body taking into account, among others, the prevailing cost of capital (equity and borrowings) in the domestic and international markets, risks being assumed by the Project Proponent and the level of Government Undertakings extended for the project; provided, further, that in the case of Negotiated Contracts, such rate of return shall be determined by the Approving Body prior to call for proposals; provided further, that for Negotiated Contracts for public utilities projects which are monopolies, the rate of return on rate base shall be determined by existing laws, which in no case shall exceed twelve per centum (12%), as provided by the Act.
- (bb) **Regulator** - Refers to the agency, body or commission empowered by law to fix the rates of a provider of a particular public service as defined by the Commonwealth Act No. 146, as amended (Public Service Act, as amended) and for which a Franchise is required to operate the same.
- (cc) **Unsolicited Proposals** - Refer to project proposals submitted by the private sector, not in response to a formal solicitation or request issued by an Agency/LGU, to undertake Infrastructure or Development Projects which may be entered into by Agency/LGU subject to the requirements/conditions prescribed under Rule 10.



Notes:

1. Definitions of terms under the Government Procurement Reform Act⁴¹ are not meant to be applied to projects under the BOT Law.⁴²

Department of Foreign Affairs v. Falcon

G.R. No. 176657, September 1, 2010

Under the BOT Law, wherein the projects are to be privately funded, the entire information technology project, including the civil works component and the technological aspect thereof, is considered an infrastructure or development project and treated similarly as traditional “infrastructure” projects. All the rules applicable to traditional infrastructure projects are also applicable to information technology projects. In fact, the MRP/V Project awarded to BCA under the BOT Law appears to include both civil works (i.e., site preparation of the Central Facility, regional DFA offices and foreign service posts) and non-civil works aspects (i.e., development, installation and maintenance in the Philippines and foreign service posts of a computerized passport and visa issuance system, including creation of databases, storage and retrieval systems, training of personnel and provision of consumables).

In contrast, under Republic Act No. 9184 or the Government Procurement Reform Act, which contemplates projects to be funded by public funds, the term “infrastructure project” was limited to only the “civil works component” of information technology projects. The non-civil works component of information technology projects would be treated as an acquisition of goods or consulting services as the case may be.

This limited definition of “infrastructure project” under the Government Procurement Reform Act is significant since the IRR of Republic Act No. 9184 has some provisions that are particular to infrastructure projects and other provisions that are applicable only to procurement of goods or consulting services. Implicitly, the civil works component of information technology projects are subject to the provisions on infrastructure projects while the technological and other components would be covered by the provisions on procurement of goods or consulting services as the circumstances may warrant.

When Congress adopted a limited definition of what is to be considered “infrastructure” in relation to information technology projects under the Government Procurement Reform Act, legislators are presumed to have taken into account previous laws concerning infrastructure projects (the BOT Law and Republic Act No. 8975) and deliberately adopted the limited definition. We can further presume that Congress had written into law a different treatment for information technology projects financed by public funds *vis-a-vis* privately funded projects for a valid legislative purpose.

⁴¹ (2002).

⁴² Department of Foreign Affairs v. Falcon, G.R. No. 176657 (1 September 2010).



2. Implementation of infrastructure or development projects means its financing, construction and operation.⁴³

**Asia's Emerging Dragon Corp. v.
Department of Transportation and Communication**

G.R. No. 169914, 18 April 2008

A person who offers to pay, or pays, on behalf of the government the amounts due to a project proponent does not thereafter obtain the status of project proponent. A project proponent is required to undertake the construction of the project, including financing. Financing is but a component of the construction of the structures and not the entirety thereof.

3. The contractual arrangements identified in the BOT Law do not bar other arrangements or variations thereof for the payment by the government of the project cost.⁴⁴
4. Projects undertaken through the BOO scheme or through contractual arrangements or schemes other than those defined under the BOT Law require Presidential approval. Such projects shall be deemed to have been approved by the President when approved at a NEDA Board meeting presided over by the President.⁴⁵ In all other cases, the signature of the President shall not be required for the perfection of a BOT contract.⁴⁶
5. The owner of the infrastructure shall have the rights of ownership prior to turnover to the government.

**Metropolitan Manila Development Authority v. Trackworks Rail
Transit Advertising, Vending and Promotions, Inc.**

G.R. No. 179554, 16 December 2009

Metro Rail Transit Corporation, Limited (MRTC) may enter into a contract with Trackworks for the use of certain portions of Metro Rail Transit 3 (MRT 3) for advertising purposes.

MRTC was the owner of MRT 3 at the time material to the case because ownership of the infrastructure has not transferred to the government. MRTC may thus, in the valid exercise of its ownership rights, enter into agreements over the infrastructure, including the lease of advertising space for billboards, signages and other advertising media, subject only to the limitations under applicable law and prior contracts.

⁴³ See definition of "Private Sector Infrastructure or Development Project" in the BOT Law IRR, *supra* note 26 at §1.3(v).

⁴⁴ Tatad v. Garcia (1995).

⁴⁵ BOT Law IRR, *supra* note 26 at § 2.10.

⁴⁶ Metropolitan Manila Development Authority v. Jancom Environmental Corporation, G.R. No. 147465 (30 January 2002).



6. During pre-qualification, the contractor must be duly licensed and accredited by the Philippine Contractors Adjudication Board (“PCAB”) in the case of a Filipino contractor, or by an equivalent accreditation institution in the contractor’s country of origin in the case of a foreign contractor. Once the project proponent is awarded the project, such foreign Contractor must secure a license and accreditation from the PCAB.⁴⁷
7. The project proponent need not be accredited by the PCAB since the project proponent may or may not be the contractor.⁴⁸
8. The project proponent may be a natural person, a juridical person, a joint venture or a consortium.⁴⁹
9. For projects to be implemented under the build-operate-transfer arrangement whose operations require a public utility franchise, the prospective project proponent and the facility operator must be Filipinos or, if corporations, must be duly registered with the Securities and Exchange Commission (“SEC”) and owned at least sixty percent (60%) by Filipinos. For other projects, the prospective Project Proponent shall comply with the nationality and ownership requirements under the Constitution and other applicable laws.⁵⁰
10. For projects to be implemented through arrangements other than a build-operate-transfer arrangement but likewise requiring a public utility franchise, only the facility operator must be a Filipino or, if a corporation, must be duly registered with the SEC and owned at least sixty percent (60%) by Filipinos.⁵¹
11. Franchise refers to a certificate, permit or other form of authorization required to be obtained by a Facility Operator from a Regulator prior to operating a public utility project.⁵²
12. While a franchise is needed to operate the facilities to serve the public, they do not by themselves constitute a public utility. What constitutes a public utility is not their ownership but their use to serve the public.⁵³

⁴⁷ BOT Law IRR, *supra* note 26 at §5.4(a)(v).

⁴⁸ *People v. Sandiganbayan*, G.R. Nos. 162748-50 (28 March 2006).

⁴⁹ See BOT Law IRR, *supra* note 26 at § 5.4(a); See also *Information Technology v. Comelec* (2004).

⁵⁰ BOT Law IRR, *supra* note 26 at § 5.4(a)(i).

⁵¹ *Id.* at § 5.4(a)(ii).

⁵² *Id.* at § 1.3(l).

⁵³ *Tatad v. Garcia* (1995) *citing* *Iloilo Ice & Cold Storage Co. v. Public Service Board*, 44 Phil. 551, 557 558 (1923).



Tatad v. Garcia

G.R. No. 114222, 6 April 1995

The Constitution, in no uncertain terms, requires a franchise for the operation of a public utility. However, it does not require a franchise before one can own the facilities needed to operate a public utility so long as it does not operate them to serve the public. In law, there is a clear distinction between the “operation” of a public utility and the ownership of the facilities and equipment used to serve the public. The right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used to serve the public.

13. The twelve per centum (12%) limit on rate of return applies only to negotiated contracts for public utility projects which are monopolies. The cap will therefore not apply: (i) in cases of publicly-biddered projects; (ii) to those projects subjected to swiss challenge; (iii) to those projects which are not monopolies; (iv) to negotiated contracts of non-monopolies; and (5) to publicly-biddered projects or those subjected to swiss challenge of monopolies. Examples of monopolies are water supply and power transmission. There is no specific restriction for the five exceptions. The limit is in accordance with the Public Service Act.
14. A direct government undertaking is a form of security whereby the government (or any of its agencies or local government units) assumes responsibility for the repayment of a loan directly incurred by the project proponent in case the project proponent defaults on the loan. An off-take arrangement, such as take-or-pay and take-and-pay, while also a form of security, is not the same as a direct government undertaking.
15. In a take-or-pay arrangement, the purchasing party is required to pay for the goods producible at the facility, even if not produced, in return for the supplier’s maintaining the facility’s capacity to produce and deliver the good or service. In a take-and-pay arrangement, the purchasing party is obligated to pay for products actually produced at the facility and delivered (or deliverable), whether or not the goods are taken by the purchaser. These arrangements are common in capital intensive projects, such as bulk water supply and energy production, and are intended to ensure that the purchaser is willing to purchase future goods produced by the supplier who has already invested substantial capital in the project.



Differences among BOT and other Contractual Arrangements

Arrangement	Undertaking	Payment of Fees	Legal Title to Facilities	Others
1. Build-and-transfer	financing and construction of an infrastructure or development facility	paid on an agreed schedule the total investments expended on the project, plus a reasonable rate of return	turned over to the government agency or local government unit concerned after completion	arrangement may be employed in the construction of any infrastructure or development project, including critical facilities which, for security or strategic reasons, must be operated directly by the Government
2. Build-lease-and-transfer	financing and construction of an infrastructure or development facility	lease payments	ownership of the facility is automatically transferred to the government agency or local government unit concerned after the lease period	
3. Build-operate-and-transfer	financing and construction of an infrastructure facility, and its operation maintenance	charge on facility users of tolls, fees, rentals, and charges	during operation period, the facility belongs to the project proponent, who then transfers the facility to the government agency or local government unit concerned at the end of the fixed term	fixed term shall not exceed fifty (50) years



Arrangement	Undertaking	Payment of Fees	Legal Title to Facilities	Others
4. Build-own-and-operate	<p>financing, construction, ownership, operation and maintenance of an infrastructure or development facility</p> <p>the proponent may assign the operation and maintenance of the facility to a facility operator</p>	collection of tolls, fees, rentals or other charges from facility users	ownership is retained by the project proponent	the projects, upon recommendation of the Investment Coordination Committee (ICC) of the National Economic and Development Authority (NEDA), shall be approved by the President of the Philippines
5. Build-transfer-and-operate	construction, including financing, of an infrastructure facility, and its operation maintenance	as provide under the BTO agreement	<p>once the facility is commissioned satisfactorily, title is transferred to the government agency or local government unit concerned, with the project proponent assuming cost overrun, delay and specified performance risks</p> <p>the private entity, however, operates the facility on behalf of the implementing agency/LGU under an agreement</p>	
6. Contract-add-and-operate	addition to an existing infrastructure facility which it is renting from the government	as provide under the CAO agreement	There may or may not be a transfer arrangement in regard to the facility, but the project proponent operates the expanded project over an agreed franchise period	



Arrangement	Undertaking	Payment of Fees	Legal Title to Facilities	Others
7. Develop-operate-and-transfer	development of adjoining property is integrated into the agreement for new infrastructure project which is to be built by a private project proponent	enjoyment of benefits that the investment creates such as higher property or rent values.		
8. Rehabilitate-operate-and-transfer	refurbishing, operation and maintenance of an existing facility; or the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country	as provide under the ROT agreement	legal title to the facility is turned over to the government at the end of the franchise period	
9. Rehabilitate-own-and-operate	refurbishing, operation and maintenance of an existing facility		as long as the operator is not in violation of its Franchise, it can continue to operate the facility in perpetuity; no time limitation imposed on ownership	
10. Supply-and-operate (a type of BOT project)	supply of equipment and machinery for a given infrastructure facility and its operation, providing in the process technology transfer and training to Filipino nationals	charge on facility users of tolls, fees, rentals, and charges	during operation period, the facility belongs to the project proponent, who then transfers the facility to the government agency or local government unit concerned at the end of the fixed term	fixed term shall not exceed fifty (50) years
11. Others				requires approval of the President



SEC. 3. Section 3 of the same Act is hereby amended to read as follows:

“SEC. 3. Private Initiative in Infrastructure. - All government infrastructure agencies, including government-owned and controlled corporations (GOCC) and local government units (LGUs) are hereby authorized to enter into contract with any duly pre-qualified project proponent for the financing, construction, operation and maintenance of any financially viable infrastructure or development facility through any of the projects authorized in this Act. Said agencies, when entering into such contracts, are enjoined to solicit the expertise of individuals, groups, or corporations in the private sector who have extensive experience in undertaking infrastructure or development projects.”

RULE 2 - GENERAL PROVISIONS

Sec. 2.1 – Authorized Contracting Government Agencies/Units. The following are authorized to enter into Contractual Arrangements under this Act and these Revised IRR:

- a. All concerned departments, bureaus, offices, commissions, authorities, or agencies of the national government, including GOCCs, GFIs, SUCs, and LGUs authorized by law or by their respective charters to undertake Infrastructure or Development projects.*

Sec. 2.2 – Eligible Types of Projects. The Construction, rehabilitation, improvement, betterment, expansion, modernization, operation, financing and maintenance of the following types of projects which are normally financed and operated by the public sector which will now be wholly or partly financed, constructed and operated by the private sector, including other infrastructure and development projects as may be authorized by the appropriate agencies, may be proposed under the provisions of the Act and these Revised IRR, provided however that such projects have a cost recovery component which covers at least 50% of the Project Cost, or as determined by the Approving Body:

- a. Highways, including expressway, roads, bridges, interchanges, tunnels, and related facilities;*
- b. Railways or rail-based projects packaged with commercial development opportunities;*
- c. Non-rail based mass transit facilities, navigable inland waterways and related facilities;*
- d. Port infrastructures like piers, wharves, quays, storage, handling, ferry services and related facilities;*
- e. Airports, air navigation, and related facilities;*
- f. Power generation, transmission, sub-transmission, distribution, and related facilities;*
- g. Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities;*



- h. Information technology (IT) and data base infrastructure, including modernization of IT, geo-spatial resource mapping and cadastral survey for resource accounting and planning;*
- i. Irrigation and related facilities;*
- j. Water supply, sewerage, drainage, and related facilities;*
- k. Education and health infrastructure;*
- l. Land reclamation, dredging and other related development facilities;*
- m. Industrial and tourism estates or townships, including related infrastructure facilities and utilities;*
- n. Government buildings, housing projects;*
- o. Markets, slaughterhouses, and related facilities;*
- p. Warehouses and post-harvest facilities;*
- q. Public fish ports and fishponds, including storage and processing facilities; and*
- r. Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others.*

Notes:

1. The following may enter into contracts under the BOT Law:

- a. departments, bureaus, offices, commissions, authorities, or agencies of the national government;
- b. government-owned and -controlled corporations;
- c. government financial institutions;
- d. state universities and colleges; and
- e. local government units,

authorized by law or by their respective charters to undertake infrastructure or development projects.⁵⁴

⁵⁴ BOT Law IRR, *supra* note 26 at §2.1(a).



2. The implementation of the following projects may be proposed under the BOT Law:

- a. Highways, including expressway, roads, bridges, interchanges, tunnels, and related facilities;
- b. Railways or rail-based projects packaged with commercial development opportunities;
- c. Non-rail based mass transit facilities, navigable inland waterways and related facilities;
- d. Port infrastructures like piers, wharves, quays, storage, handling, ferry services and related facilities;
- e. Airports, air navigation, and related facilities;
- f. Power generation, transmission, sub-transmission, distribution, and related facilities;
- g. Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities;
- h. Information technology and data base infrastructure, including modernization of IT, geo-spatial resource mapping and cadastral survey for resource accounting and planning;
- i. Irrigation and related facilities;
- j. Water supply, sewerage, drainage, and related facilities;
- k. Education and health infrastructure;
- l. Land reclamation, dredging and other related development facilities;
- m. Industrial and tourism estates or townships, including related infrastructure facilities and utilities;
- n. Government buildings, housing projects;
- o. Markets, slaughterhouses, and related facilities;
- p. Warehouses and post-harvest facilities;
- q. Public fish ports and fishponds, including storage and processing facilities; and
- r. Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others.⁵⁵

3. The government should, as much as possible, fund consultancy services for government infrastructure projects from local funds and using local resources and expertise. Consultancy services shall only be proposed for foreign assistance when foreign funding is indispensable or local funds are insufficient. Where Filipino capability is determined by appropriate authorities to be insufficient, Filipino consultants may hire or associate themselves with foreign consultants, provided that the Filipino shall be the lead consultant. Where foreign funding is indispensable, foreign consultants for the project must enter into joint venture with Filipino consultants.⁵⁶

⁵⁵ *Id.* at § 2.2.

⁵⁶ Executive Order 278 (2004).



SEC. 4. Section 4 of the same act is hereby amended to read as follows:

“SEC. 4. *Priority Projects.* - All concerned government agencies, including government-owned and-controlled corporations and local government units, shall include in their development programs those priority projects that may be financed, constructed, operated and maintained by the private sector under the provisions of this Act. It shall be the duty of all concerned government agencies to give wide publicity to all projects eligible for financing under this Act, including publication in national and, where applicable, international newspapers of general circulation once every six (6) months and official notification of project proponents registered with them.

The list of all such national projects must be part of the development programs of the agencies concerned. The list of projects costing up to Three hundred million pesos (P300,000,000) shall be submitted to ICC of NEDA for its approval and to the NEDA Board for projects costing more than Three hundred million pesos (P300,000,000). The list of projects submitted to ICC of the NEDA Board shall be acted upon within thirty (30) working days.

The list of local projects to be implemented by the local government units concerned shall be submitted, for confirmation, to the municipal development council for projects costing up to Twenty million pesos; those costing above Twenty up to Fifty million pesos, to the provincial development council; those costing up to Fifty million, to the city development council; above Fifty million up to Two hundred million pesos, to the regional development councils; and those above Two hundred million pesos, to ICC of NEDA.”⁵⁷

57 *Amending BOT Act: Conference Committee Report on Senate Bill No. 1586/ House Bill No. 10943, Record of the Senate, Volume IV, No. 72 (19 April 1994).*

Senator Revilla: xxx

One of the key House inclusions agreed to by the Senate was a multiple approval process of BOT programs. Since BOT projects are very complicated in legal and financial agreements, the House, under the leadership of Public Works Committee Chairman Victor Ortega, proposed a multi-tiered process for the approval of BOT programs:

For the list of projects above P300 million, NEDA Board approval is required.

For the list of national projects up to P300 million, the approval of the Investment Coordination Committee or ICC of NEDA is required.

For the list of local projects between P200 million and P300 million, ICC approval is required.

For the list of local projects between P50 million and P200 million, approval of the respective Regional Development Councils is required.

For the list of local projects between P20 million and P50 million, approval of the respective Provincial Development Councils is required.

And for the list of city projects up to P50 million, approval of the respective City Development Councils is required.

Mr. President, this is a welcome addition, since it will encourage local government units to plan out their BOT programs, through the creation and submission of BOT lists, instead of simply identifying BOT projects on an ad hoc basis.



Bicameral Conference Committee on Public Works (21 March 1994).

REP. PAYUMO. Xxx. In the Senate version, they include even local government units to go through the ICC. Whereas in the House version we separated the national and the local projects, and we subjected the local projects to confirmation by the Local Development Councils which in this same section we can build in the proposal of the Chairman for the graduated approval authorities.

In which case, Mr. Chairman, after the end of Section 4, per the House version, we then include the approval authorities or approval system as follows: national National projects....

REP. DIAZ. Meron ba dito o wala na? More than 300 meron ba?

THE CHAIRMAN (REP. ORTEGA). Up to P300 million, ICC-NEDA.

REP. PAYUMO. (continuing)...for national projects, P300 million, up to P300 million. Approval shall be by ICC-NEDA. Projects of more than P300 million, then approval shall be by the NEDA Board. Now, on local projects of P200 million....

THE CHAIRMAN (REP. ORTEGA). 900.

REP. DIAZ. 900 lang siguro.

REP. PAYUMO. Okay, excuse us. Local projects, P100 million, approval will be by ICC-NEDA...

REP. DIAZ. Above P100 million.

REP. PAYUMO. Above P100 million is ICC-NEDA; P50 up to P100 million by the Regional Development Council; REP. DIAZ. Local projects yun.

REP. PAYUMO. Yes, local projects of P50 to 100 million, RDC. P20 million to P50 million by the PDC.

THE CHAIRMAN (REP. ORTEGA). Provincial Development Council.

REP. PAYUMO. And projects not to exceed P20 million by the Municipal Development Council or City Development Council.

THE CHAIRMAN (REP. ORTEGA). Offhand, I would like to suggest that the city should be elevated to the category of the province instead of being categorized at municipality. So, 20 to 50. So, 20 to 50, Provincial Development Council or City Development Council.

REP. ROXAS. For example, Davao City with a budget of P1 billion, what's a P50 million project?

THE CHAIRMAN (REP. ORTEGA). Depende rin sa size, eh. Kasi kung more than P100 million yung project, kung more than P100 million dadaan na sa ICC. Kaya nga kung ita-tap natin yung city naman dito masyadong discrepancy. Teka, one more thing, 'no. Would thirty days be reasonable?

SEN. MACAPAGAL. We were told that it would be because part of the problem of the present BOT scheme is the red tape and the action by the RDC, the approval takes forever. Sabi ng RDC kaya nila.

CONG. ORTEGA. Kung i-45 days natin?

THE CHAIRMAN (Sen. Revilla) Darami ang red tape natin. CONG. ORTEGA. Parang a two-week grace period Lang sa kanila. Kasi kung minsan din, depende rin iyan kung gusto case to case basis, kung minsan bumibilis masyado iyong kuwan doon, baka naman masyadong naapura sila doon. Etc), before 30 days, baka kapus iyong trenta calendar days. I-kuwarenta y cinco natin, bale 30 working days iyon. Will you add those days? What would you prefer? We retain 30 days, working, or we put "45 calendar days"? May we insert WORKING, 30 working days.

SEN. MACAPAGAL. A matter of style. There is no sentence there, o, for national projects.

CONG. PAYUMO. Then, we can add there another Provided However, Mr. Chairman at the end. ANY PROJECT SUBMITTED TO THE ICC TO WHICH ARE NOT APPROVED OR DISAPPROVED WITHIN THIRTY WORKING DAYS SHALL BE CONSIDERED APPROVED.

SEN. MACAPAGAL. That was objected to by Sen. Tanada. That was the original formulation. He did not want that automatic approval.



CONG. PAYUMO. So, supposing they did not act?

SEN. MACAPAGAL. Then they violated the law. Then you can sue them. The proponent agency can sue them, mandamus. They just work to have no action.

CONG. ORTEGA. Para kung nababasa na baka iyong iba, kung hindi nila napag-aralan, hindi na Lang nila a-aksyunan. Sa akin with the present provision now....

CONG. ROXAS. So aalisin na rin iyong automatic approval?

SEN. MACAPAGAL. Oo, ayaw ni Bobby iyon eh. Iyong approval, dapat may sentence, approval letters.

(Informal and simultaneous discussion ensued)

SEN. MACAPAGAL. I think we have to make a distinction between the priority programs and the individual projects because what is being required to be submitted is the program, the infrastructure program, not the specific projects. Because if you start putting all these projects here, then all of these -- it is not the intention that the specific project will go to the NEDA for approval. It is only the general program. In fact, it is only the priorities.

(Informal and simultaneous discussion ensued)

CONG. ORTEGA. Iyan iyong programa. Ang concern niya ngayon deals with ceilings of specific projects to ---the authority to approve. Ito escalated na. Kung twenty million lang, sa Municipal Development Council lang, sa local. Iba ito. This does not refer to general program.

(Informal and simultaneous discussion ensued)

SEN. MACAPAGAL. May I ask whether those ceilings are what are in EO 380?

MR. ENCARNACION. I doubt it because we just improvised this tonight.

SEN. MACAPAGAL. Because, if what you wanted is to remove EO 380, then why don't we reiterate EO 380?

CONG. ORTEGA. Ano ba ang EO 380, ito ba?

SEN. MACAPAGAL. Oo. Because it is very very complicated of all whole approval process now makes the law more complicated.

(Informal and simultaneous discussion ensued)

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REP. PAYUMO. It shall be the duty government agencies to give wide publicity to all projects in general population under this act including publication in national etcetera.

THE CHAIRMAN (REP. ORTEGA). 'Yon na. The list of all national projects and must be submitted to the Investment Coordination Committee of the National Economic Development Authority for confirmation, if not approval, for projects costing up to three hundred million.

SEN. MACAPAGAL. Problem, problem. Take a look at the local government unit; it has two projects in its priority. One, is fifty million and another is fifty billion. You have to submit two separate approving authorities because remember that first paragraph is a list of projects and it's a program. It's an infrastructure program. That's why I was saying from the beginning, let's have a list between priority infrastructure program and the specific B-O-T project.

REP. DIAZ. The intent of decentralizing approval here is to give life to the local autonomy which is normal in any organization given certain limits but it does not state the amount. Bahala na yung taong yun. But siguro ang puwede duon notification. Ang nakalagay naman yung notification naman pa rin, eh. Di ba the ICC will still be notified?

THE CHAIRMAN (REP. ORTEGA). Yes.

REP. DIAZ. Instead of re-approval process. So, there were steps to cut off para hindi lahat. Otherwise, you will have a massive backlog with the ICC. That's the problem.



Sec. 2.3 – List of Priority Projects. Concerned Agencies/LGUs are tasked to prepare their infrastructure or development programs and to identify specific priority projects that may be financed, constructed, operated and maintained by the private sector through the Contractual Arrangements or schemes authorized under these Revised IRR and to submit for the approval by the Approving Body, as specified in Section 2.7. Priority projects shall include but not be limited to those identified in the Medium-Term Philippine Development Programs (MTPDP), Medium-Term Public Investment Programs (MTPIP), Regional Development Programs (RDPs), Regional Development Investment Programs (RDIPs) as well as specific LGU development plans.

Sec. 2.4 – Publication and Notice. All Agencies/LGUs shall provide wide publicity of the List of Priority Projects proposed for implementation under the Contractual Arrangements or schemes as authorized under the Act and these Revised IRR to keep interested/concerned parties informed thereof. For this purpose, all Agencies/LGUs shall cause their respective List of Priority Projects to be published at least once every six (6) months in a national newspaper of general circulation, and where applicable, international newspapers of general circulation. Said List should also be posted continuously in the website of the concerned Agency/LGU, if available.

Sec. 2.5 – Registration of Project Proponents. Project Proponents may register with the Agency/LGU, indicating which projects are of interest to them, and for this purpose, submit their company profiles in the form prescribed in the ICC Guidelines. Duly registered Project Proponents shall be officially notified and furnished by the Agency/LGU a copy of the list of their respective priority projects and corresponding project updates at least once every six (6) months.

SEN. MACAPAGAL-ARROYO. Matter of start I think ICC was already... the first time it has mentioned there was already a parenthesis ICC. So, we do not have to spell out the whole Investment Coordinating Committee here.

REP. DIAZ. Parang NEDA.

THE CHAIRMAN (REP. ORTEGA). ICC na lang lahat yung kuwan, subsequent referrals to ICC.

SEN. MACAPAGAL-ARROYO. Ah, yes, that is the first time it appears.

THE CHAIRMAN (REP. ORTEGA). Hindi sa umpisa, spell it out subsequently.

SEN. MACAPAGAL-ARROYO. This is the first nga, eh.

SEN. ALVAREZ. Let me ask you, specific program ba yung medium term na yan or programs lang? That's only one terminology and there are many programs. Next government baka mamaya hindi medium term ang tawag diyan, eh, just programs.

THE CHAIRMAN (REP. ORTEGA). Puwede na yang medium term. Accepted.

SEN. MACAPAGAL-ARROYO. Besides, there's a bracket there to signify a deletion but there's no opening bracket.

THE CHAIRMAN (REP. ORTEGA). Consistency with national development goals, okay ba yun? O national development programs? Yung second paragraph.

SEN. MACAPAGAL-ARROYO. Can we start from the top? "All concerned agency shall include in their infrastructure programs". Those priority projects that may be financed...."

THE CHAIRMAN (REP. ORTEGA). I-delete mo na nga yung infrastructure na una.



Sec. 2.6 – Allowable Modes of Implementation. Projects may be implemented through public bidding or direct negotiation. The direct negotiation mode is subject to conditions specified in Rules 9 and 10 hereof.

Sec. 2.7 – Approval of Priority Projects. The approval of projects proposed under this Act shall be in accordance with the following:

- a. National Projects - The projects must be part of the Agency's development programs, and shall be approved as follows:*
 - i. projects costing up to PhP 300 million, shall be submitted to ICC for approval;*
 - ii. projects costing more than PhP 300 million, shall be submitted to the NEDA Board for approval upon the recommendation of ICC; and*
 - iii. regardless of amount, negotiated projects shall be submitted to the NEDA Board for approval upon recommendation by the ICC.*
- b. Local Projects - Local projects to be implemented by the LGUs shall be submitted by the concerned LGU for confirmation, as follows:*
 - i. to the municipal development council for projects costing up to PhP 20 million;*
 - ii. to the provincial development council for those costing above PhP 20 million up to PhP 50 million;*
 - iii. to the city development council for those costing up to PhP 50 million;*
 - iv. to the regional development council or, in the case of Metro Manila projects, the Regional Development Council for Metropolitan Manila, for those costing above PhP 50 million up to PhP 200 million; and*
 - v. to the ICC for those costing above PhP 200 million.*

Final approval of projects classified under b.i to b.iv of this section is vested on the Local Sanggunians per provision of the Local Government Code.

Sec. 2.8 – Detailed Guidelines for the Approval of Projects/Contracts. The Approving Body shall, from time to time, prescribe or revise detailed guidelines on the process and procedures for the approval of projects and contracts as well as the requirements to be submitted in support thereof, provided that the same are consistent with the Act and these Revised IRR.



Sec. 2.9 – Policy on Deviations from Approved Contract. The Agency/LGU shall not proceed with the award and signing of the contract with the Project Proponent if there are material deviations from the parameters and terms and conditions set forth in the draft contract as approved by the Approving Body. The Head of the Agency/LGU shall be responsible for compliance with this policy and violation of this Section 2.9 shall render the award and/or the signed contract invalid.

Sec. 2.10 – Presidential Approval, When Required. Projects undertaken through the BOO scheme or through Contractual Arrangements or schemes other than those defined under Section 1.3 (f) of these Revised IRR shall require Presidential approval. For this purpose, the Head of Agency/LGU shall submit the proposed project to the NEDA Board through the ICC, which shall evaluate the proposal and forward its recommendations to the President. However, such projects shall be deemed to have been approved by the President when approved at a NEDA Board meeting presided over by the President.

Sec. 2.11 – Deadline for Approval of Solicited Projects/Contracts. The Approving Body shall act on the project and the contract within thirty (30) calendar days upon satisfactory compliance by the concerned Agency/LGU with the requirements of the Approving Body. Failure of the Approving Body to act on the project and contract within the specified period shall be deemed an approval thereof and the concerned Agency/LGU may proceed with the solicitation of proposals. Such approval, however, shall be valid only for a period of eighteen (18) months from the issuance of the approval unless the invitation to pre-qualify and to bid has been issued; provided, that the Approving Body shall issue a written notice of approval or disapproval upon the written request for extension by the Agency/LGU, which must be filed within eighteen (18) months from the issuance of such approval.



Notes:

1. Development program refers to national, regional or local government plans or programs included in, but not limited to, the Medium-Term Philippine Development Plan (MTPDP), the Regional Development Plans and Local Development Plans.⁵⁸
2. Priority projects shall include, but not be limited to, those identified in:
 - a. Medium-Term Philippine Development Programs (MTPDP);
 - b. Medium-Term Public Investment Programs (MTPIP);
 - c. Regional Development Programs (RDPs);
 - d. Regional Development Investment Programs (RDIPs);
 - e. specific development plans of local government units.⁵⁹
3. Each agency and local government unit shall publish their respective list of priority projects at least once every six months in a national newspaper of general circulation and, where applicable, international newspapers of general circulation. The list should also be posted in the website of the concerned agency or local government unit, if applicable.⁶⁰
4. Project Proponents registered with the agencies and local government units shall be officially notified and furnished by the agency or local government units a copy of the list of their respective priority projects and corresponding project updates at least once every six (6) months.⁶¹

58 BOT Law IRR, *supra* note 26 at §1.3(i).

59 *Id.* at §2.3.

60 *Id.* at §2.4.

61 *Id.* at §2.4.



5. Approval of projects shall be required as follows:

Type of Project	Amount	Approving Authority
National Projects	up to PhP 300 million (not negotiated)	Investment Coordinating Committee
	more than PhP 300 million (not negotiated)	NEDA Board, upon the recommendation of ICC
	negotiated projects, regardless of amount	NEDA Board, upon the recommendation of ICC
Local projects	up to PhP 20 million	municipal development council
	above PhP 20 million up to PhP 50 million	provincial development council
	up to PhP 50 million	city development council
	above PhP 50 million up to PhP 200 million	regional development council/ Regional Development Council for Metropolitan Manila
	above PhP 200 million	Investment Coordinating Committee

Section 5. A new section is hereby added after Section 4 of the same Act and numbered as Section 4-A, to read as follows:

“Sec. 4-A. *Unsolicited proposals.* - Unsolicited proposals for projects may be accepted by any government agency or local government unit on a negotiated basis: Provided, That, all the following conditions are met: [1] such projects involve a new concept or technology and/or are not part of the list of priority projects, [2] no direct government guarantee, subsidy or equity is required, and [3] the government agency or local government nit has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days: Provided, further, That in the event another proponent submits a lower price proposal, the original proponent shall have the right to match that price within thirty (30) working days.”



Rule 10

UNSOLICITED PROPOSALS

Section 10.1 - Requisites for Unsolicited Proposals

Any Agency/LGU may accept Unsolicited Proposals on a negotiated basis provided that all the following conditions are met:

- a. the project involves a new concept or technology and/or is not part of the List of Priority Projects;*
- b. no Direct Government Guarantee, subsidy or equity is required; and*
- c. the Agency/LGU concerned has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days.*

If no comparative or competitive proposal or no complying bid is received by the Agency/LGU, the original proponent shall immediately be awarded the contract. In the event that a comparative proponent submits a price proposal better than that submitted by the original proponent, the latter shall have the right to match such price proposal within thirty (30) working days from receipt of a notification from the Agency/LGU of the result of the comparative or competitive bid. Should the original proponent fail to match the price proposal of the comparative proponent within the specified period, the contract shall be awarded to the comparative proponent. On the other hand, if the original proponent matches the price proposal of the comparative proponent within the specified period, the project shall immediately be awarded to the original proponent.



Notes:

1. There are no unsolicited proposals under RA 6957. It is not provided for. The general intention of RA 7718 is to make the BOT Law (RA 6957) easier and more attractive to investors.⁶² The lawmakers intended to expand the coverage and liberalize the procedure.⁶³ The inclusion of Unsolicited Proposals is a major amendment from RA 6957.
2. New concept or technology and/or is not part of the List of Priority Projects - A project may be included in the List of Priority Projects as long as it contains a new concept or technology.⁶⁴

62 Senator Ramon Revilla, Jr., Sponsorship Speech for S.B. No. 1586/ H.B. No. 10943, *Conference Committee Report on S.B. No. 1586/ H.B. No. 10943*, Record of the Senate, Second Regular Session Volume IV, Nos. 53-73, p. 820 (21 February 1994 to 20 April 1994).

"The new BOT Law was proposed in order to broaden the scope of the current BOT Law and introduce features that would attract greater private sector participation in infrastructure undertakings."

63 *Interpellation, Conference Committee Report on S.B. No. 1586/H.B. No. 10943*, Record of the Senate, Second Regular Session, Volume IV, Nos. 53-73, p. 827 (21 February 1994 to 20 April 1994).

SENATOR GONZALES: My understanding of the passage of this bill is not only to expand the coverage of the old BOT bill but also to liberalize its procedure; to encourage immediate participation of the private sectors which are turned off by the bureaucratic red tape and the procedural difficulties to be hurdled. That is why, we try to simplify the same as much as possible. But the net result is that, there may never be any subject of unsolicited proposal, as these requirements are now written, Mr. President.

SENATOR MACAPAGAL: Well, Mr. President, if I may. If we talk about liberalization, there are many important provisions in this bill that have liberalized the BOT.

First, the definition of BOT has been liberalized; second, the approval process has been liberalized; and third, we are now providing for a wider scope for negotiated contracts than under the present dispensation.

Those are just some of the measures for liberalization.

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SENATOR GONZALES: Mr. President, just for the record. Aside from that requirement, this Section also requires as an added circumstance -- the second -- that no direct government guarantee, subsidy or equity is required. And finally, the government agency or local government unit has invited, by publication, for three consecutive weeks in a newspaper of general circulation, comparative or competitive proposals, and no other proposal is received for a period of 60 working days.

What I am trying to say is that, probably, these are too stringent requirements for the so-called unsolicited proposals. If on the other hand we just argue --- well these are those which can be covered by negotiated contract -- and as a general rule all awards should be done by means of a competitive public bidding, then I think that could be remedied by the requirement here: "That in the event another proponent submits a lower price proposal, the original proponent shall have the right to match that price within thirty (30) working days" or probably with an additional 5 percent. But what this Representation is trying to say is that we could have made it easier for the construction of projects through BOT schemes and other similar derivative schemes, Mr. President.

SENATOR MACAPAGAL: Mr. President, this Representation certainly agrees with the Gentleman that if we could have made this more liberal we would have. If one recalls, this is the way to save the concept of negotiated contracts, in the first place, because of the very contentious debate and the very passionate objections to the concept of a negotiated contract under the BOT scheme that were expressed on the Floor.

SENATOR GONZALES: This Representation would just want to avoid a repetition of our very sad experience. The distinguished Lady Senator, in her own sponsorship speech, has admitted that two years after the passage and effectivity of the original BOT Law, hardly had anyone taken advantage of its provision, Mr. President.

64 *Bicameral Conference* (21 – 22 March 1994).

THE CHAIRMAN (SEN. REVILLA). How about new technology?



3. List of Priority Projects - The List of Priority Projects refers to a new (prospective) list.⁶⁵
 4. With regard to government guarantee, liability attaches to the contracting government agency, and is not answered for by the National Government.⁶⁶
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REP. DIAZ. Oh no, puwede yon. That is the intention. Instead of concept, it should really be called technology or method.

THE CHAIRMAN (REP. ORTEGA). Wala pang nakaisip. Meron nakaisip na, bagong paraan.

REP. PAYUMO. New idea or technology.

REP. DIAZ. Ang point naman nila, because this refers to projects that are not in the list. Supposing there is no plan to put up an express way here, and you say I would like to do it. So it's a new proposal. So, style na yan, papaano natin paghahaluhaluin dito.

THE CHAIRMAN (SEN. REVILLA). Ilagay natin new method for technology.

SEN. MACAPAGAL. And for instance, to build the north expressway, you need to have a new method of technology?

REP. DIAZ. That's why if it's not on the list...

SEN. MACAPAGAL. No, only if it's on the list.

REP. DIAZ. No, there are two things we are trying to say. If you are not on the list, you will be an object of an unsolicited proposal, because it's not on the list, hindi pa naiisip ng gobyerno, naisip mo.

SEN. MACAPAGAL. Yes, okay.

REP. DIAZ. That's one type that we want to cover.

THE CHAIRMAN (SEN. REVILLA). Or you are in the list but you are coming up with a new technology or new method.

65 *Id.*

SENATOR GONZALES: May I be favored with some clarification on the provisions of a new section to be known as Section 4-A, after Section 4 of Republic Act No. 6957, regarding unsolicited proposals.

In this particular new paragraph, unsolicited proposals for projects may be accepted by any government agency or local government unit on a negotiated basis for as long as there are three concurring conditions. The first condition is that such projects involve new concept or technology and are not part of the list of priority projects.

I would assume, Mr. President, that the list of priority projects is the long list that had been prepared and even approved by Congress when the original BOT law was passed.

SENATOR MACAPAGAL: Mr. President, actually this is a new paragraph because it is a rewording of a provision that was really closer to the Senate version.

If I may go back to the Senate version that we approved, that is Section 5 which gave to the old law a Section 4-A, which reads: "Unsolicited proposals for projects which involve a new concept which are not included in the list of the Government's priority projects may be accepted, et cetera."

Mr. President, if the Gentleman recalls from the debates that we had on the Floor, which were very extensive with regard to unsolicited proposals, what we have said is that we must not tie up the initiatives, especially of local government units, to a list that they, in their perhaps more limited experience than the private sector, have drawn up; and it may very well be that a proponent will come later on with a novel concept that will improve the well-being of the people in the community. Therefore, that particular kind of project is what is envisioned in the unsolicited proposals.

SENATOR GONZALES: My question, Mr. President, is whether or not the list of priority projects were already prepared after Congress had enacted the original BOT law, or is it a list still to be prepared?

SENATOR MACAPAGAL: Mr. President, if we will tie this up in the context of the other provisions in the present bill that we are now seeking ratification for, we are talking about a new list because this bill provides for a new list to be drawn up.

66 *Interpellation, Conference Committee Report on S.B. No. 1586/H.B. No. 10943, supra note 63 at p. 829 (21 February 1994 to 20 April 1994).*



5. Direct Government Guarantees cannot be inserted in an unsolicited proposal: “It is further provided that the presence of direct government guarantee, subsidy or equity will “necessarily, disqualify a proposal from being treated and accepted as an unsolicited proposal.” The BOT Law clearly and strictly prohibits direct government guarantee, subsidy and equity in unsolicited proposals that the mere inclusion of a provision to that effect is fatal and is sufficient to deny the proposal. It stands to reason therefore that if a proposal can be denied by reason of the existence of direct government guarantee, then its inclusion in the contract executed after the said proposal has been accepted is likewise sufficient to invalidate the contract itself. A prohibited provision, the inclusion of which would result in the denial of a proposal cannot, and should not, be allowed to later on be inserted in the contract resulting from the said proposal. The basic rules of justice and fair play alone militate against such an occurrence and must not, therefore, be countenanced particularly in this instance where the government is exposed to the risk of shouldering hundreds of million of dollars in debt.”⁶⁷

THE PRESIDENT: Before the distinguished Gentleman leaves that point, if I may -- because that is a very important point that the Minority Leader raised regarding compensation by Government -- the qualified agencies under this law would be the Government or its agencies, the government-owned and controlled corporations, and, finally, local government units.

When we say here the the Government shall compensate, we are referring to the contracting entity itself, not the Government itself. If it is a local government, then it is the local government. If it is a government-owned or controlled corporation like NPC, then it should be NPC that should be liable for that compensation.

SENATOR MACAPAGAL: Yes, Mr. President. That interpretation is bolstered by other provisions in this bill against direct government guarantees.

THE PRESIDENT: I think that is a very critical interpretation. If we say that it is the Government that will compensate, in effect, the Government is guaranteeing all these contracts, regardless of the fact that they may have been entered into by a local government unit or a government-owned or-controlled corporation.

Senator Tañada: That is correct, Mr. President. That is why I wanted to clarify that point. It would appear under the present wording that, eventually, the obligations, even through contracted for by a local government unit or by a government-owned or controlled corporation, would be answered for by the National Government which is not -- I am glad to hear -- the case.

THE PRESIDENT: It is not the intendment.

SENATOR MACAPAGAL: It is not the case, Mr. President, because the law otherwise provides that there will be no direct government guarantees.

67 Demosthenes P. Agan, Jr., et al. v. Philippine International Air Terminals Co., Inc., et al., G.R. No. 155001 (5 May 2003).



6. The right to match by the Original Proponent must be based on the same specifications.⁶⁸ The right to match is an encouragement to project proponents.⁶⁹
7. "An essential element of a publicly-bid contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, but more importantly, on the contract bidden upon. Each bidder must be able to bid on the same thing. The rationale is obvious. If the winning bidder is allowed to later include or modify certain provisions in the contract awarded such that the contract is altered in any material respect, then the essence of fair competition in the public bidding is destroyed. A public bidding would indeed be a farce if after the contract is awarded, the winning bidder may modify the contract and include provisions which are favorable to it that were not previously made available to the other bidders."⁷⁰

68 *Interpellation, Conference Committee Report on S.B. No. 1586/ H.B. No. 10943, supra* note 63 at p. 830 (21 February 1994 to 20 April 1994).

THE PRESIDING OFFICER [SENATOR AQUINO]: On the Unsolicited Proposals on page 11, lines 16 and 17, "THAT IN THE EVENT ANOTHER PROPONENT SUBMITS A LOWER PRICE PROPOSAL", does the Lady Senator actually mean here lower, or should it not be the more advantageous proposal?

The price can be higher and this will be good for the Government. If it is an infrastructure, maybe it will be built with stronger materials. In effect, it will be a higher-priced item. So, this will actually mean the better proposal -- whether it is lower or higher. Am I correct in this assessment?

SENATOR MACAPAGAL: I do not know how our Colleagues in the Chamber would want to interpret this particular provision, which was proposed by Senator Gonzales. My understanding is, it is to be interpreted at face value -- on its face, which is the lower price proposal.

THE PRESIDING OFFICER [SENATOR AQUINO]: Yes, precisely. If, let us say, we need a certain bridge and it is going to be made out of concrete materials, it might cost so much. But if it will be made out of wood, it will be a lower price proposal. The Government will naturally prefer a concrete bridge, so that it should be the proposal that is more advantageous to the Government and not necessarily the lower-priced one.

SENATOR MACAPAGAL: Mr. President, the proposal is supposed to be based on general specifications. If we talk about a more advantageous bid as opposed to a lower price proposal, then we are adding another burden that must be hurdled by the proponent of an unsolicited proposal.

If we recall, earlier, Senator Gonzales stood up and said that this provision is very stringent. If we allow another bidder to give another type of proposal with different specifications or different materials, then it would be harder for the unsolicited proponent who already spent on the feasibility study to match that.

So, by specifying -- I believe the price based on general specifications -- then we are being more fair and just to the proponent of the unsolicited proposal.

THE PRESIDING OFFICER [SENATOR AQUINO]: I accept that. In other words, it will be the same specifications.

SENATOR MACAPAGAL: Yes, Mr. President. It will be the same specifications.

69 *Id.*

SENATOR GONZALES: Mr. President, during the consideration of this proposal, I tried to soften it. To me that seems to be a very stringent requirement. To encourage private proponents, this Representation said that the project proponent has the right to submit a matching bid. Probably, we can even adopt what has been used in PHILSECO that the project proponent has the right to issue a matching bid plus 5 percent of the best bid after a public bidding.

THE PRESIDENT: This is better than the PHILSECO formula. The original proponent needs only too much.

SENATOR GONZALES: This is more liberal and fair. At the same time it encourages also the project proponent. One does his own studies. He spends for it. He develops a concept and he employs engineers, designers for that purpose. He has already an initial investment in the project, Mr. President.

70 *Agan v. PIATCO* (2003).



SECTION 10.2 - NEW TECHNOLOGY

The Project Proponent proposing a project involving a new concept or technology shall incorporate in its proposal information regarding said new concept or technology which it should have directly, or through any of its key members, successfully implemented at a scale similar to the proposed project. The information disclosed must be in sufficient detail so as to allow the Agency/LGU to properly evaluate the new concept or technology. Additionally, the new technology must possess at least one of the following attributes:

A recognized process, design, methodology or engineering concept which has demonstrated its ability to significantly reduce implementation of Construction costs, accelerate project execution, improve safety, enhance project performance, extend economic life, reduce costs of facility maintenance and operations, or reduce negative environmental impact or social/economic disturbances or disruptions either during the project implementation/Construction phase or the operation phase;

A process for which the Project Proponent or any member of the proponent joint venture/consortium possesses exclusive rights, either world-wide or regionally; or

A design, methodology or engineering concept for which the proponent or a member of the proponent consortium or association possesses intellectual property rights.

SECTION 10.3 - PROJECTS INELIGIBLE FOR UNSOLICITED PROPOSALS

Projects included in the “List of Priority Projects”, as defined under Section 2.3, shall not be eligible to be accepted as Unsolicited Proposals, unless involving a new concept or technology. In addition, any component of an approved solicited project shall not be eligible for any Unsolicited Proposal.

SECTION 10.4 - INVESTMENT INCENTIVES AND GOVERNMENT UNDERTAKINGS FOR UNSOLICITED PROPOSALS

As a general rule, the Government may grant Investment Incentives and Government Undertakings to Unsolicited Proposals as enumerated under Rule 13, except for Direct Government Guarantees, direct government subsidy or government equity.

The sale, lease, or grant of usufruct, with consideration of government assets, including among others, right-of-way, to Project Proponents shall not be considered as direct subsidy or equity.



Notes:

1. Investment Incentives are those provided by existing laws.⁷¹

SECTION 10.5 - SUBMISSION OF A COMPLETE PROPOSAL

For a proposal to be considered by the Agency/LGU, the proponent has to submit a complete proposal, which shall include a feasibility study, company profile, and the draft contract adverted to in Section 4.4 above. The Agency/LGU shall acknowledge receipt of the proposal and advise the proponent whether the proposal is complete or incomplete within seven (7) calendar days from submission thereof. If incomplete, it shall indicate what information is lacking or necessary.

71 Interpellation, Conference Committee Report on S.B. No. 1586/H.B. No. 10943, *supra* note 63 at p. 830 (21 February 1994 to 20 April 1994).

SENATOR TAÑADA: Now, on the new addition relating to investment incentives, under the new Section 12, it is provided that: "Among other incentives, projects in excess of one billion pesos shall be entitled to incentives as provided by the Omnibus Investments Code upon, registration with the Board of Investments."

My question, Mr. President, is: What had been the basis for fixing the amount at "in excess of one billion pesos"?

SENATOR MACAPAGAL: Mr. President, under the policy thrust of the present Administration, we are supposed to be phasing out incentives. We are not supposed to be passing legislation that provides for additional incentives. In fact, in the Senate version, we did not provide for this because we have been trying to hew closely to that directive that we should not legislate incentives.

However, the House version contained incentives. Since they have pushed for this, as a matter of policy, they said that because the incentive scheme is provided for under the BOI, let them qualify as BOI registered firms rather than legislating the incentives.

Secondly, in order to limit the provision of incentives, therefore, as further compromise with the House version which wanted to have incentives -- in fact, it was the House which agreed after we pointed out the thrust against new exemptions -- that perhaps it would be more prudent and more in keeping with our trying to trim the budgetary deficit that only large projects should be entitled to these incentives.

SENATOR TAÑADA: Mr. President, what would now be these incentives that would be given to these project proponents engaged in projects in excess of P1 billion? Since it states here "among other incentives", they would also be entitled to incentives as provided by the Omnibus Investments Code.

May we just be clarified on what would all these incentives be that will be given to the project proponent?

(At this juncture, the Senate President relinquished the Chair to Senator Agapito A. Aquino.)

SENATOR MACAPAGAL: Mr. President, first, let us begin with incentives as provided by the Omnibus Investments Code. The incentives that are provided by the BOI are mainly the tax and duty-free importation of capital equipment and, in some cases, income tax holidays. But the most commonly enjoyed incentives are the tax and duty-free importation of capital equipment or tax credits for the purchase of domestic capital equipment.

As far as the other incentives are concerned, the debates on the Floor very clearly indicate that these other incentives include the minimal rules and regulations which include the limited government guarantees on force majeure, and the right of way. These are the incentives that are understood by the layman in a more general sense, and they have been enumerated on the Floor debates.

SENATOR TAÑADA: For how long will these incentives be enjoyed by the project proponent?

SENATOR MACAPAGAL: Under the Board of Investments system, Mr. President, as a rule, incentives are enjoyed only for about five years as far as tax and duty-free importation of capital equipment is concerned. In fact, in no case beyond 1994. So, there is a limit to the provision of these incentives.



SECTION 10.6 - TREATMENT OF MORE THAN ONE PROPOSAL FOR THE SAME OR SIMILAR PROJECT

In the case where the Agency/LGU receives more than one Unsolicited Proposal involving the same or similar project, the Agency/LGU may reject all such proposals and instead, bid out the project as a solicited proposal. Otherwise, the Agency/LGU shall evaluate the proposals using a first in time approach. Under this approach, the first complete proposal is evaluated and decided upon. The second complete proposal will only be entertained if the first one is rejected. Otherwise, the second proposal will be considered only if there is a failure in the negotiation of the first proposal or during the “invitation for comparative proposals” as defined under Section 10.11.

SECTION 10.7 - EVALUATION OF UNSOLICITED PROPOSALS

The Agency/LGU is tasked with the initial evaluation of the proposal. The Agency/LGU shall: 1) appraise the merits of the project; 2) qualify the proponent based on the provisions of Rule 5 hereof; 3) assess the appropriateness of the contractual arrangement and reasonableness of the risk allocation; and 4) inform the Approving Body of its receipt of an Unsolicited Proposal. The Agency/LGU is given thirty (30) calendar days to evaluate the proposal from the date of submission of the complete proposal. Within this thirty (30)-day period, the Agency/LGU, shall advise the proponent in writing whether it accepts or rejects the proposal. Acceptance means commitment of the Agency/LGU to pursue the project and recognition of the proponent as “original proponent” subject to Section 10.8. At this point, the Agency/LGU will no longer entertain other similar proposals unless the parties are unable to agree during the period for negotiations specified in Section 10.8 below, or the original proponent is unable to comply with the parameters set by the Approving Body, or until the solicitation of comparative proposals has been completed. The Agency/LGU shall inform the Approving Body of its decision to accept or to reject the Unsolicited Proposal. In case of acceptance, the Agency/LGU shall submit to the Approving Body all pertinent documentation.



Notes:

1. The right of the Original Proponent is not absolute, and depends on compliance with the procedure and conditions explicitly provided by the statutes and their IRR, evaluation of the government agency or local government unit. Special rights or privileges of an original proponent – the right to match the lowest and most advantageous bid, and the right to the award if so matched – comes into play only when there are other proposals submitted during the public bidding.

Asia's Emerging Dragon Consortium v. Department of Transportation and Communication

G.R. No. 169914, 18 April 2008

“The rights or privileges of an original proponent of an unsolicited proposal for an infrastructure project are never meant to be absolute. Otherwise, the original proponent can hold the Government hostage and secure the award of the infrastructure project based solely on the fact that it was the first to submit a proposal. The absurdity of such a situation becomes even more apparent when considering that the proposal is unsolicited by the Government. The rights or privileges of an original proponent depends on compliance with the procedure and conditions explicitly provided by the statutes and their IRR.

“An unsolicited proposal is subject to evaluation, after which, the government agency or local government unit (LGU) concerned may accept or reject the proposal outright.

“Under Section 10.6 of the IRR, the “acceptance” of the unsolicited proposal by the agency/LGU is limited to the “commitment of the [a]gency/LGU to pursue the project and recognition of the proponent as the ‘original proponent.’” Upon acceptance then of the unsolicited proposal, the original proponent is recognized as such but no award is yet made to it. The commitment of the agency/LGU upon acceptance of the unsolicited proposal is to the pursuit of the project, regardless of to whom it shall subsequently award the same. The acceptance of the unsolicited proposal only precludes the agency/LGU from entertaining other similar proposals until the solicitation of comparative proposals.

“Consistent in both the statutes and the IRR is the requirement that invitations be published for comparative or competitive proposals. Therefore, it is mandatory that a public bidding be held before the awarding of the project. The negotiations between the agency/LGU and the original proponent, as provided in Section 10.9 of the IRR, is for the sole purpose of coming up with draft agreements, which shall be used in the Terms of Reference (TOR) for the solicitation of comparative proposals. Even at this point, there is no definite commitment made to the original proponent as to the awarding of the project. In fact, the same IRR provision even gives the concerned agency/LGU, in case of unresolvable differences during the negotiations, the option to reject the original proponent’s proposal and just bid out the project.



“Generally, in the course of processing an unsolicited proposal, the original proponent is treated in much the same way as all other prospective bidders for the proposed infrastructure project. It is required to reformat and resubmit its proposal in accordance with the requirements of the TOR. It must submit a bid bond equal to the amount and in the form required of the challengers. Its qualification shall be evaluated by the concerned agency/LGU, using evaluation criteria in accordance with Rule 5 of the IRR, and which shall be the same criteria to be used in the TOR for the challengers. These requirements ensure that the public bidding under Rule 10 of IRR on Unsolicited Proposals still remain in accord with the three principles in public bidding, which are: the offer to the public, an opportunity for competition, and a basis for exact comparison of bids.

“The special rights or privileges of an original proponent thus come into play only when there are other proposals submitted during the public bidding of the infrastructure project. As can be gleaned from the plain language of the statutes and the IRR, the original proponent has: (1) the right to match the lowest or most advantageous proposal within 30 working days from notice thereof, and (2) in the event that the original proponent is able to match the lowest or most advantageous proposal submitted, then it has the right to be awarded the project. The second right or privilege is contingent upon the actual exercise by the original proponent of the first right or privilege. Before the project could be awarded to the original proponent, he must have been able to match the lowest or most advantageous proposal within the prescribed period. Hence, when the original proponent is able to timely match the lowest or most advantageous proposal, with all things being equal, it shall enjoy preference in the awarding of the infrastructure project.”

SECTION 10.8 - NEGOTIATION WITH THE ORIGINAL PROPONENT

The Agency/ LGU shall indicate in its letter of acceptance, as referred to under Section 10.7, the confirmation of the proponent as the “original proponent” and the mechanics of the negotiation including the commencement date and the authorized representative(s) of the Agency/ LGU. Negotiations shall focus on the project scope, implementation arrangements, and the terms and conditions of the draft contract for the Unsolicited Proposal, among others. The Agency/LGU shall secure confirmation of the indicative Reasonable Rate of Return from the Approving Body prior to negotiation. The Agency/ LGU may request the Approving Body for technical assistance during negotiations. The Agency/ LGU and the original proponent shall conclude negotiations within a period of ninety (90) calendar days from receipt by the proponent of written notice from the Agency/ LGU to commence negotiation. The Agency/ LGU and the original proponent shall negotiate in good faith and endeavor to complete the negotiation within the ninety (90)-day period; provided, that should there be irreconcilable differences during the negotiation period, the Agency/ LGU shall have the option to reject the proposal by advising the original proponent in writing stating the grounds for rejection and



thereafter may accept a new Unsolicited Proposal, or bid out the project as a solicited proposal, or undertake the project on its own. The Agency/ LGU shall, at the end of the ninety (90)-day negotiation period, submit a report to the Approving Body of the result of its negotiation with the original proponent.

SECTION 10.9 - APPROVAL OF UNSOLICITED PROJECTS/CONTRACTS BY THE APPROVING BODY

The Head of Agency/LGU shall secure approval of the unsolicited project and draft contract from the Approving Body after negotiation with the original proponent. An Unsolicited Proposal shall be submitted to the Approving Body only upon official endorsement by the Head of the concerned Agency/LGU stating that the project meets the requisites for accepting Unsolicited Proposals as specified in Section 10.1 (a) and (b) above.

The Agency/LGU shall also submit to the Approving Body its evaluation/appraisal of the merits of the project as justification for accepting the project including providing the same of the acceptance letter to the original proponent as part of the documentation for the project.

Failure of the Approving Body to act on the project and contract within thirty (30) calendar days from receipt of the endorsement by the Agency/ LGU shall be deemed an approval thereof. The Agency/ LGU may proceed with the solicitation of comparative proposals.

The approval by the Approving Body of the unsolicited project and contract under this section shall be valid only for a period of eighteen (18) months from the issuance of the approval unless the invitation for comparative proposals has been issued; provided, that the Approving Body shall issue a written notice of approval or disapproval upon the written request for extension by the Agency/ LGU, which must be filed within eighteen (18) months from the issuance of such approval.

The original proponent shall, within forty-five (45) calendar days from receipt of Notice of Approval from the Approving Body, notify the Agency/ LGU in writing of its acceptance of all the terms and conditions of the approval of the Approving Body. Failure by the original proponent to submit such acceptance in writing shall be deemed a rejection by the Agency/ LGU of the Unsolicited Proposal. The Agency/ LGU shall thereafter notify the original proponent of said rejection.

The “original proponent” status shall expire at the end of the validity period of the approval by the Approving Body of the unsolicited project and contract.



SECTION 10.10 - TENDER DOCUMENTS

The qualification and tender documents shall be prepared along the lines specified under Rules 4 and 5 hereof. The contract as approved by the Approving Body which shall be part of the tender documents will be considered final and non-negotiable by the comparative proponents. Proprietary information shall, however, be respected, protected and treated with utmost confidentiality. As such, it shall not form part of the bidding/tender and related documents.

SECTION 10.11 - INVITATION FOR COMPARATIVE PROPOSALS

The Agency/LGU PBAC shall publish the invitation for comparative proposals after receipt of the notification from the Original Proponent that the latter accepts all the terms and conditions indicated in the Notice of Approval, in accordance with Section 10.9. The invitation for comparative or competitive proposals should be published at least once every week for three (3) consecutive weeks in at least one (1) newspaper of general circulation. Said invitation should also be posted continuously in the website of the Agency/LGU concerned, if available, during the period stated above. For projects costing at least US\$ 10 million, the invitation may also be published at least once (1) in at least one (1) international publication. It shall indicate the time, which should not be earlier than the last date of publication, and place where tender/bidding documents could be obtained. It shall likewise explicitly specify a time of sixty (60) working days reckoned from the date of issuance of the tender/bidding documents upon which proposals shall be received. Beyond said deadline, no proposals shall be accepted. A pre-bid conference shall be conducted ten (10) working days after the issuance of the tender/bidding documents.

SECTION 10.12 - POSTING OF BID BOND BY ORIGINAL PROPONENT

The original proponent shall be required at the date of the first day of the publication of the “invitation for comparative proposals” to submit a bid bond equal to the amount and in the form required of the comparative proponents.

SECTION 10.13 - QUALIFICATION OF COMPARATIVE PROPONENTS

The evaluation criteria used for qualifying the original proponent should be the same criteria used in the “Term of Reference” for the comparative proponents.



SECTION 10.14 - SUBMISSION OF PROPOSAL

The bidders are required to submit the proposal in three envelopes at the time and place specified in the Tender Documents. The first envelope shall contain the qualification documents, the second envelope the technical proposal as required under Section 7.1 (b), and the third envelope the financial proposal as required under Section 7.1 (c).

SECTION 10.15 - EVALUATION OF COMPARATIVE PROPOSALS

Proposals shall be evaluated in three stages: Stage 1, qualification documents; Stage 2, the technical proposal; and Stage 3, the financial proposal. Only those bids which pass the first stage will be considered for the second stage and similarly, only those which pass the second stage will be considered for the third stage evaluation. The Agency/LGU will return to the disqualified bidders the remaining envelopes unopened, together with a letter explaining why they were disqualified. The criteria for evaluation will follow Rule 5 for the qualification of bidders and Rule 8 for the technical and financial proposals. The time frames under Rules 5 and 8 shall likewise be followed.

SECTION 10.16 - DISCLOSURE OF THE PRICE PROPOSAL

The decision to disclose the price or financial proposal of the original proponent in the Tender Documents shall be mutually agreed upon between the Agency/LGU and the original proponent. If the original proponent's price proposal was not disclosed in the Tender Documents, it should be revealed upon the opening of the financial proposals of the comparative proponents.

SECTION 10.17 - FAILURE OF A WINNING COMPARATIVE PROPONENT TO ENTER INTO CONTRACT

In the event of refusal, inability or failure of the winning comparative proponent to enter into contract with the Agency/LGU within the specified time in the Tender Documents, its bid security shall be forfeited in favor of the Agency/LGU. In such an event, the Agency/LGU concerned shall consider for award the bidder with the next- ranked complying comparative bid which is better than the offer of the original proponent. The original proponent shall again be given the right to match the comparative proponent's bid. If no other comparative bid is determined to be better than the offer of the original proponent, the project shall immediately be awarded to the original proponent.



SEC. 6. Section 5 of the same Act is hereby amended to read as follows:

“SEC. 5. Public Bidding of Projects. - Upon approval of the projects mentioned in Section 4 of this Act, the head of the infrastructure agency or local government unit concerned shall forthwith cause to be published, once every week for three (3) consecutive weeks, in at least two (2) newspapers of general circulation and in at least one (1) local newspaper which is circulated in the region, province, city or municipality in which the project is to be constructed, a notice inviting all prospective infrastructure or development project proponents to participate in a competitive public bidding for the projects so approved.

“In the case of a build-operate-and-transfer arrangement, the contract shall be awarded to the bidder who, having satisfied the minimum financial, technical, organizational and legal standards required by this Act, has submitted the lowest bid and most favorable terms for the project, based on the present value of its proposed tolls, fees, rentals and charges over a fixed term for the facility to be constructed, rehabilitated, operated and maintained according to the prescribed minimum design and performance standards, plans and specifications. For this purpose, the winning project proponent shall be automatically granted by the appropriate agency the franchise to operate and maintain the facility, including the collection of tolls, fees, rentals, and charges in accordance with Section 5 hereof.

“In the case of build-and-transfer or build-lease-and-transfer arrangement, the contract shall be awarded to the lowest complying bidder based on the present value of its proposed schedule of amortization payments for the facility to be constructed according to the prescribed minimum design and performance standards, plans, and specifications: Provided, however, That a Filipino contractor who submits an equally advantageous bid with exactly the same price and technical specifications as those of a foreign contractor shall be given preference.

“In all cases, a consortium that participates in a bid must present proof that the members of the consortium have bound themselves jointly and severally to assume responsibility for any project. The withdrawal of any member of the consortium prior to the implementation of the project could be a ground for the cancellation of the contract.

“The public bidding must be conducted under a two-envelope/two-stage system: the first envelope to contain the technical proposal and the second envelope to contain the financial proposal. The procedures for this system shall be outlined in the implementing rules and regulations of this Act.

“A copy of each contract involving a project entered into under this Act shall forthwith be submitted to Congress for its information.”



Notes:

1. The term “**public bidding**” is not defined in the BOT Law (R.A. No. 6957, as amended by R.A. No. 7718) and its IRR. The term ‘competitive bidding,’ a term used interchangeably with “public bidding,” is expressly defined under the Government Procurement Reform Act (Republic Act No. 9184), a latter enactment.
2. The Supreme Court has stated that the definition of a term in a statute is not conclusive as to the meaning of the same term as used elsewhere. This is evident when the legislative definition is expressly made for the purposes of the statute containing such definition.⁷² Notwithstanding the lack of definition, the concept of “public bidding” is well-settled under Philippine jurisprudence.
3. The word “bidding,” in its broad sense, refers to an offer or an invitation to prospective contractors whereby the government manifests its intention to accept proposals for the purchase of supplies, materials and equipment for official business or public use, or for public works or repair. The three principles in public bidding are: the offer to the public; an opportunity for competition; and a basis for exact comparison of bids.⁷³
4. The distinctive character of a public bidding system is destroyed and the purpose of its adoption is thwarted when a regulation thereon excludes any of three principles mentioned above. Public bidding of government contracts and for the disposition of government assets must embody those three principles. Their only difference, if at all, is that in the public bidding for public contracts, the award is generally given to the lowest bidder, while in the disposition of government assets, the award is to the highest bidder.⁷⁴
5. Bidding rules may specify other conditions or require that the bidding process be subjected to certain reservations or qualifications. Since a bid is in the nature of an offer to contract with the Government, the government agency involved may or may not accept it.⁷⁵
6. As the owner of the property subject of the bid, the Government has the power to determine who shall be its recipient, as well as under what terms it may be awarded. In this sense, participation in the bidding process is a privilege inasmuch as it can only be exercised under existing criteria imposed by the Government itself.⁷⁶

72 DFA v. Falcon (2010).

73 JG Summit Holdings, Inc., v. Court of Appeals, et al., G.R. No. 124293 (20 November 2000) (citations omitted).

74 *Id.*

75 National Power Corporation v. Pinatubo Commercial, G.R. No. 176006 (26 March 2010) (citations omitted).

76 *Id.*



7. By its very nature, public bidding aims to protect the public interest by giving the public the best possible advantages through open competition. Thus:

Competition must be legitimate, fair and honest. In the field of government contract law, competition requires, not only 'bidding upon a common standard, a common basis, upon the same thing, the same subject matter, the same undertaking,' but also that it be legitimate, fair and honest; and not designed to injure or defraud the government.⁷⁷

8. It is inherent in public biddings that there shall be a fair competition among the bidders. The specifications in such biddings provide the common ground or basis for the bidders and should, accordingly, operate equally or indiscriminately upon all bidders.⁷⁸ As stated by Chief Justice Stuart of the Supreme Court of Minnesota:

The law is well settled that where, as in this case, municipal authorities can only let a contract for public work to the lowest responsible bidder, the proposals and specifications therefore must be so framed as to permit free and full competition. Nor can they enter into a contract with the best bidder containing substantial provisions beneficial to him, not included or contemplated in the terms and specifications upon which the bids were invited.⁷⁹

9. Public bidding aims to secure for the government the lowest possible price under the most favorable terms and conditions, to curtail favoritism in the award of government contracts and avoid suspicion of anomalies. More importantly, it places all bidders on equal footing. Any government action which permits any substantial variance between the conditions under which the bids are invited and the contract executed after the award thereof is a grave abuse of discretion amounting to lack or excess of jurisdiction which warrants proper judicial action.⁸⁰
10. The essence of public bidding is an opportunity for fair competition, and a fair basis for the precise comparison of bids. This system aims to "level the playing field." This means each bidder must bid under the same conditions; and be subject to the same guidelines, requirements and limitations, so that the best offer or lowest bid may be determined, all other things being equal.⁸¹
11. It is repugnant to the very concept of public bidding to permit a variance between the conditions under which bids are invited and those under which proposals are submitted and approved; or, the conditions under which the bid is won and those under which the awarded contract will be complied with. The substantive amendment of the contract bid out, without any public bidding – *after* the bidding process had been concluded – runs counter to the public policy on public biddings.⁸²

⁷⁷ *Agan v. PIATCO* (2003) (citations omitted).

⁷⁸ *Id. citing* A. Cobacha & D. Lucenario, *Law on Public Bidding and Government Contracts* 13 (1960).

⁷⁹ *Id. quoting* *Diamond v. City of Mankato*, 93 N.W. 912.

⁸⁰ *Id.*

⁸¹ *Information Technology v. Comelec* (2004).

⁸² *Id.*



12. Under a build-operate-transfer project, when the facilities have already been built, their possession transferred to the government, and are already being operated by the latter, nothing much remains of the project. Accordingly, it does not make sense to subject the project to another bidding and awarding process when said project is substantially finished and already operational.⁸³
13. The ultimate goal of a BOT project is for the government to eventually gain possession, ownership, and control of the infrastructure subject thereof from the private sector that undertook its building and financing, after allowing the latter to recoup its investments and reap reasonable profit.⁸⁴
14. The bidding process is already over after the award thereof, even if eventually, the said award was nullified and voided. The nullification of the award did not revive the proposal nor re-open the bidding.⁸⁵
15. In the *Asia's Emerging Dragon Corporation v. DOTC* case,⁸⁶ the NAIA Terminal 3 Project was proposed, subjected to bidding, and awarded as a build-operate-transfer (BOT) project. The original proposal of Asia's Emerging Dragon Corporation (AEDC) is for a BOT project, in which it undertook to *build, operate, and transfer* to the Government the NAIA Terminal 3 facilities. Such undertakings are no longer applicable when the physical structures comprising the NAIA Terminal 3 Project are already substantially built (by another entity), and there is almost nothing left for AEDC to construct. Hence, the project could no longer be awarded to AEDC.
16. There could be no reversion to the original proposal of AEDC and award to it only the unexecuted components of the NAIA Terminal 3 Project because to do so would essentially leave out the undertaking to build or construct the structures. To allow AEDC to proceed would be on terms and conditions that would necessarily be different from its original proposal. An amendment of the proposal of AEDC to address such prevailing circumstances is out of the question since such an amendment would be substantive and tantamount to an entirely new proposal, which must again be subjected to competitive bidding.⁸⁷
17. **A build-operate-transfer (BOT) agreement** is one whole contract, and must not be taken in truncated parts. Under the aforementioned factual background, the Supreme Court went on to discuss that AEDC's offer to reimburse the Government the amount it shall pay to PLATCO for the NAIA Terminal 3 Project facilities, as shall be determined in the expropriation proceedings before the RTC of Pasay City, cannot restore AEDC to its status and rights as the project proponent. It must be stressed that the law requires the project proponent to undertake the construction of the project, including financing; financing, thus, is but a component of the construction of the structures and not the entirety thereof.⁸⁸

⁸³ See *Asia's Emerging Dragon Corporation v. Department of Transportation and Communications*, G.R. No. 169914 (7 April 2009).

⁸⁴ *Id.*

⁸⁵ See *Asia's Emerging Dragon Corporation v. Department of Transportation and Communications*, G.R. No. 169914 (18 April 2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*



18. A BOT agreement is not a mere financing arrangement. Given the special nature of a BOT agreement, Article 1503 of the Civil Code is inapplicable as it refers only to ordinary contracts of sale.⁸⁹ Article 1503 provides:

Art. 1503. When there is a contract of sale of specific goods, the seller may, by the terms of the contract, reserve the right of possession or ownership in the goods until certain conditions have been fulfilled. The right of possession or ownership may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.
19. Under BOT agreements, the private corporations/ investors are the owners of the facility or machinery concerned (*Ibid.*).
20. A BOT arrangement is *sui generis* and is different from the usual financing arrangements. Under this concept, it is the project proponent who constructs the project at its own cost and subsequently operates and manages it. The proponent secures the return on its investments from those using the project's facilities through appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated. At the end of the fixed term agreed upon, the project proponent transfers the ownership of the facility to the government agency.

**National Power Corporation v. Central Board of Assessment
Appeals et al.**

G.R. No. 171470, 30 January 2009

The underlying concept behind a BOT agreement is defined and described in the BOT law x x x

Under this concept, it is the project proponent who constructs the project at its own cost and subsequently operates and manages it. The proponent secures the return on its investments from those using the project's facilities through appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated. At the end of the fixed term agreed upon, the project proponent transfers the ownership of the facility to the government agency. Thus, the government is able to put up projects and provide immediate services without the burden of the heavy expenditures that a project start up requires.

xxx xxx xxx

As envisioned in the BOT law, the parties' agreement assumes that within the agreed BOT period, BPPC – the investor–private corporation – shall recover its investment and earn profits through the agreed compensation scheme; thereafter, it shall transfer the whole project, including machineries and equipment, to NAPOCOR without

⁸⁹ National Power Corporation v. Province of Quezon and Municipality of Pagbilao, G.R. No. 171586 (25 January 2010).



additional cost or compensation. The latter, for its part, derives benefit from the project through the fulfillment of its mandate of delivering electricity to consumers at the soonest possible time, without immediately shouldering the huge financial requirements that the project would entail if it were to undertake the project on its own. Its obligation, in exchange, is to shoulder specific operating costs under a compensation scheme that includes the purchase of all the electricity that BPPC generates.

That some kind of “financing” arrangement is contemplated – in the sense that the private sector proponent shall initially shoulder the heavy cost of constructing the project’s buildings and structures and of purchasing the needed machineries and equipment – is undeniable. The arrangement, however, goes beyond the simple provision of funds, since the private sector proponent not only constructs and buys the necessary assets to put up the project, but operates and manages it as well during an agreed period that would allow it to recover its basic costs and earn profits. In other words, the private sector proponent goes into business for itself, assuming risks and incurring costs for its account. If it receives support from the government at all during the agreed period, these are pre-agreed items of assistance geared to ensure that the BOT agreement’s objectives – both for the project proponent and for the government – are achieved. In this sense, a BOT arrangement is *sui generis* and is different from the usual financing arrangements where funds are advanced to a borrower who uses the funds to establish a project that it owns, subject only to a collateral security arrangement to guard against the nonpayment of the loan. It is different, too, from an arrangement where a government agency borrows funds to put a project from a private sector-lender who is thereafter commissioned to run the project for the government agency. In the latter case, the government agency is the owner of the project from the beginning, and the lender-operator is merely its agent in running the project.

If the BOT Agreement under consideration departs at all from the concept of a BOT project as defined by law, it is only in the way BPPC’s cost recovery is achieved; instead of selling to facility users or to the general public at large, the generated electricity is purchased by NAPOCOR which then resells it to power distribution companies. This deviation, however, is dictated, more than anything else, by the structure and usages of the power industry and does not change the BOT nature of the transaction between the parties.

21. The BOT scheme is expressly defined as one where the contractor undertakes the construction and financing in infrastructure facility, and operates and maintains the same. The contractor operates the facility for a fixed period during which it may recover its expenses and investment in the project plus a reasonable rate of return thereon. After the expiration of the agreed term, the contractor transfers the ownership and operation of the project to the government.⁹⁰

⁹⁰ Tatad v. Garcia (1995).



22. In the **build-transfer (BT)** scheme, the contractor undertakes the construction and financing of the facility, but after completion, the ownership and operation thereof are turned over to the government. The government, in turn, shall pay the contractor its total investment on the project in addition to a reasonable rate of return. If payment is to be effected through amortization payments by the government infrastructure agency or local government unit concerned, this shall be made in accordance with a scheme proposed in the bid and incorporated in the contract.⁹¹
23. Emphasis must be made that under the BOT scheme, the owner of the infrastructure facility must comply with the citizenship requirement of the Constitution on the operation of a public utility. No such a requirement is imposed in the BT scheme.⁹²
24. There is no mention in the BOT Law that the BOT and BT schemes bar any other arrangement for the payment by the government of the project cost. The law must not be read in such a way as to rule out or unduly restrict any variation within the context of the two schemes. Indeed, no statute can be enacted to anticipate and provide all the fine points and details for the multifarious and complex situations that may be encountered in enforcing the law.⁹³
25. The concept of **consortium** is generally understood as a community of interest that characterizes a joint venture. A consortium as a proponent for a BOT project shall be evaluated on the individual or collective experience of its members and their contractors.

**Information Technology Foundation of the Philippines, et al. v.
Commission on Elections, et al.**

G.R. No. 159139, 13 January 2004

Additionally, argues the Comelec, the Implementing Rules and Regulations of RA 6957 (the Build-Operate-Transfer Law) as amended by RA 7718 would be applicable, as proponents of BOT projects usually form joint ventures or consortiums. Under the IRR, a joint venture/ consortium proponent shall be evaluated based on the individual or the collective experience of the member-firms of the joint venture/ consortium and of the contractors the proponent has engaged for the project.

Unfortunately, this argument seems to assume that the “collective” nature of the undertaking of the members of MPC, their contribution of assets and sharing of risks, and the “community” of their interest in the performance of the Contract entitle MPC to be treated as a joint venture or consortium; and to be evaluated accordingly on the basis of the members’ collective qualifications when, in fact, the evidence before the Court suggest otherwise.

91 *Id.*

92 *Id.*

93 Tatad v. Garcia (1995) *citing* Director of Forestry v. Munoz, 23 SCRA 1183 (1968); People v. Exconde, 101 Phil. 1125 (1957); United States v. Tupasi Molina, 29 Phil. 119 (1914).



This Court in *Kilosbayan v. Guingona* defined joint venture as “an association of persons or companies jointly undertaking some commercial enterprise; generally, all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and [a] duty, which may be altered by agreement to share both in profit and losses.”

Going back to the instant case, it should be recalled that the automation Contract with Comelec was not executed by the “consortium” MPC -- or by MPEI for and on behalf of MPC -- but by MPEI, period. The said Contract contains no mention whatsoever of any consortium or members thereof. This fact alone seems to contradict all the suppositions about a joint undertaking that would normally apply to a joint venture or consortium: that it is a commercial enterprise involving a community of interest, a sharing of risks, profits and losses, and so on.⁹⁴

26. The members of the consortium should bind themselves jointly and severally to assume responsibility for any project. In this connection, the exact nature and scope of parties’ respective undertakings should be clearly delineated in order for the Government to enforce the joint and several liabilities of the members of the consortium.

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x x x Absent any clear-cut statement as to the exact nature and scope of the parties’ respective undertakings, commitments, deliverables and covenants, one party or another can easily dodge its obligation and deny or contest its liability under the Agreement; or claim that it is the other party that should have delivered but failed to.

Likewise, in the absence of definite indicators as to the amount of investments to be contributed by each party, disbursements for expenses, the parties’ respective shares in the profits and the like, it seems to the Court that this situation could readily give rise to all kinds of misunderstandings and disagreements over money matters.

Under such a scenario, it will be extremely difficult for Comelec to enforce the supposed joint and several liabilities of the members of the “consortium.” The Court is not even mentioning the possibility of a situation arising from a failure of WeSolv and MPEI to agree on the scope, the terms and the conditions for the supply of the products and services under the Agreement. In that situation, by virtue of paragraph 6 of its MOA, WeSolv would perforce cease to be bound by its obligations -- including its joint and solidary liability with MPEI under the MOA -- and could forthwith disengage from the project. Effectively, WeSolv could at any time unilaterally exit from its MOA with MPEI by simply failing to agree. Where would that outcome leave MPEI and Comelec?

⁹⁴ *Id.*



To the Court, this strange and beguiling arrangement of MPEI with the other companies does not qualify them to be treated as a consortium or joint venture, at least of the type that government agencies like the Comelec should be dealing with. With more reason is it unable to agree to the proposal to evaluate the members of MPC on a collective basis.⁹⁵

27. When the project proponent is a consortium, there should be proof of the joint and several obligation of the members of the consortium to assume responsibility for the project.

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In any event, the MPC members claim to be a joint venture/consortium; and respondents have consistently been arguing that the IRR for RA 6957, as amended, should be applied to the instant case in order to allow a collective evaluation of consortium members. Surprisingly, considering these facts, respondents have not deemed it necessary for MPC members to comply with Section 5.4 (a) (iii) of the IRR for RA 6957 as amended.

According to the aforementioned provision, if the project proponent is a joint venture or consortium, the members or participants thereof are required to submit a sworn statement that, if awarded the contract, they shall bind themselves to be jointly, severally and solidarily liable for the project proponent's obligations thereunder. This provision was supposed to mirror Section 5 of RA 6957, as amended, which states: "In all cases, a consortium that participates in a bid must present proof that the members of the consortium have bound themselves jointly and severally to assume responsibility for any project. The withdrawal of any member of the consortium prior to the implementation of the project could be a ground for the cancellation of the contract." The Court has certainly not seen any joint and several undertaking by the MPC members that even approximates the tenor of that which is described above. We fail to see why respondents should invoke the IRR if it is for their benefit, but refuse to comply with it otherwise.⁹⁶

28. A solidary or joint and several obligation is one in which each debtor is liable for the entire obligation, and each creditor is entitled to demand the whole obligation. This is in contrast to a joint obligation where each obligor answers only for a part of the whole liability and to each obligee belongs only a part of the correlative rights.⁹⁷

95 *Id.*

96 *Id.*

97 Industrial Management International Development Corp. v. National Labor Relations Commission, G.R. No. 101723 (11 May 2000).



29. Well-entrenched is the rule that a solidary obligation cannot lightly be inferred. There is a solidary liability only when the obligation expressly so states, when the law so provides or when the nature of the obligation so requires.⁹⁸ In the case of the BOT Law, the law ordains for the joint and several obligation of the members of the consortium to assume responsibility for the project.

RULE 3 - THE BOT PRE-QUALIFICATION, BIDS, AND AWARDS COMMITTEE

SECTION 3.1 - COMPOSITION

The Head of the Agency/LGU shall create a BOT Pre-qualification, Bids and Awards Committee (PBAC) composed of the following:

- a. At least a third ranking regular official of the Agency/LGU - Chairman*
- b. A legal officer - Member-Secretary*
- c. One (1) technical officer knowledgeable with the technical aspects or requirements of the project, duly designated by the Head of Agency/LGU concerned on a project-to-project basis - Member (provisional)*
- d. One (1) technical officer knowledgeable with aspects or requirements of the project from a concerned regulatory body, when applicable, to be invited by the Agency/LGU concerned on a project-to-project basis. - Member (provisional and non-voting)*
- e. An officer knowledgeable in finance - Member*
- f. An officer knowledgeable in management/operation of the project - Member*
- g. Two (2) representatives from the private sector: one from duly recognized Contractors associations; and the other from either the facility users, or duly recognized accounting associations. - Observers (non-voting)*
- h. A representative from the Commission on Audit - Observer (non-voting)*
- i. One (1) representative from the BOT Center for national projects, in accordance with Section 2.7 (a) - Observer (non-voting)*
- j. One (1) representative from the local DILG office, for LGU projects - Observer (non-voting)*

Observers will be notified at least two (2) calendar days before the following stages: pre-bid conference, opening of bids, evaluation of bids, contract award, and special meetings of the PBAC. The absence of observers will not nullify the PBAC proceedings, provided that they have been duly invited in writing.



SECTION 3.2 - RESPONSIBILITY OF THE PBAC

The PBAC herein created shall be responsible for all aspects of the pre-bidding and bidding process in the case of solicited proposals, and for the comparative bidding process (otherwise known as the “Swiss Challenge”), in the case of Unsolicited Proposals, including, among others, the preparation of the bidding/tender documents, publication of the invitation to pre-qualify and bid, pre-qualification of prospective bidders, conduct of pre-bid conferences and issuance of supplemental notices, interpretation of the rules regarding the bidding, the conduct of bidding, evaluation of bids, resolution of disputes between bidders, and recommendation for the acceptance of the bid and/or for the award of the project.

SECTION 3.3 - QUORUM

A quorum of the PBAC shall be composed of a simple majority of all voting members of the Committee. The Chairman shall vote only in case of a tie.

Notes:

1. The purpose of **pre-qualification** in any public bidding is to determine, at the earliest opportunity, the ability of the bidder to undertake the project.⁹⁹
2. The discretion to accept or reject bids and award contracts is of such wide latitude that courts will not interfere, unless it is apparent that such discretion is exercised arbitrarily, or used as a shield to a fraudulent award. The exercise of that discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the concerned government agencies, not by the courts. Courts will not interfere with executive or legislative discretion exercised within those boundaries. Otherwise, they stray into the realm of policy decision-making.¹⁰⁰
3. As such, prospective bidders, cannot claim any demandable right to take part in it if they fail to meet the criteria. Thus, it has been stated that under the traditional form of property ownership, recipients of privileges from the government cannot be said to have property rights because they possess no traditionally recognized proprietary interest therein.¹⁰¹
4. The **BOT Center** was reorganized under Executive Order No. 8 dated 09 September 2010 issued by President Benigno Aquino III. It was renamed as the Public Private Partnership Center of the Philippines, and transferred from the Department of Trade and Industry to the National Economic and Development Authority.

⁹⁹ Agan v. PIATCO (2003).

¹⁰⁰ NPC v. Pinatubo (2010) (citations omitted).

¹⁰¹ *Id.*



RULE 4 - BID/TENDER DOCUMENTS

SECTION 4.1 - BID/TENDER DOCUMENTS

The Agency/LGU concerned shall prepare the bid/tender documents, which shall include the following:

- a. “Instructions to Bidders”;*
- b. “Minimum Design, Performance Standards/Specifications, and Economic Parameters” such as discount rate, inflation factor and foreign exchange rate, where applicable, among others;*
- c. “Draft Contract” (as approved in accordance with Section 2.8) reflecting the contractual arrangement under which the project shall be undertaken, and the respective undertakings of the contracting parties, among others;*
- d. “Bid Form” reflecting the required information to properly evaluate the bid proposal;*
- e. forms of bid and performance securities;*
- f. current applicable rules and regulations of the BSP; and*
- g. other documents as may be deemed necessary by the Agency/LGU concerned.*

SECTION 4.2 - INSTRUCTIONS TO BIDDERS

The instructions to bidders, which establish the rules of the bidding, shall be clear, comprehensive and fair to all bidders and shall, as far as necessary and practicable, include the following information:

- a. General description and objectives of the project, including a statement that the project shall be proposed under Republic Act No. 6957, as amended by Republic Act No. 7718 and these Revised IRR;*
- b. Contractual arrangement under which the project shall be undertaken;*
- c. Bid submission procedures and requirements, which shall include information on the manner of bid submission, the number of copies of bid proposal to be submitted, where the bids are to be submitted, the deadline for the submission of bids, permissible mode of transmission of bid proposals, etc.;*
- d. Investment Incentives and Government Undertakings under Rule 13;*
- e. Bid security and bid security validity period;*
- f. Milestones;*
- g. Method and criteria for the evaluation of the technical component of the bids;*
- h. Parameters and criteria for evaluation of financial component of the bids;*

Any one or more of the following criteria may be used in the evaluation of the financial component of the bid for determining the most advantageous bid for the Government:

- i. Lowest proposed toll, fee, rental or charge at the start of project operation, if a pre-agreed parametric tariff adjustment formula is prescribed in the bid document;*



- ii. *Lowest present value of proposed tolls, fees, rentals and other charges for the period covered by the contract;*
- iii. *Lowest present value of government subsidy to be provided for the period covered by the contract;*
- iv. *Highest present value of proposed payments to Government, such as: concession fees, lease/rental payments, fixed/guaranteed payments, and/or variable payments/percentage shares of revenue for the period covered by the contract; or*
- v. *Any other appropriate financial bid parameter as may be approved by the Approving Body.*
- vi. *Minimum amount of equity as prescribed by the Approving Body.*
- vii. *Formula and appropriate indices to be used in the adjustments of tolls/fees/rentals/charges, when applicable. Said formula shall take into account the reasonableness of the same to users of the project/facility under bidding;*
- viii. *Requirements of concerned regulatory bodies, such as, but not limited to: the Department of Environment and Natural Resources (DENR), for the issuance of an Environmental Compliance Certificate (ECC); National Water Resources Board (NWRB), for the issuance of the Water Permit; the PCAB, for the registration requirements of Contractors; and, the Toll Regulatory Board (TRB), for the review of toll rates and adjustment formula for Negotiated Contracts.*
- ix. *Current rules and regulations of the BSP; m. Revenue sharing arrangements, if any; n. Expected commissioning date; and o. Nationality and ownership requirements as, required by law.*

SECTION 4.3 - MINIMUM DESIGNS, PERFORMANCE STANDARDS/ SPECIFICATIONS AND ECONOMIC PARAMETERS

Minimum design and performance standards/ specifications, including appropriate environmental standards as prescribed by the DENR, shall be clearly defined and shall refer more to the desired quantity and quality of the outputs of the facility and should state that non-conformity with any of these minimum requirements shall render the bids as non-responsive. Likewise, for the purpose of evaluating bids, the following economic parameters, among others, shall be prescribed:

- a. *Discount rate, foreign exchange rate and inflation factor as prescribed by the Approving Body.*
- b. *Maximum period of project Construction.*
- c. *Fixed term for project operation and collection of the proposed tolls/fees/rentals/charges, if applicable.*
- d. *Formula and price indices to be used in the adjustments of tolls/fees/rentals/charges, if applicable.*
- e. *Minimum period of repayment, if applicable. f. Revenue Share of the Implementing Agency/LGU, if applicable. g. Minimum amount of equity as prescribed by the Approving Body; and h. Current rules and regulations of the BSP.*



SECTION 4.4 - DRAFT CONTRACT

The draft contract should clearly define the basic and legal relationship between the parties and their rights and responsibilities including the specific Government Undertakings to be provided by the Agency/LGU relative to the project. The draft contract shall be the draft approved by the Approving Body and shall have the following mandatory terms or conditions:

- a. specific contractual arrangement, term, and scope of work;*
- b. project technical specifications and system features;*
- c. implementation milestones including those for securing other approvals, project completion date;*
- d. cost recovery scheme via proposed tolls, fees, rentals and charges, as the case may be;*
- e. liquidated damages as contemplated under Section 12.14;*
- f. performance and warranty bonds contemplated under Sections 12.8 and 12.9;*
- g. minimum insurance coverage as follows: Contractors' all risk, motor vehicle, workmen's compensation, and third party liability for the project including comprehensive general liability insurance;*
- h. acceptance tests and procedures;*
- i. warranty period and procedures (after transfer);*
- j. grounds for and effects of contract termination including modes for settling disputes;*
- k. the manner and procedures for the resolution of warranty against corruption, and*
- l. compliance with all other applicable laws, rules, and regulations.*

Notes:

1. In *Demosthenes P. Agan, Jr., et al. v. Philippine International Air Terminals Co., Inc., et al.*,¹⁰² the Supreme Court discussed that in public bidding, bids are submitted in accord with the prescribed terms, conditions and parameters laid down by Government and pursuant to the requirements of the project bidden upon. Bidders formulate competing proposals which are evaluated to determine the bid most favorable to the government. Once the contract based on the bid most favorable to the government is awarded, all that is left to be done by the parties is to execute the necessary agreements and implement them.
2. There can be no substantial or material change to the parameters of the project, including the essential terms and conditions of the contract bidden upon, after the contract award. If there were changes and the contracts end up unfavorable to government, the public bidding becomes a mockery and the modified contracts must be struck down.¹⁰³

¹⁰² G.R. No. 155001 (21 January 2004).

¹⁰³ *Id.*



3. An essential element of a publicly bidden contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, but more importantly, on the contract bidden upon. Each bidder must be able to bid on the same thing.¹⁰⁴
4. The rationale is obvious. If the winning bidder is allowed to later include or modify certain provisions in the contract awarded such that the contract is altered in any material respect, then the essence of fair competition in the public bidding is destroyed. A public bidding would indeed be a farce if after the contract is awarded, the winning bidder may modify the contract and include provisions which are favorable to it that were not previously made available to the other bidders.¹⁰⁵
5. While a winning bidder is not precluded from modifying or amending certain provisions of the contract bidden upon, such amendments must not be substantial or material enough to alter the basic parameters of the contract and essentially constitute a denial to the other bidders of the opportunity to bid on the same terms.¹⁰⁶
6. ABOT agreement is one whole contract. Accordingly, the determination of whether or not a modification or amendment of a contract bidden out is material rests on whether the contract, taken in its entirety, would contain substantially different terms and conditions that would have the effect of altering the technical and/ or financial proposals previously submitted by other bidders.¹⁰⁷
7. An amendment to a contract awarded through public bidding, when such subsequent amendment was made without a new public bidding, is null and void.

Caltex (Philippines), Inc. v. Delgado Brothers, Inc.,

G.R. No. L-5439, 29 December 1954

The Court agrees with the contention of counsel for the plaintiffs that the due execution of a contract after public bidding is a limitation upon the right of the contracting parties to alter or amend it without another public bidding, for otherwise what would a public bidding be good for if after the execution of a contract after public bidding, the contracting parties may alter or amend the contract, or even cancel it, at their will? Public biddings are held for the protection of the public, and to give the public the best possible advantages by means of open competition between the bidders. He who bids or offers the best terms is awarded the contract subject of the bid, and it is obvious that such protection and best possible advantages to the public will disappear if the parties to a contract executed after public bidding may alter or amend it without another previous public bidding.

104 Agan v. PIATCO (2003).

105 *Id.*

106 *Id.*

107 *Id.*



8. Considering the rationale and purpose of the BOT Law, it is not extraordinary or unusual for the project proponent or the winning bidder to obtain financing for the project. Expectedly, compliance by the project proponent of its undertakings therein would involve a substantial amount of investment. It is therefore inevitable for the awardee of the contract to seek alternate sources of funds to support the project. Be that as it may, the amendments to the contract bidden upon should always conform to the general policy on public bidding if such procedure is to be faithful to its real nature and purpose.¹⁰⁸
9. In the case of *Agan v. PIATCO, supra*, the Supreme Court categorically ruled that the draft Concession Agreement attached to the Bid Documents and offered for public bidding, differ in at least two material respects with the amended Concession Agreement: (1) the types of fees or charges that are subject to MIAA regulation or control and the extent thereof; and (2) the assumption by the Government, under certain conditions, of the liabilities of PIATCO. Said amendments directly translate to concrete financial advantages to PIATCO that were previously not available during the bidding process.
10. The foregoing substantial amendments made the amended Concession Agreement an entirely different agreement from the contract bidden out. Consequently, the Supreme Court declared the same null and void for being contrary to public policy.

RULE 5 - QUALIFICATION OF BIDDERS SECTION

SECTION 5.1 - WHO MAY PARTICIPATE

Any individual, partnership, corporation or firm, whether local or foreign, including joint venture or consortia of local, foreign or local and foreign firms, subject to the limits herein set, may participate or apply for pre- or simultaneous qualification for projects covered under the provisions of the Act and these Revised IRR.

SECTION 5.2 - PUBLICATION OF INVITATION TO PRE-QUALIFY AND BID

The Head of the Agency/LGU concerned shall, after obtaining approval for the project and the contract, forthwith cause to be published, once every week for three (3) consecutive weeks, in at least two (2) newspapers of general circulation and in at least one (1) local newspaper of general circulation in the region, province, city or municipality in which the projects are to be implemented, a notice inviting all prospective infrastructure or development Project Proponents to pre-qualify and bid for the projects so approved. Said invitation should also be posted continuously in the website of the Agency/LGU concerned, if available, during the period stated above. For projects costing at least US\$ 10 million, the invitation may also be published in at least one (1) international publication. Likewise, the Agency/LGU concerned shall issue official notification of the same to Project Proponents registered with them.

The published Invitation to Pre-qualify and Bid shall contain information, among others, whether the Contractor to be employed to undertake the Construction works needs to be pre-identified for pre-qualification purposes or not.

108 *Id.*



SECTION 5.3 - PERIOD TO PREPARE PRE-QUALIFICATION DOCUMENTS

The Agency/LGU concerned shall allow prospective bidders at least thirty (30) calendar days from the last date of publication of the Invitation to Pre-qualify and Bid to prepare their respective pre-qualification documents. For projects costing at least PhP 300 million, the period of preparation shall at least be forty-five (45) calendar days from the last date of publication of the Invitation to Pre-qualify and Bid. In any event, the deadline for submission of pre-qualification statements shall be indicated in the published Invitation to Pre-qualify and Bid.

SECTION 5.4 - PRE-QUALIFICATION REQUIREMENTS

To pre-qualify, a prospective Project Proponent must comply with the following requirements:

a. Legal Requirements

- i. For projects to be implemented under the BOT scheme whose operations require a public utility Franchise, the prospective Project Proponent and the Facility Operator must be Filipinos or, if corporations, must be duly registered with the Securities and Exchange Commission (SEC) and owned up to at least sixty percent (60%) by Filipinos. For projects other than these, the prospective Project Proponent shall comply with the nationality and ownership requirements under the Constitution and other applicable laws*
- ii. For projects to be implemented through a scheme other than the BOT and requiring a public utility Franchise, the Facility Operator must be a Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission (SEC) and owned up to at least sixty percent (60%) by Filipinos.*

Consistent with existing laws, the Project Proponent may be the operator but it may be allowed to enter into a management contract with another entity, who may be 100% foreign owned, for the day to day operation of the facility, provided that the Project Proponent will assume all attendant liabilities of the operator.

- iii. In case the prospective Project Proponent is a joint venture or consortium, the members or participants thereof shall already be disclosed during the pre-qualification stage and shall undergo pre-qualification. Further, the members or participants thereof shall execute an undertaking in favor of the Agency/LGU that if awarded the contract, they shall bind themselves to be jointly and severally liable for the obligations of the Project Proponent under the contract.*

However, if members of the joint venture or consortium organize themselves as a corporation registered under Philippine laws, such corporation shall execute such an undertaking binding itself to be liable for the obligations of the Project Proponent under the contract, which shall substitute or be in lieu of the undertaking submitted by the members or participants of the joint venture or consortium.



- iv. *For projects to be operated by the Project Proponent itself or owned by the Project Proponent but operated through a Facility Operator where operation of the facility does not require a public utility Franchise, the Project Proponent or the Facility Operator may be Filipino or foreign-owned.*
 - v. *For purposes of pre-qualification, the Contractor proposed to be engaged by the Project Proponent to undertake the Construction of the project must be duly licensed and accredited by the PCAB, in the case of a Filipino Contractor, or by an equivalent accreditation institution in the Contractor's country of origin, in the case of a foreign Contractor. Once the Project Proponent is awarded the project, such foreign Contractor must secure a license and accreditation from the PCAB.*
- b. *Experience or Track Record - The prospective Project Proponent must possess adequate experience in terms of the following:*
- i. *Firm Experience - By itself or through the member-firms in case of a joint venture/consortium or through a Contractor(s) which the prospective Project Proponent may have engaged for the project, the prospective Project Proponent and/or its Contractor(s) must have successfully undertaken a project(s) similar or related to the subject infrastructure/development project to be bid. The individual firms and/or their Contractor(s) may individually specialize on any or several phases of the project(s). A joint venture/consortium proponent shall be evaluated based on the individual or collective experience of the member-firms of the joint venture/consortium and of the Contractor(s) that it has engaged for the project.*

For purposes of the above, joint ventures/consortia shall submit as part of their pre-qualification statement a business plan which shall, among others, identify their members and their Contractor(s), if the experience of their Contractor(s) are necessary for the determination of the capacity of the joint venture/consortium to undertake the project and the description of the respective roles said members and Contractors, if necessary, shall play or undertake in the project. If undecided on a specific Contractor, the prospective Project Proponent may submit a short list of Contractors from among which it will select the final Contractor. Short listed Contractors are required to submit a statement indicating willingness to participate in the project and capacity to undertake the requirements of the project. The business plan shall disclose which of the members of the joint venture/consortium shall be the lead member the financing arm, and/or Facility Operator(s), and the Contractor(s) if required to be pre-identified as prescribed in the published Invitation to Pre-qualify and Bid or if the qualifications/experience of their Contractor(s) are necessary for the determination of the capacity of the joint venture/consortium to undertake the project.

- ii. *Key Personnel Experience - The key personnel of the prospective Project Proponent and/or its Contractor(s) must have sufficient experience in the relevant aspect of schemes similar or related to the subject project, as specified by the Agency/LGU.*



- c. *Financial Capability* - *The prospective Project Proponent must have adequate capability to sustain the financing requirements for the detailed engineering design, Construction and/or operation and maintenance phases of the project, as the case may be.*

The Agency/LGU concerned shall determine on a project-to-project basis, and before pre-qualification, the minimum amount of equity needed. In addition, the Agency/LGU will inform the proponents of the minimum debt-equity ratio required by the BSP for projects to be financed by foreign loans.

For purposes of pre-qualification, this capability shall be measured in terms of proof of the ability of the prospective Project Proponent and/or the consortium to provide:

i. Equity

- (a) a minimum amount of equity to the project measured in terms of the net worth of the company, or in the case of joint ventures or consortia, the combined net worth of members, or*
- (b) a set-aside deposit equivalent to the minimum equity required*

ii. Debt

A letter testimonial from a domestic universal/commercial bank or an international bank with a subsidiary/branch in the Philippines or any international bank recognized by the BSP attesting that the prospective Project Proponent and/or members of the consortium are banking with them, and that they are in good financial standing and/or are qualified to obtain credit accommodations from such banks to finance the project.

The Agency/LGU, through its PBAC, shall complete the evaluation of the pre-qualification documents of the prospective Project Proponents within thirty (30) calendar days.

SECTION 5.5 - PRE-QUALIFIED AND DISQUALIFIED PROPONENTS

The Agency/LGU, through its PBAC, shall, within a period of thirty (30) calendar days after the deadline set for the submission of the pre-qualification documents, determine which among prospective proponents are “pre-qualified” or “disqualified”. Accordingly, the PBAC shall duly inform the prospective Project Proponents who have been pre-qualified within seven (7) calendar days after approval thereof. Disqualified proponents shall likewise be informed stating therein the grounds for their disqualification within the same period. Those disqualified may appeal the disqualification within fifteen (15) working days from receipt of the notice of disqualification to the Head of Agency in the case of national projects, or the Head of the DILG unit concerned or his authorized representative, in the case of local projects.

The bidding process will be suspended while the appeal is being evaluated. The Head of Agency or Head of the DILG unit concerned or his authorized representative, as the case may be, shall act on the appeal within forty-five (45) working days from receipt of the appeal and upon filing of a non-refundable appeal fee in an amount equivalent to no less than one-half of one percent (0.5%) of the Project Cost as approved by the Approving Body. The decision of the Head of Agency or Head of the DILG unit concerned or his authorized representative on the appeal shall be final and immediately executory.



SECTION 5.6 - ISSUANCE OF TENDER DOCUMENTS

The Agency/LGU concerned shall make available the related bid documents to all pre-qualified bidders as soon as practicable to provide respective bidders ample time to examine the same and to prepare their respective bids prior to the date of opening of bids.

SECTION 5.7 - SIMULTANEOUS QUALIFICATION

In the exigency of service, the Agency/LGU Head may opt to do a simultaneous qualification instead of a pre-qualification of proponents. In case of simultaneous qualification, the publication of the invitation, following the requirements in Section 5.2, shall be for the submission of qualification requirements and bid proposals. The bidders shall be asked to submit their proposal in three envelopes; the first envelope - the qualification documents corresponding to the requirements so stated in Section 5.4 herein; the second envelope - the technical proposal; and the third envelope - the financial proposal. The requirements for bid submission are covered under Rule 7 of these Revised IRR. The period for the preparation of the qualification documents shall be subsumed under the time allotted for bid preparation.

SECTION 5.8 - ACCEPTANCE OF CRITERIA AND WAIVER OF RIGHTS TO ENJOIN PROJECT

All prospective bidders shall be required to submit, as part of their qualification documents, a statement stipulating that the bidder (i) has accepted the qualification criteria established by the PBAC of the Agency/LGU concerned, and (ii) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the concerned Agency/LGU or its PBAC to prevent or restrain the qualification process or any proceedings related thereto, the holding of a bidding or any proceedings related thereto, the negotiation of and award of the contract to a successful bidder, and the carrying out of the awarded contract. Such waiver shall, however, be without prejudice to the right of a disqualified or losing bidder to question the lawfulness of its disqualification or the rejection of its bid by appropriate administrative or judicial processes not involving the issuance of a writ of injunction or prohibition or restraining order.

Notes:

1. The determination of whether or not a bidder is **pre-qualified** to undertake the project requires an evaluation of the financial capacity of the said bidder at the time the bid is submitted based on the required documents presented by the bidder.¹⁰⁹
2. The PBAC should not be allowed to speculate on the future financial ability of the bidder to undertake the project on the basis of documents submitted. This would open doors to abuse and defeat the very purpose of a public bidding. This is especially true in the case at bar which involves the investment of

109 *Id.*



billions of pesos by the project proponent. The relevant government authority is duty-bound to ensure that the awardee of the contract possesses the minimum required financial capability to complete the project. To allow the PBAC to estimate the bidder's future financial capability would not secure the viability and integrity of the project.¹¹⁰

3. A restrictive and conservative application of the rules and procedures of public bidding is necessary not only to protect the impartiality and regularity of the proceedings but also to ensure the financial and technical reliability of the project.

Republic of the Philippines v. Hon. Ignacio C. Capulong:

G.R. No. 93359, 12 July 1991

The basic rule in public bidding is that bids should be evaluated based on the required documents submitted before and not after the opening of bids. Otherwise, the foundation of a fair and competitive public bidding would be defeated. Strict observance of the rules, regulations, and guidelines of the bidding process is the only safeguard to a fair, honest and competitive public bidding.

4. If the maximum amount of equity that a bidder may invest in the project at the time the bids are submitted falls short of the minimum amounts required to be put up by the bidder, said bidder should be properly disqualified.¹¹¹
5. An award to a disqualified bidder is null and void.¹¹²
6. With respect to the bidder's financial capacity at the pre-qualification stage, the law requires the government agency to examine and determine the ability of the bidder to fund the entire cost of the project by considering the maximum amounts that each bidder may invest in the project at the time of pre-qualification.¹¹³
7. The Implementing Rules and Regulations of the R.A. No. 7718 provide for the unyielding standards the PBAC should apply to determine the financial capability of a bidder for pre-qualification purposes: (i) proof of the ability of the project proponent and/ or the consortium to provide a minimum amount of equity to the project; and (ii) a letter testimonial from reputable banks attesting that the project proponent and/or members of the consortium are banking with them, that they are in good financial standing, and that they have adequate resources.¹¹⁴

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*



8. The evident intent of these standards is to protect the integrity and insure the viability of the project by seeing to it that the proponent has the financial capability to carry it out. As a further measure to achieve this intent, it maintains a certain debt-to-equity ratio for the project.¹¹⁵
9. At the pre-qualification stage, it is most important for a bidder to show that it has the financial capacity to undertake the project by proving that it can fulfill the requirement on minimum amount of equity.¹¹⁶
10. It cannot be overly emphasized that the rules require a minimum amount of equity to ensure that a bidder is not merely an operator or implementor of the project but an investor with a substantial interest in its success. The minimum equity requirement also guarantees the Philippine government and the general public, who are the ultimate beneficiaries of the project, that a bidder will not be indifferent to the completion of the project. The discontinuance of the project will irreparably damage public interest more than private interest.¹¹⁷
11. The submission of testimonial letters attesting to a bidder's financial capacity merely establishes its credit worthiness or its ability to obtain loans to finance the project. They do not, however, prove compliance with the requirement of minimum amount of equity in relation to the prescribed debt-to-equity ratio. This equity cannot be satisfied through possible loans.¹¹⁸
12. In the case of *Francisco S. Tatad, et al. v. Hon. Jesus B. Garcia, Jr., et al.*,¹¹⁹ citing the case of *Deloso v. Sandiganbayan*,¹²⁰ it was discussed where there is only one applicant which passed the prequalification process, conducting a public bidding in accordance with Section 5 of the BOT Law for that lone participant will be an absurd and pointless exercise.
13. If the prequalification process is actually tainted by foul play, it becomes a wonder why none of the competing firms ever brought the matter before the PBAC, or intervened in this case before the Supreme Court.

Tatad v. Garcia

G.R. No. 114222, 6 April 1995

x x x [T]here is nothing in our laws that prohibits parties to a contract from renegotiating and modifying in good faith the terms and conditions thereof so as to meet legal, statutory and constitutional requirements. Under the circumstances, to require the parties to go back to step one of the prequalification process would just be an idle ceremony. Useless bureaucratic "red tape" should be eschewed because it discourages private sector participation, the "main engine" for national growth and development (R.A. No. 6957, Sec. 1), and renders the BOT Law nugatory.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 G.R. No. 114222 (6 April 1995).

120 217 SCRA 49 (1993).



14. The Supreme Court in the case of *Tatad v. Garcia, supra*, held that Republic Act No. 7718 is a curative statute. It is intended to provide financial incentives and “a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector” (Sec. 1). A curative statute makes valid that which before enactment of the statute was invalid. Taken in this light, the Supreme Court ruled that whatever doubts and alleged procedural lapses private respondent and DOTC may have engendered and committed (in the case of *Tatad v. Garcia, supra*) in entering into the questioned contracts, these had been cured by R.A. No. 7718.¹²¹
15. Where there is a lack of qualified bidders or contractors, the award of government infrastructure contracts may be made by negotiation. Presidential Decree No. 1594 is the general law on government infrastructure contracts while the BOT Law governs particular arrangements or schemes aimed at encouraging private sector participation in government infrastructure projects. The two laws are not inconsistent with each other but are in *pari materia* and should be read together accordingly.¹²²
16. Under the BOT Law (R.A. No. 6957), as amended by R.A. No. 7718, once an applicant has prequalified, it can enter into any of the schemes enumerated in Section 2 thereof.¹²³
17. Anent securing of a **franchise** for BOT projects that require the same, the following discussion of the Supreme Court of ownership vis-à-vis the operation of a public utility is instructive:

People v. Quasha

93 Phil. 333, G.R. No. L-6055, 12 June 1953

In law, there is a clear distinction between the “operation” of a public utility and the ownership of the facilities and equipment used to serve the public.

Ownership is defined as a relation in law by virtue of which a thing pertaining to one person is completely subjected to his will in everything not prohibited by law or the concurrence with the rights of another (Tolentino, II Commentaries and Jurisprudence on the Civil Code of the Philippines 45 [1992]).

The exercise of the rights encompassed in ownership is limited by law so that a property cannot be operated and used to serve the public as a public utility unless the operator has a franchise. The operation of a rail system as a public utility includes the transportation of passengers from one point to another point, their loading and unloading at designated places and the movement of the trains at pre-scheduled times (cf. *Arizona Eastern R.R. Co. v. J.A. Matthews*, 20 Ariz 282, 180 P.159, 7 A.L.R. 1149 [1919] ; *United States Fire Ins. Co. v. Northern P.R. Co.*, 30 Wash 2d 722, 193 P. 2d 868, 2 A.L.R. 2d 1065 [1948]).

¹²¹ *Id. citing* Development Bank of the Philippines v. Court of Appeals, 96 SCRA 342 (1980); Santos v. Duata, 14 SCRA 1041 (1965); and Adong v. Cheong Seng Gee, 43 Phil. 43 (1922).

¹²² *Id.*

¹²³ *Id.*



The right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used to serve the public. The devotion of property to serve the public may be done by the owner or by the person in control thereof who may not necessarily be the owner thereof.

This dichotomy between the operation of a public utility and the ownership of the facilities used to serve the public can be very well appreciated when we consider the transportation industry. Enfranchised airline and shipping companies may lease their aircraft and vessels instead of owning them themselves.

XXX XXX XXX

Indeed, a mere owner and lessor of the facilities used by a public utility is not a public utility (Providence and W.R. Co. v. United States, 46 F. 2d 149, 152 [1930]; Chippewa Power Co. v. Railroad Commission of Wisconsin, 205 N.W. 900, 903, 188 Wis. 246 [1925]; Ellis v. Interstate Commerce Commission, Ill 35 S. Ct. 645, 646, 237 U.S. 434, 59 L. Ed. 1036 [1914]). Neither are owners of tank, refrigerator, wine, poultry and beer cars who supply cars under contract to railroad companies considered as public utilities (Crystal Car Line v. State Tax Commission, 174 p. 2d 984, 987 [1946]).

Even the mere formation of a public utility corporation does not *ipso facto* characterize the corporation as one operating a public utility. The moment for determining the requisite Filipino nationality is when the entity applies for a franchise, certificate or any other form of authorization for that purpose

RULE 6 - SUPPLEMENTAL NOTICES AND PRE-BID CONFERENCES

SECTION 6.1 - RESPONSIBILITY OF BIDDER

The prospective bidder shall be solely responsible for having taken all the necessary steps to carefully examine and acquaint himself with the requirements and terms and conditions of the bidding documents with respect to the cost, duration, and execution/operation of the project as it affects the preparation and submission of his bid. The Agency/LGU concerned shall not assume any responsibility regarding erroneous interpretations or conclusions by the prospective bidder out of data furnished or indicated in the bidding documents.

SECTION 6.2 - SUPPLEMENTAL NOTICES

If a bidder is in doubt as to the meaning of any data or requirements or any part of the bidding documents, written request may be submitted to the Agency/LGU concerned for an interpretation of the same, allowing sufficient time for the concerned Agency/LGU to reply before the submission of his/her bid. Any substantive interpretation given by the concerned Agency/LGU shall be issued



in the form of a Supplemental Notice, and furnished to all prospective bidders. The Agency/LGU concerned may also issue Supplemental Notices to all prospective bidders at any time for purposes of clarifying any provisions of the bidding documents provided that the same is issued within a reasonable period to allow all bidders to consider the same in the preparation of their bids. Receipt of all Supplemental Notices shall be duly acknowledged by each bidder prior to the submission of his bid and shall be so indicated in the bid.

SECTION 6.3 - PRE-BID CONFERENCE

For projects costing less than PhP 300 million, a pre-bid conference shall also be conducted by the concerned Agency/LGU at least thirty (30) calendar days before the deadline for the submission of bids to clarify any provisions, requirements and/or terms and conditions of the bidding documents and/or any other matter that the prospective bidders may raise. For projects costing PhP 300 million and above, the pre-bid conference shall be conducted sixty (60) to one hundred twenty (120) calendar days before the submission of bids.

Nothing stated at the pre-bid conference shall modify any provisions or terms and conditions of the bidding documents unless such is made as a written amendment thereto by the concerned Agency/LGU. Any amendments shall be issued by the Agency/LGU concerned to all bidders within a reasonable time to allow them to consider the same in the preparation of their bids and shall be duly acknowledged by each bidder prior to the submission of his bid and shall be so indicated in his bid. A summary of the pre-bid conference proceedings shall also be issued to all prospective bidders by the Agency/LGU concerned. Attendance to the pre-bid conference by prospective bidders shall not be mandatory.

RULE 7 - SUBMISSION, RECEIPT AND OPENING OF BIDS

SECTION 7.1 - REQUIREMENTS FOR BID SUBMISSION

Bidders shall be required to submit their bids on or before the deadline stipulated in the "Instructions to Bidders". For pre-qualified bidders, their bids shall be submitted in two (2) separate sealed envelopes, the first being the technical proposal and the second the financial proposal. In case of simultaneous qualification, three (3) envelopes shall be submitted. The first envelope shall be the qualification requirements, the second the technical proposal and the third the financial proposal. All envelopes shall bear the name of the bidder and project to be bid out in capital letters and addressed to the PBAC of the concerned Agency/LGU. They shall be marked "Do Not Open Before (date and time of opening of bids)". The envelopes shall be appropriately labeled as Qualification Requirements, Technical Proposal and Financial Proposal.

- a. The "Qualification Requirements" shall contain requirements as stated in Section 5.4*
- b. The "Technical Proposal" shall contain the following:*
 - i. Compliance statements with regard to the contractual arrangement and term and scope of work, project technical specifications, system features, implementation milestones including project completion date, acceptance tests and procedures, warranty period*



- and procedures (after transfer), and other technical parameters as stated in the tender documents.*
- ii. Operational feasibility of the project, which shall indicate the proposed organization, methods and procedures for the operation and maintenance of the project under bidding;*
 - iii. Technical soundness/preliminary engineering design, including proposed project timeline;*
 - iv. Preliminary environmental assessment, which shall indicate the probable adverse effects of the project on the environment and the corresponding mitigating measures to be adopted;*
 - v. Project Cost;*
 - vi. Bid security in the form of cash, certified check, manager's check, letter of credit, or bank draft/guarantee issued by a reputable local/foreign bank, or a surety bond callable on demand issued by the Government Service Insurance System (GSIS) or an entity duly registered and recognized by the Office of the Insurance Commissioner and acceptable to the Agency/LGU, or any combination thereof payable to the Agency/LGU concerned based on the total Project Cost (as indicated by the prospective Project Proponent) in accordance with the following schedules:*

PROJECT COST (as estimated by the Agency/LGU or proposed by the Project Proponent)	REQUIRED BID SECURITY
<i>less than PhP 5.0 billion</i>	<i>2.0% of the Project Cost</i>
<i>less than PhP 5.0 billion to less than PhP 10.0 billion</i>	<i>1.5% of the Project Cost or PhP 100 million, whichever is higher</i>
<i>PhP 10.0 billion and more</i>	<i>1.0% of the Project Cost or PhP 150 million, whichever is higher</i>

In case the bid security is issued by an international bank, said security has to be confirmed and validated by its local branch in the Philippines or by a bank that is duly registered and authorized by the BSP.

The posting of the bid security is for the purpose of guaranteeing that the proposed contract awardee shall enter into contract with the concerned Agency within the time prescribed therefor.

Bids and bid securities shall be valid for a period to be prescribed by the Agency/LGU concerned in the bidding documents but in no case beyond one hundred and eighty (180) calendar days from the date of opening of bids, subject to Section 11.6. The actual amount of bid security to be posted by the bidders will be fixed by the concerned Agency/LGU prior to bidding. Said actual amount shall not be less than the amount prescribed in the above schedule.



vii. Other documents as may be required by the concerned Agency/LGU to support the bidder's technical proposal.

c. The "Financial Proposal" shall contain the following, as the case may be:

- i. Compliance statements with regard to the financial parameters stated in the tender documents, which may include those on liquidated damages as contemplated under Section 12.13, performance and warranty bonds contemplated under Sections 12.7 and 12.8, insurance cover for the project including comprehensive general liability insurance, acceptance tests and procedures, and warranty period and procedures (after transfer);
- ii. Proposed Project Cost, operation and maintenance cost, project financing scheme including the amount of equity to be infused and debt to be obtained for the project, sources of financing, and all other related costs; and
- iii. Financial bid corresponding to the parameters set by the Agency/LGU in accordance with Section 4.2 (h).

SECTION 7.2 - SUBMISSION OF LATE BIDS

Bids submitted after the deadline for submission prescribed in the "Instructions to Bidders" shall be considered late and shall be returned unopened.

SECTION 7.3 - OPENING OF THE ENVELOPE FOR QUALIFICATION OF BIDDER

At the date and time stipulated in the "Instructions to Bidders", the PBAC shall open the envelope and ascertain whether the same is complete in terms of the information required under Section 5.4. Such information shall be recorded at the time, including the names and addresses of required witnesses. All bidders or their representatives present at the opening of the first envelopes shall sign a register of the opening of the qualification envelope.

SECTION 7.4 - EVALUATION OF QUALIFICATION REQUIREMENTS

The qualification documents will first be evaluated prior to the opening of the technical proposal. The Agency/LGU shall inform bidders whether they are qualified or disqualified, and for the latter, the reasons for disqualification, within fifteen (15) calendar days. Only qualified bidders shall be allowed to participate in the bid evaluation. Disqualified bidders shall be informed of the grounds of disqualification and their technical and financial proposals returned unopened.

SECTION 7.5 - REJECTION OF BIDS

Incomplete information on any of the envelopes and/or non-compliance with the bid security requirements prescribed in Section 7.1 (b) shall be grounds for automatic rejection of bids.



**SECTION 7.6 - OPENING OF THE ENVELOPE
FOR THE TECHNICAL PROPOSAL**

At the date and time of bid opening, as stipulated in the “Instructions to Bidders”, the PBAC shall open only the technical proposal and ascertain whether the same is complete in terms of the data/information required under Section 7.1 (b) above and whether the same is accompanied by the required bid security in the prescribed form, amount and period of validity. Such information shall be recorded at the time, including the names and addresses of required witnesses. All bidders or their representatives present at the opening of the first envelopes shall sign a register of the bid opening.

**SECTION 7.7 - OPENING OF THE ENVELOPE
FOR THE FINANCIAL PROPOSAL**

Only those bidders whose technical proposal passed the evaluation criteria as prescribed under Section 8.1 hereof shall have their financial proposal opened for further evaluation. Those who failed the evaluation of the technical proposal shall not be considered further, and the PBAC shall return their financial proposals unopened together with the reasons for their disqualification from the bidding.

Once the bidders who have qualified for the evaluation of the financial proposal have been determined, the PBAC shall notify said bidders of the date, time and place of the opening of the envelopes for the financial proposal. The opening thereof shall follow the same procedures prescribed for the opening of the previous envelopes.

SECTION 7.8 - WITHDRAWAL AND/OR MODIFICATION OF BIDS

Withdrawal and/or modification of bids may be allowed upon written notice by the bidder concerned to the Agency/LGU prior to the time and date set for the opening of bids (opening of first envelopes) as specified in the “Instructions to Bidders”. No bids shall be modified or withdrawn after the time prescribed to open bids. Bid modifications received after said period shall be considered late and will be returned unopened. Withdrawal of bids after the bid opening date shall cause the forfeiture of the bidder’s bid security.



RULE 8 - EVALUATION OF BIDS SECTION

SECTION 8.1 - THE FIRST ENVELOPE EVALUATION

The evaluation of bids shall be undertaken in two (2) stages, in accordance with the procedures described below.

The first envelope evaluation shall involve the assessment of the technical, operational, environmental, and financing viability of the proposal as contained in the bidders' first envelopes vis-à-vis the prescribed requirements and criteria/ minimum standards and basic parameters prescribed in the bidding documents. Only those bids that have been determined to have positively passed the first stage of evaluation shall be qualified and considered for the second stage of evaluation.

The Agency/LGU concerned shall evaluate the technical proposals of the bidder in accordance with the following criteria:

- a. Technical soundness (preliminary engineering design) - The basic engineering design of the project should conform to the minimum design and performance standards and specifications set by the Agency/LGU concerned as prescribed in the bidding documents. The engineering surveys, plans and estimates should be undertaken within +/- 20% of the final quantities. The Construction methods and schedules should also be presented and shown to be feasible or "doable".*
- b. Operational feasibility - The proposed organization, methods, and procedures for operating and maintaining the completed facility must be well defined, should conform to the prescribed performance standards, and should be shown to be workable. Where feasible, it should provide for the transfer of technology used in every phase of the project.*
- c. Environmental Standards - The proposed design and the technology of the project to be used must be in accordance with the environmental standards set forth by the Department of Environment and Natural Resources (DENR), as indicated in the bid documents. Any adverse effects on the environment as a consequence of the project as proposed by the prospective Project Proponent must be properly identified, including the corresponding corrective/mitigating measures to be adopted.*
- d. Project Financing - The proposed financing plan should positively show that the same could adequately meet the Construction cost as well as the operating and maintenance costs requirements of the project. The Agency/LGU concerned shall assess the financing proposals of the bidders if the same matches and adequately meets the cost requirements of the project under bidding.*
- e. Enhancements - Other terms which the prospective Project Proponent may offer to the Government to make the proposals more attractive, such as, but not limited to provisions allowing the Government to share in revenues and less government guarantees or reduction in the level of Government Undertakings or support.*

The PBAC of the Agency/LGU concerned shall complete the evaluation of the technical proposal within thirty (30) calendar days from the date the bids are opened.



SECTION 8.2 - THE SECOND ENVELOPE EVALUATION

The second envelope evaluation shall involve the assessment and comparison of the financial proposals of the bidders, based on the parameters stated in Section 4.2 (h). The second stage evaluation shall be completed by the PBAC of the concerned Agency/LGU within fifteen (15) calendar days from the date the first stage evaluation shall have been completed.

In the case of BT and BLT schemes, a Filipino Project Proponent who submits an equally advantageous bid with exactly the same price and technical specifications as that of a foreign Project Proponent shall be given preference.

SECTION 8.3 - RIGHT TO REJECT ALL BIDS

The Agency/LGU concerned reserves the right to reject any or all bids, waive any minor defects therein and accept the offer it deems most advantageous to the Government.

Section 7. A new section is hereby added after Section 5 of the same Act and numbered as Section 5-A, to read as follows:

“Sec. 5-A. *Direct Negotiation of Contracts.* - Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder:

“(a) If, after advertisement, only one contractor applied for prequalification and it meets the prequalification requirements, after which it is required to submit a bid/proposal which is subsequently found by the agency/local government unit (LGU) to be complying.

“(b) If, after advertisement, more than one contractor applied for prequalification but only one meets the prequalification requirements, after which it submits bid/proposal which is found by the agency/LGU to be complying.

“(c) If, after prequalification of more than one contractor, only one submits a bid which is found by the agency/LGU to be complying.

“(d) If, after prequalification, more than one contractor submit bids but only one is found by the agency/LGU to be complying: Provided, That, any of the disqualified prospective bidder may appeal the decision of the implementing agency/LGUs Prequalification Bids and Awards Committee within fifteen (15) working days to the head of the agency, in case of national projects or to the Department of the Interior and Local Government, in case of local projects from the date the disqualification was made known to the disqualified bidder. Provided, furthermore, That the implementing agency/LGUs concerned should act on the appeal within forty-five (45) working days from receipt thereof.”



Notes:

1. Presidential Decree No. 1594 and the BOT Law are not inconsistent with each other but are in *pari materia* and should be read together accordingly.

Tatad v. Garcia

G.R. No. 114222, 6 April 1995

“The fact that the contract for the construction of the EDSA LRT III was awarded through negotiation and before congressional approval on January 22 and 23, 1992 of the List of National Projects to be undertaken by the private sector pursuant to the BOT Law does not suffice to invalidate the award. Subsequent congressional approval of the list including “rail-based projects packaged with commercial development opportunities” under which the EDSA LRT III project falls, amounts to a ratification of the prior award of the EDSA LRT III contract under the BOT Law. Indeed, where there is a lack of qualified bidders or contractors, the award of government infrastructure contracts may be made by negotiation. Presidential Decree No. 1594 is the general law on government infrastructure contracts while the BOT Law governs particular arrangements or schemes aimed at encouraging private sector participation in government infrastructure projects. The two laws are not inconsistent with each other but are in *pari materia* and should be read together accordingly.”

RULE 9 NEGOTIATED CONTRACT SECTION

SECTION 9.1 - DIRECT NEGOTIATION

Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder:

If, after advertisement, only one prospective Project Proponent applies for pre-qualification and it meets the pre-qualification requirements, after which, it is required to submit a bid/proposal which is subsequently found by the Agency/LGU to be complying;

If, after advertisement, more than one prospective Project Proponent applied for pre-qualification but only one meets the pre-qualification requirements, after which it submits a bid proposal that is found by the Agency/LGU to be complying;

If, after pre-qualification of more than one prospective Project Proponent, only one submits a bid which is found by the Agency/LGU to be complying;

If, after pre-qualification, more than one prospective Project Proponent submit bids but only one is found by the Agency/LGU to be complying;

In such events, however, any disqualified bidder may appeal the disqualification of the concerned Agency/LGU to the Head of Agency, in case of national projects, or to the Head



of the DILG unit concerned or his authorized representative, in case of local projects, within fifteen (15) working days from receipt of the notice of disqualification. The Head of Agency or the Head of the DILG unit concerned or his authorized representative shall act on the appeal within forty-five (45) working days from receipt thereof. The decision of the Head of Agency or the Head of the DILG unit concerned or his authorized representative shall be final and immediately executory.

SECTION 9.2 - UNSOLICITED PROPOSALS

Unsolicited Proposals may be accepted by an Agency/LGU on a negotiated basis, subject to the conditions provided under Rule 10.

SECTION 9.3 - CONDITIONS FOR NEGOTIATED PROJECTS

In addition to the above requisites for negotiated projects, the Approving Body must prescribe the Reasonable Rate of Return prior to the negotiation in the case of solicited proposals as referred to under Section 9.1 of these Revised IRR. The scope of negotiation, in the case of solicited proposals referred to under Section 9.1 of these Revised IRR, shall be limited to the financial proposal of the proponent and compliance with the approved Reasonable Rate of Return.

SECTION 9.4 - FINANCIAL AND TECHNICAL EVALUATION OF NEGOTIATED CONTRACTS

In so far as applicable, the same rules provided for the evaluation of the technical and financial aspects of bid proposals shall be applied in the evaluation of Negotiated Contracts authorized in the Act and these Revised IRR.

SEC. 8. Section 6 of the same Act is hereby amended to read as follows:

“Section 6. *Repayment Scheme.* - For the financing, construction, operation and maintenance of any infrastructure project undertaken through the Build-Operate-and-Transfer arrangement or any of its variations pursuant to the provisions of this Act, the project proponent shall be repaid by authorizing it to charge and collect reasonable tolls, fees, and rentals for the use of the project facility not exceeding those incorporated in the contract and, where applicable, the proponent may likewise be repaid in the form of a share in the revenue of the project or other non-monetary payments, such as, but not limited, to the grant of a portion or percentage of the reclaimed land, subject to the constitutional requirements with respect to the ownership of land: Provided, That for negotiated contracts, and for projects which have been granted a natural monopoly or where the public has no access to alternative facilities, the appropriate government regulatory bodies, shall approve the tolls, fees, rentals, and charges based on a reasonable rate of return: Provided, further, That the imposition and collection of tolls, fees, rentals, and charges shall be for a fixed term as proposed in the bid and incorporated in the contract but in no case shall this term exceed fifty [50] years: Provided, furthermore, That the tolls, fees, rentals, and charges



may be subject to adjustment during the life of the contract, based on a predetermined formula using official price indices and included in the instructions to bidders and in the contract: Provided, also, That all tolls, fees, rentals, and charges and adjustments thereof shall take into account the reasonableness of said rates to the end-users of private sector-built infrastructure: Provided, finally, That during the lifetime of the franchise, the project proponent shall undertake the necessary maintenance and repair of the facility in accordance with standards prescribed in the bidding documents and in the contract. In the case of a Build-and-Transfer arrangement, the repayment scheme is to be effected through amortization payments by the government agency or local government unit concerned to the project proponent according to the scheme proposed in the bid and incorporated in the contract.”

SECTION 12.16 - REPAYMENT SCHEMES

12.16.1 General Classification

The repayment schemes for the projects shall depend on the contractual arrangement as follows or as may be approved by the Approving Body:

a. For projects undertaken through BOT, CAO, DOT, ROT, BOO and ROO arrangements, the Project Proponents may be repaid by authorizing it to collect reasonable tolls, fees, and charges for a fixed term. In the case of BOT, CAO, DOT, ROT arrangements, such term shall in no case exceed fifty (50) years. However, for BOO and ROO arrangements, the Project Proponent, upon renewal of its Franchise or contract with the Agency or LGU, may be allowed to continue collecting toll, fees, charges and rentals for the operation of the facility or the provision of the service.

b. For projects undertaken through BTO arrangement - the Project Proponent may be repaid by either of the following two options: First Option - the Agency/LGU provides Amortization as may be appropriate and reasonable. Tolls, fees, rentals and charges that the Project Proponent may collect while operating the facility on behalf of the Agency/LGU may be applied directly to the Amortization. Moreover, the Facility operator may be repaid by the Agency/LGU through a management fee as may be incorporated in the management contract entered between the Agency/LGU and the Project Proponent; Second Option - the Project Proponent may be allowed to directly collect tolls, fees, rentals and charges for a fixed term.

c. For projects undertaken through BT and BLT arrangements - the Project Proponent may be repaid by the Agency/LGU through Amortization as may be appropriate and reasonable.

d. Where applicable, the proponent may likewise be repaid in the form of a share in the revenue of the project or other non-monetary payments, such as, but not limited to the grant of commercial development rights or the grant of a portion or percentage of the reclaimed land, subject to constitutional requirements.

e. For projects undertaken through arrangements not enumerated under this Act but approved/authorized by the NEDA Board, the Project Proponent may be repaid through any schemes as recommended by the ICC and approved/authorized by the NEDA Board.



12.16.2 Tolls, fees, rentals and charges

The proposed tolls, fees, and charges shall be considered by the Agency/LGU in the evaluation of the bid, taking into account the reasonableness thereof to the end-users of the facility. The tolls, fees, charges and rentals that a Project Proponent may charge for the use of the facility shall be those as approved by the Approving Body consistent with Section 1.3 (a.a), resulting from the bidding, and incorporated in the contract, which, shall be upheld/adopted/accorded utmost weight/recognized by the Regulator.

12.16.3 Remittance of Earnings or Other Amounts Due to a Foreign Project Proponent

The remittance of earnings and other amounts due to a foreign proponent under the contract shall be in accordance with pertinent laws, rules and regulations especially those issued by the BSP.

SECTION 12.17 - REVENUE SHARING

The Agency/LGU concerned may share in the revenue from the operation of the Project Proponent in the form of either a fixed fee or a certain percentage of the gross revenue or a combination of both, provided that the same is indicated in the bidding documents and included in the contract.

SECTION 12.18 - ADJUSTMENTS OF TOLLS/FEES/RENTALS/CHARGES

The tolls, fees, rentals and charges may be subject to adjustment during the life of the contract, based on the pre-determined formula and official price indices prescribed in the “Instructions to Bidders” and the approved contract. For this purpose, prior to bidding, the concerned Agency/LGU shall secure either the advice of the Regulator or the approval of the Approving body or both, as the case maybe, for such formula. The monitoring of the consistency of the proposed adjustments of tolls, fees, rentals and charges with the prescribed rate of return, if any, shall be undertaken by the appropriate regulatory body or Implementing Agency/LGU. Price indices shall be based on the official issuances by the National Statistics Office (NSO), BSP, Department of Labor and Employment (DOLE) and other sources authorized by the Agency/LGU concerned prior to bidding.

SECTION 12.19 - AUDIT OF COLLECTIONS

All revenues, share and/or receipts pertaining to or accruing to the Agency/LGU derived from any project proposed under the Act and these Revised IRR, including expenditures or use of funds and property, owned or held in trust by, or pertaining to the Government, shall be subject to examination audit by the Commission on Audit (COA), including i) ensuring that such revenues, share and/or receipts are fully and properly accounted for and remitted to the Agency/LGU, and ii) determining if the mandated return on rate base is complied with, in the case of Public Utility Projects. All revenues and receipts pertaining to or accruing to the Project Proponent shall be treated as private funds including interest or yield thereon, which may be remitted directly to the Project Proponent, as maybe stipulated in the contract.



Notes:

1. **Repayment scheme.** The Project Proponents shall be repaid for Build-Operate-and-Transfer (BOT), Contract-Add-and-Operate (CAO), Develop-Operate-and Transfer (DOT), Rehabilitate-Operate-and-Transfer (ROT), Build-Own-and Operate (BOO) and Rehabilitate-Own-and- Operate (ROO) arrangements by authorizing them to collect reasonable tolls, fees, and charges for a fixed term. In the case of BOT, CAO, COT, and ROT arrangements, such term shall in no case exceed fifty (50) years. For BOO and ROO arrangements, the Project Proponent, upon renewal of its franchise or contract with the Agency or LGU, may be allowed to continue collecting toll, fees, charges and rentals for the operation of the facility or the provision of the service
2. **Repayment scheme for Build-Transfer-and- Operate (BTO) arrangements.** The Project Proponent may be repaid by either of the following options:
 - a. The Agency/ LGU provides amortization payments as may be appropriate and reasonable. Tolls, fees, rentals and charges that the project proponent may collect while operating the facility on behalf of the agency may be applied directly to the amortization payments. The facility operator may be repaid by the Agency /LGU through a management fee as may be incorporated in the management contract entered between the Agency/ LGU and the project proponent; or
 - b. The proponent may be allowed to directly collect tolls, fees, rentals and charges for a fixed term.
3. **Repayment scheme for Build-and-Transfer (BT) and Build-Lease-and-Transfer (BLT) arrangements.** The Project Proponent may be repaid by the Agency/ LGU through amortization payments as may be appropriate and reasonable. Where applicable, the proponent may likewise be repaid in the form of a share in the revenue of the project or other non-monetary payments, such as, but not limited to the grant of commercial development rights or the grant of a portion or percentage of the reclaimed land, subject to the constitutional requirement that only Filipino citizens or in the case of a corporation only those with at least 60% Filipino equity will be allowed to own land.¹²⁴
4. Repayment scheme for other variations of the arrangements or for project approved by the President of the Philippines.

The Project Proponent may be repaid through any schemes as recommended by the Investment Coordination Committee and approved/authorized by the President of the Philippines.
5. As a general rule, tolls, fees, charges and rentals that a Project Proponent may generally charge for the use of the facility shall be those incorporated in the contract and, if required by existing laws, approved by the appropriate government regulatory bodies. The proposed tolls, fees, and charges shall be considered by the Agency or LGU in the evaluation of the bid, taking into account the reasonableness thereof to the end-users of the facility.

124 See Metropolitan Manila Development Authority v. Trackworks Rail Transit Advertising, G.R. No. 179554 (16 December 2009); and Chavez v. National Housing Authority, G.R. No. 164527 (15 August 2007).



6. The right of foreign contractors/investors under BOT, BT, BOO, BLT and other similar schemes to convert its peso earnings into foreign currency and to remit the same to its home country shall be governed by existing monetary rules and regulations.
7. The tolls, fees, rentals and charges may be subject to adjustment during the life of the contract, based on the predetermined formula and official price indices prescribed in the Instructions to Bidders and the approved contract.
8. An arrangement where the agency undertook responsibility for the payment of all real estate taxes and assessments, does not justify tax exemption.¹²⁵
9. A BOT arrangement is sui generis and is different from the usual financing arrangements where funds are advanced to a borrower who uses the funds to establish a project that it owns, subject only to a collateral security arrangement to guard against the nonpayment of the loan.¹²⁶
10. The basic rationale for investing in a toll project is a reasonable rate of return for the investment.¹²⁷
11. The Court refused to issue an injunction to the collection of the toll fees where there was no showing that public respondents abused their discretion in imposing and collecting the said fees, which were provided in the Toll Operations Agreement. The TOA remains valid where it has not been declared invalid by any court, or that the presumption that official duty was performed regularly was not overturned.¹²⁸
12. The BOT Law (RA 6957) brought about a novel way of implementing government contracts by allowing reclaimed land as part or full payment to the contractor of a government project to satisfy the huge financial requirements of the undertaking.¹²⁹
13. Foreshore and submerged areas, being part of the lands of the public domain, cannot be alienated unless classified as agricultural lands of the public domain. “The mere reclamation of these areas by the Public Estates Authority does not convert these inalienable natural resources of the State into alienable or disposable lands of the public domain. There must be a law or presidential proclamation officially classifying these reclaimed lands as alienable or disposable and open to disposition or concession. Moreover, these reclaimed lands cannot be classified as alienable or disposable if the law has reserved them for some public or quasi-public use.”¹³⁰

125 National Power Corporation v. Central Board of Assessment Appeals, G.R. No. 171470 (30 January 2009).

126 *Id.*

127 Francisco, Jr. v. Toll Regulatory Board, G.R. No. 166910 (19 October 2010); Marcos v. Republic, G.R. No. 169917 (19 October 2010); Gising Kabataan Movement, Inc. v. Republic, G.R. No. 173630 (19 October 2010); Republic v. Young Professionals and Entrepreneurs of San Pedro, Laguna, G.R. No. 183599 (19 October 2010).

128 Francisco v. UEM-MARA Phils., Toll Regulatory Board, G.R. Nos. 135688-89 (18 October 2007).

129 Chavez v. NHA (2007).

130 Chavez v. Public Estates Authority, G.R. No. 133250 (9 July 2002, 6 May 2003 & 11 November 2003).



14. A private corporation, even one that undertakes the physical reclamation of a government BOT project, cannot acquire reclaimed alienable lands of the public domain in view of the constitutional ban, under Section 3, Article XII of the 1987 Constitution, which prohibits private corporations from acquiring any kind of alienable land of the public domain.¹³¹
15. The issuance of certificates of titles in National Housing Authority's (NHA) name automatically converts the reclaimed lands to patrimonial properties of the NHA.¹³²
16. **Smokey Mountain Case**¹³³ *vis-à-vis* the **PEA-Amari Case**.¹³⁴ The petitioner in the Smokey Mountain Case (who is the same petitioner in the PEA-Amari case) challenged a BOT agreement between the National Housing Authority (NHA) and a contractor (RII Builders, Inc.) involving the development of the Smokey Mountain Dumpsite into a habitable housing project, with reclamation of the area across Radial Road 10 as the enabling component of the project. On the strength of the Pea-Amari case, petitioner averred, among others, that the reclaimed land may not be given to the contractor as payment for undertaking the project because they constituted inalienable public lands that were outside the commerce of men.¹³⁵
17. The Supreme Court disagreed, holding that "the issuance of certificates of titles in NHA's name automatically converts the reclaimed lands to patrimonial properties of the NHA. Otherwise, the lots would not be of use to the NHA's housing projects or as payment to the BOT contractor as the enabling component of the BOT contract. The lands become alienable and disposable lands of public domain upon issuance of the special patents and become patrimonial properties of the Government from the time the titles are issued to the NHA."¹³⁶
18. The High Court noted that the subject reclaimed lands had been classified as alienable and open to disposition under Presidential Proclamations. According to the Court, while such grant of authority to sell public lands, pursuant to the Pea-Amari case, does not convert alienable lands of the public domain into private or patrimonial lands, it had, in the same case also ruled that "alienable lands of public domain must be transferred to qualified private parties, or to government entities not tasked to dispose of public lands, before these lands can become private or patrimonial lands."¹³⁷
19. The Court, thus, explained – "x x To lands reclaimed by PEA or through a contract with a private person or entity, such reclaimed lands still remain alienable lands of public domain which can be transferred only to Filipino citizens but not to a private corporation. This is because PEA under PD 1084 and EO 525 is tasked to hold and dispose of alienable lands of public domain and it is only when it is transferred to Filipino citizens that it becomes patrimonial property."¹³⁸

¹³¹ *Id.*

¹³² Chavez v. NHA (2007).

¹³³ *Id.*

¹³⁴ Chavez v. PEA (2003).

¹³⁵ Chavez v. NHA (2007).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*



20. The NHA is a government agency not tasked to dispose of public lands under its charter—The Revised Administrative Code of 1987. The NHA is an ‘end-user agency’ authorized by law to administer and dispose of reclaimed lands. The moment titles over reclaimed lands based on the special patents are transferred to the NHA by the Register of Deeds, they are automatically converted to patrimonial properties of the State which can be sold to Filipino citizens and private corporations, 60% of which are owned by Filipinos. The reason is obvious: if the reclaimed land is not converted to patrimonial land once transferred to NHA, then it would be useless to transfer it to the NHA since it cannot legally transfer or alienate lands of public domain. More importantly, it cannot attain its avowed purposes and goals since it can only transfer patrimonial lands to qualified beneficiaries and prospective buyers to raise funds for the SMDRP.”¹³⁹
21. Warranty to compensate a Project Proponent for the loss of revenue resulting from the non-implementation of the periodic and interim toll fee adjustments violates the constitutionally guaranteed power of the Legislature to exclusively appropriate money for public purpose from the General Funds of the Government.¹⁴⁰
22. Any toll fee increase should comply with the legal twin requirements of publication and public hearing, the absence of which will nullify the imposition and collection of the new toll fees.¹⁴¹
23. It is imperative that in implementing and imposing new, i.e. subsequent toll rates arrived at using the toll rate adjustment formula, the subject toll way operators and the Toll Regulatory Board must necessarily comply not only with the requirement of publication but also with the equally important public hearing. Any fixing of the toll rate, which did not or does not comply with the twin requirements of public hearing and publication, will be struck down as void. In such case, the previously valid toll rate shall consequently apply, pending compliance with the twin requirements for the new toll rate.¹⁴²
24. Where an entity derived its right to install its billboards, signanges and other advertizing media in the MRT3 from the MRTC’s (the Project Proponent) authority under the BLT agreement to develop commercial premises in the MRT3 structure or to obtain advertising income therefrom, the MMDA cannot dismantle such billboards and other advertising media. Under the BLT agreement, MRTC owns the MRT3 for 25 years, upon the expiration of which it would transfer ownership to the Government. Until this date, the MRTC’s act of entering into the contract for advertising services with another entity was a valid exercise of ownership by the former.¹⁴³

139 *Id.*

140 Francisco v. TRB (2010); Marcos v. Republic (2010); Gising Kabataan v. Republic (2010); Republic v. Young Professionals (2010).

141 *Id.*

142 *Id.*

143 MMDA v. Trackworks (2009).



SEC. 9. Section 7 of the same Act is hereby amended to read as follows:

“SEC. 7. *Contract Termination.* - In the event that a project is revoked, cancelled or terminated by the Government through no fault of the project proponent or by mutual agreement, the Government shall compensate the said project proponent for its actual expenses incurred in the project plus a reasonable rate of return thereon not exceeding that stated in the contract as of the date of such revocation, cancellation or termination: Provided, That the interest of the Government in these instances shall be duly insured with the Government Service Insurance System (GSIS) or any other insurance entity duly accredited by the Office of the Insurance Commissioner: Provided, finally, That the cost of the insurance coverage shall be included in the terms and conditions of the bidding referred to above.

In the event that the government defaults on certain major obligations in the contract and such failure is not remediable or if remediable shall remain unremedied for an unreasonable length of time, the project proponent/contractor may, by prior notice to the concerned national government agency or local government unit specifying the turn-over date, terminate the contract. The project proponent/contractor shall be reasonably compensated by the Government of equivalent or proportionate contract cost as defined in the contract.”¹⁴⁴

144 *Amending BOT Act: Conference Committee Report on Senate Bill No. 1586/ House Bill No. 10943, Record of the Senate, Volume IV, No. 72 (19 April 1994).*

SENATOR MERCADO: Mr. President, this is going to be very short. I have only one point that I would like to raise with the Sponsor of this Conference Committee Report.

It has been said that one of the major changes of this measure is the new paragraph in Section 7 which relates to the fact that if the Government defaults on certain major obligations in the contract, and there is no remedy for such default, and if the remedies are not acted upon for a reasonable length of time, then the project proponent may, upon prior notice, terminate the contract and shall be compensated reasonably as per the contract price proportionate to the contract as defined by what has been signed.

Mr. President, because this is a new provision, I would like to ask Senator Macapagal if she can provide us some information as regards the operationalization of the phrases “unreasonable length of time” and “reasonably compensated.” What parameters are going to be used in determining what is reasonable length of time for the Government not being able to act upon certain measures that would remedy faults on the part of the Government? And if the Government pays the contractor, how do we operationalize reasonable compensation?

SENATOR MACAPAGAL: Mr. President, if we are going to try to do some statutory construction of the intent of the House, it is quite difficult because I read the transcript of the House debates, and this is a provision that was not really greatly debated upon. So we have very little to work on as far as the House intention is concerned. However, we may say probably that an unreasonable length of time is when the investment project proponent is already greatly affected.

As far as the term “reasonably compensated” is concerned, I would imagine that that should be defined in the contract as part of the penalty clause.

SENATOR MERCADO: What percentage would that be? If the amount is defined in the contract, how do we compute the percentage that would reasonably compensate the private sector or the contractor?

SENATOR MACAPAGAL: We would be expecting that the implementing rules and regulations will put the parameter. This is one of the areas that we are leaving up to the implementing rules because they have to be drafted anyway.

SENATOR MERCADO: Mr. President, I am afraid that we might be giving those who will be drafting the rules and regulations to implement this law too wide a latitude as regards these two issues – the matter of determining what is reasonable compensation and how to determine reasonable length of time.

I believe it would be more useful if we can provide the Department of Public Works and Highways, which is going to make rules and regulations, with some formulas that we could use to be able to interpret this measure.



SENATOR MACAPAGAL: Mr. President, we certainly welcome a suggestion from the Gentleman about what guidance we can give the Committee making the rules about what we in the Senate think should be a reasonable length of time or what should constitute a reasonable compensation.

SENATOR MERCADO: Mr. President, inasmuch as we are not going to approve this today, and we are going to wait for Senator Tatad to arrive before we vote with finality on this Conference Committee Report, I would like to make some suggestions, and work hopefully with the technical staff and find out what we can come up with.

Thank you very much.

THE PRESIDENT: I think that is a very important issue, and we accept the reservation. The matter of what is reasonable or not is a matter of fact, as we lawyers say. But I think it will be helpful if the technical staff of the Committee who will draft the implementing rules and regulations can indicate the criteria for judging whether the period or the compensation is reasonable or not so that we can insert these criteria and discussion into the Record as future reference to the Committee that will draft the implementing rules and regulations.

SENATOR GONZALES: Mr. President.

THE PRESIDENT: Senator Gonzales is recognized.

SENATOR GONZALES: Mr. President, will the distinguished Sponsor yield for some questions?

SENATOR MACAPAGAL: Certainly, Mr. President. If I may give some additional information with regard to the previous question of Senator Mercado. In the implementing rules of PD 5094, which is the guidelines on contracts, a contractor is authorized to suspend work if program bidding is not acted upon within 45 days from the presentation of completed documents. That may be one guideline as far as unreasonable period of time is concerned. We are therefore left with something more operational as far as reasonable compensation is concerned.

SENATOR MERCADO: Mr. President, that and maybe other inputs can be submitted by the technical committee so that we can have a guideline as regards the two issues I have raised.

The President: Yes.

x x x

SENATOR TAÑADA: Mr. President, under Section 9 of the measure which amends Section 7 of the BOT Law, the project proponent or contractor is now being given the right to terminate the contract in the event the Government defaults on certain major obligations.

My question is: Would there be any significant difference between a contract terminated by the Government as provided in the first paragraph of Section 7 of the Act and a contract terminated by a project proponent or contractor?

SENATOR MACAPAGAL: Yes, Mr. President. There may be some differences as far as the events leading to a probable termination are concerned. For instance, the Government may terminate a contract if the funds are not available, or some natural event renders the whole project useless.

On the other hand, as far as the contractor is concerned, if the contractor will terminate the contract, it will probably be because there are some obligations the Government has undertaken, which it is not complying with, and this noncompliance is causing great expense on the part of the contractor. The contractor then may wish to terminate the contract.

For instance, there may be a contract but the right-of-way problems are so difficult to solve that the contractor begins to see his investments whittling away; or if peace-and-order problems become such a big obstacle to the implementation of the project, then the contractor may wish to terminate the project.

SENATOR TAÑADA: Thank you, Mr. President.

On the matter of the compensation that may have to be paid to the project proponent or contractor, it appears under the first paragraph that the Government shall compensate the project proponent for its actual expenses incurred in the project plus a reasonable rate of return thereon, while in the new paragraph, it is only stated that the project proponent shall be reasonably compensated.

Is there any difference then, Mr. President, in the computation or determination of the compensation referred to in these two paragraphs?



SENATOR MACAPAGAL: Mr. President, essentially, the difference, perhaps, may not be that much because we anticipate that in both cases, the reasonable compensation should be defined in the contract.

SENATOR TAÑADA: And as has been brought out earlier, Mr. President, we will be coming out with certain standards and guidelines as to what these would be.

SENATOR MACAPAGAL: We will appreciate that, Mr. President.

SENATOR TAÑADA: I notice, Mr. President, that in the new paragraph, it is stated that the project proponent contractor shall be reasonably compensated by the Government.

Are we just referring to the National Government or would this include the local government units or the different department agencies that may have contracted for the work?

SENATOR MACAPAGAL: It will be whoever entered into the contract with the project proponent. So that includes a national government agency or a local government unit, Mr. President.

SENATOR TAÑADA: What would happen if the local government unit concerned would not be in a position to pay the reasonable compensation that may have been arrived at?

SENATOR MACAPAGAL: Since the local government unit now enjoys corporate personality, then it can be sued by the contractor. There is no guarantee by the National Government to cover the compensation that cannot be answered by the local government.

SENATOR TAÑADA: So, the project proponent or the contractor cannot go after the National Government?

SENATOR MACAPAGAL: No, Mr. President.

SENATOR TAÑADA: I notice also that in the first paragraph of this section, it is provided that the interest of the Government in these instances shall be insured with the Government Service Insurance System or any other insurance entity duly accredited by the Office of the Insurance Commissioner.

In the light of this provision calling for the insurance of the interest of the Government in the project, would this not be the source of the compensation that may be due to the project proponent or contractor?

SENATOR MACAPAGAL: It may be under the usual rules of commercial operation of insurance companies, Mr. President.

SENATOR TAÑADA: Do we understand that it is not only the interest of the National Government but also of the local government units and the government agencies concerned that should be insured?

SENATOR MACAPAGAL: Yes, Mr. President. Although this provision in this paragraph is already part of the old law, our understanding is that "Government" here covers National Government, government agencies, and local government units.

SENATOR TAÑADA: Moving on to the other major change and this is with respect to the investment incentives...

THE PRESIDENT: Before the distinguished Gentleman leaves the point, if I may – because that is a very important point the Minority Leader raised regarding compensation by Government – the qualified agencies under this law would be the Government or its agencies, the government-owned and controlled corporations, and finally, local government units.

When we say here that the Government shall compensate, we are referring to the contracting entity itself, not the Government itself. If it is a local government, then it is the local government. If it is a government owned or-controlled corporation like NPC, then it should be NPC that should be liable for that compensation.

SENATOR MACAPAGAL: Yes, Mr. President. That interpretation is bolstered by other provisions in this bill against direct government guarantees.

THE PRESIDENT: I think that is a very critical interpretation. If we say that it is the Government that will compensate, in effect, the Government is guaranteeing all these contracts, regardless of the fact that they may have been entered into by a local government unit or a government-owned or-controlled corporation.

SENATOR TAÑADA: That is correct, Mr. President. That is why I wanted to clarify that point. It would appear under the present wording that, eventually, the obligations, even though contracted for by a local government unit or by a government-owned or-controlled corporation, would be answered for by the National Government which is not – I am glad to hear – the case.



SECTION 12.20 - CONTRACT TERMINATION/RESCISSION

The contract may be terminated/rescinded in the following events:

a. If the Agency/LGU concerned fails to comply with any major obligation prescribed in the approved contract, and such failure is not remediable or if remediable shall remain unremedied for an unreasonable length of time, the Project Proponent may, with prior notice to the concerned Agency/LGU, specifying the turn-over date, terminate the contract. In such an event, the Project Proponent shall be reasonably compensated by the Government for equivalent or proportionate contract cost, as defined in the contract subject to (c) below.

b. If the Project Proponent refuses or fails to perform any of the provisions of the approved contract with such diligence as will ensure the project's completion, operation and maintenance in accordance with the prescribed technical and performance standards or otherwise fails to satisfy any of the contract provisions including compliance with the prescribed/agreed milestone

THE PRESIDENT: It is not the intendment.

SENATOR MACAPAGAL: It is not the case, Mr. President, because the law otherwise provides that there will be no direct government guarantees.

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SENATOR GONZALES: Mr. President, I beg the indulgence of the distinguished Sponsor. I rise as a consequence of some of the points raised by the Majority Leader.

Section 7 of the BOT Law, as amended by this bill, is not exclusive in the sense that this does not refer to all cases of contract termination and/or adjustment. In many public works contract that I have seen, it is the contractor who is at fault in the sense that, because of lack of capability, in spite of prequalification – probably, lack of capital, lack of technical skill, then there is exasperating delay in the completion of the project and demonstrated inability to complete the same.

That is not covered by Section 7, because this is a termination or revocation of a contract for cause or causes arising from the fault of the contractor.

SENATOR MACAPAGAL: That is right, Mr. President. If it is the contractor's fault, then he is not entitled to any of the remedies provided in this bill.

SENATOR GONZALES: In short, Section 7 is without prejudice to the right of the Government to cancel, revoke or terminate a project for causes attributable to the fault of the contractor.

SENATOR MACAPAGAL: Yes, Mr. President.

SENATOR GONZALES: In which case, it is not the Government that is bound to pay anything but it is the contractor who would be responsible to answer for damages.

SENATOR MACAPAGAL: Yes, Mr. President, when it is the contractor's fault, and that situation is not contemplated in this provision.

SENATOR GONZALES: And the Government is not stopped from going against the performance bond which is normal in public works contract.

SENATOR MACAPAGAL: That is right, Mr. President, in cases where it is the contractor's fault which, I reiterate, is not contemplated in this bill.

SENATOR GONZALES: More so if there is any clause or provision in the contract regarding the award of punitive damages.

SENATOR MACAPAGAL: It is correct, Mr. President.



activities, or commits any substantial breach of the approved contract, the Agency/LGU shall notify the Project Proponent in writing of the same and if not corrected within the time specified, the Agency/LGU concerned may rescind the contract. In such an event, the Agency/LGU concerned may either:

- i. Take over the facility and assume all attendant liabilities thereof; or*
- ii. Allow the Project Proponent's lenders/creditors/banks to exercise their rights and interests under the loan and collateral documents with respect to the project.*

In any case, the Agency/LGU concerned shall likewise forfeit the performance security of the defaulting Project Proponent.

c. In the event that the project/contract is: (a) revoked, cancelled, or terminated by (i) the Agency/LGU in accordance with the contract through no fault of the Project Proponent or (ii) by mutual agreement, or (b) revoked or canceled by a court by final judgment through no fault of the Project Proponent, the Agency/LGU shall compensate the said Project Proponent for its actual expenses incurred in the project plus a Reasonable Rate of Return thereon not exceeding that stated in the contract, as of the date of contract termination, provided that the interest of the Government in these instances shall be duly insured with the GSIS or any other insurance entity duly accredited by the Office of the Insurance Commissioner; provided further that the cost of the insurance coverage shall be included in the terms and conditions of the approved contract.

In the cases referred to in (a) and (c) above, an independent appraiser, mutually acceptable to the Agency/LGU and the Project Proponent, shall determine the amount to be paid to the Project Proponent, which determination shall be made within a period not more than one hundred eighty (180) calendar days from contract rescission or termination. The amount determined by the independent appraiser shall be binding to both the Project Proponent and the Agency/LGU.

In cases of emergency or when the public interest so requires, the Agency/LGU may immediately takeover the facility prior to the determination of said amount and payment thereof to the Project Proponent. Unless otherwise agreed upon by the Agency/LGU and the Project Proponent, the amount fixed by said independent appraiser shall be paid by the Agency/LGU not later than ninety (90) calendar days from said independent appraiser's advice of such determination, subject to the enactment of a law or ordinance, as the case may be, appropriating such amount, if required.

SECTION 12.21 - VENUE FOR LITIGATION

The venue for the resolution of disputes, arbitration or litigation shall be as mutually agreed upon by the parties to the contract. In default thereof, the venue shall be in the Philippines.



SECTION 12.22 - TRANSFER OF AND WARRANTY OVER THE FACILITY

Under Contractual Arrangements involving transfer of the facility to the Agency/LGU, the transfer or turnover will necessarily include the transfer of full legal ownership over the project in favor of the Agency/ LGU, subject to any existing liens as may be agreed upon in the project agreement. The Project Proponent shall provide warranty that the facility meets the project technical specifications/agreed system features, performance standards and services in connection therewith for a period not less than one (1) year from the turnover of the facility. For this purpose, the Project Proponent shall put up a warranty security in the form of cash, letter of credit, or bank draft/guarantee issued by a reputable local/foreign bank, or a surety bond issued by the GSIS or an entity duly registered and recognized by the Office of the Insurance Commissioner, callable on demand and acceptable to the Agency/LGU, or any combination thereof payable to the Agency/ LGU concerned, the amount of which shall be determined by the Agency/LGU and shall be stipulated in the contract. The warranty security shall be made effective immediately upon transfer of full legal ownership over the project in favor of the Agency/LGU, as described above.

Notes:

1. **Termination.** The contract/ agreement may be terminated/ rescinded by:

- a) The Project Proponent, with prior notice specifying the turn-over date, if:
 - i) the Agency/LGU concerned fails to comply with any major obligation prescribed in the approved contract, and
 - ii) such failure is not remediable or if remediable shall remain unremedied for an unreasonable length of time.

In such an event, the Project Proponent shall be reasonably compensated by the Government for equivalent or proportionate contract cost, as defined in the contract subject to par. (c) of Section 12.20 of the Rules.

- b) The Agency/LGU if:
 - i) the Project Proponent refuses or fails to perform any of the provisions of the approved contract with such diligence as will ensure the project's completion, operation and maintenance in accordance with the prescribed technical and performance standards or
 - ii) otherwise fails to satisfy any of the contract provisions including compliance with the prescribed/agreed milestone activities, or
 - iii) commits any substantial breach of the approved contract,

The Agency/LGU shall notify the Project Proponent in writing of the same and if the breach is not corrected within the time specified, the Agency/LGU concerned may rescind the contract.

- c) By mutual agreement of the Parties



2. **Termination/ rescission of contracts by the Agency/ LGU.** The Agency/ LGU may either:
- i. Take over the facility and assume all attendant liabilities; or
 - ii. Allow the Project Proponent's lenders/creditors/banks to exercise their rights and interests under the loan and collateral documents with respect to the project.

In any case, the Agency/LGU concerned shall likewise forfeit the performance security of the defaulting Project Proponent.

3. The Project Proponent shall be compensated for its actual expenses incurred for the project with reasonable rate of return thereon not exceeding that stated in the contract, as of the date of termination, when such revocation, cancellation or termination is due to:
- a. the Agency/ LGU's action in accordance with the contract through no fault of the Project Proponent or by mutual agreement;
 - b. revoked or cancelled by a court by final judgment through no fault of the Project Proponent; provided that the interest of the Government in these instances shall be duly insured with the GSIS or any other insurance entity duly accredited by the Office of the Insurance Commissioner. The cost of the insurance coverage shall be included in the terms and conditions of the approved contract.

4. **Determination of amount to be paid.** In the cases of termination or cancellation due to: 1) the failure of the Agency/LGU to comply with the major obligations of the contract; or 2) due to cancellation by virtue of a final court judgment through no fault of the Project proponent; or 3) through the action of the Agency/ LGU without fault of the Project Proponent, an independent appraiser, mutually acceptable to the Agency/LGU and the Project Proponent, shall determine the amount to be paid to the Project Proponent. Such determination shall be made within a period not more than one hundred eighty (180) calendar days from contract rescission or termination. The amount determined by the independent appraiser shall be binding on both the Project Proponent and the Agency/ LGU.

5. **Facility Take-Over.** The Agency or LGU may immediately take over the facility prior to determination of the amount and payment thereof when:
1. there is an emergency; or
 2. when the public interest so requires

Unless otherwise agreed upon by the Agency/ LGU and the Project Proponent, the amount fixed by an independent appraiser shall be paid by the Agency/ LGU not later than ninety (90) calendar days from said independent appraiser's advice of such determination, subject to the enactment of a law or ordinance, as the case may be, appropriating such amount, if required.

6. **Venue for litigation.** As a general rule, the venue for the resolution of disputes, arbitration or litigation shall be as mutually agreed upon by the parties to the contract. In default thereof, the venue shall be in the Philippines.



7. **Transfer/Turn-over of Facility.** Under Contractual Arrangements involving transfer of the facility to the Agency/ LGU, the transfer or turn-over will necessarily include the transfer of full legal ownership over the project in favor of the Agency/ LGU, subject to any existing liens as may be agreed upon in the project agreement.
8. **Warranty requirement.** The Project Proponent shall provide warranty that the facility meets:
 - a) the project technical specifications/ agreed system features;
 - b) performance standards; and
 - c) services in connection therewith for a period not less than one (1) year from the turnover of the facility.

For this purpose, the Project Proponent shall put up a warranty security in the form of:

- a) cash;
 - b) letter of credit; or
 - c) bank draft/guarantee issued by a reputable local/foreign bank; or
 - d) a surety bond issued by the GSIS or an entity duly registered and recognized by the Office of the Insurance Commissioner, which shall be callable on demand and acceptable to the Agency/ LGU, or any combination thereof payable to the Agency/ LGU concerned, the amount of which shall be determined by the Agency/ LGU and shall be stipulated in the contract. The warranty security shall be made effective immediately upon transfer of full legal ownership over the project in favor of the Agency/ LGU.
9. Where the Supreme Court invalidated a BOT contract, it declared that it “was not unmindful of the reality that the structures comprising the NAIA IPT III facility are almost complete and that funds have been spent by PIATCO in their construction. For the government to take over the said facility, it has to compensate respondent PIATCO as builder of the said structures. The compensation must be just and in accordance with law and equity for the government can not unjustly enrich itself at the expense of PIATCO and its investors.”¹⁴⁵
10. The BOT Law expressly allows the government to terminate a BOT agreement, even without fault on the part of the project proponent, subject to the payment of the actual expenses incurred by the proponent plus a reasonable rate of return.¹⁴⁶
11. “Under the BOT Law and the Amended BOT Agreement, in the event of default on the part of the government (in this case, the Department of Foreign Affairs) or on the part of the proponent, the non-defaulting party is allowed to terminate the agreement, again subject to proper compensation in the manner set forth in the agreement. x x Indeed, the right of BCA, a party which may or may not have been in default on its BOT contract, to have the termination of its BOT contract reversed is not guaranteed by the BOT Law. Even assuming BCA’s innocence of any breach of contract, all the law provides is that BCA should be adequately compensated for its losses in case of contract termination by the government.”¹⁴⁷

¹⁴⁵ Agan v. PIATCO (2004).

¹⁴⁶ DFA v. Falcon (2010).

¹⁴⁷ *Id.*



12. Trial courts are prohibited from issuing a Temporary Restraining Order (TRO) or writ of preliminary injunction against the government to restrain or prohibit the termination or rescission of any national government project/ contract. “Verily, there is valid reason for the law to deny preliminary injunctive relief to those who seek to contest the government’s termination of a national government contract. The only circumstance under which a court may grant injunctive relief is the existence of a matter of extreme urgency involving a constitutional issue, such that unless a TRO or injunctive writ is issued, grave injustice and irreparable injury will result.”¹⁴⁸
13. The principle in public bidding is that bids are submitted in accord with the prescribed terms, conditions and parameters laid down by government and pursuant to the requirements of the project bidden upon. In light of these parameters, bidders formulate competing proposals which are evaluated to determine the bid most favorable to the government. Once the contract based on the bid most favorable to the government is awarded, all that is left to be done by the parties is to execute the necessary agreements and implement them.

Agan v. Philippine International Air Terminal, Co., Inc.

G.R. No. 155001, 21 January 2004

On October 5, 1994, Asia’s Emerging Dragon Corp. (AEDC) submitted an unsolicited proposal to the Philippine Government through the Department of Transportation and Communication (DOTC) and Manila International Airport Authority (MIAA) for the construction and development of the NAIA IPT III under a build-operate-and-transfer arrangement pursuant to R.A. No. 6957, as amended by R.A. No. 7718 (BOT Law). The DOTC/MIAA then invited the public for submission of competitive and comparative proposals to the unsolicited proposal of AEDC. On September 20, 1996 a consortium composed of the People’s Air Cargo and Warehousing Co., Inc. (Paircargo), Phil. Air and Grounds Services, Inc. (PAGS) and Security Bank Corp. (Security Bank) (collectively, Paircargo Consortium), submitted their competitive proposal to the Prequalification Bids and Awards Committee (PBAC).

After finding that the Paircargo Consortium submitted a bid superior to the unsolicited proposal of AEDC and after failure by AEDC to match the said bid, the DOTC issued the notice of award for the NAIA IPT III project to the Paircargo Consortium, which later organized into PIATCO. Hence, on July 12, 1997, the Government, through then DOTC Secretary Arturo T. Enrile, and PIATCO, through its President, Henry T. Go, signed the “Concession Agreement for the Build-Operate-and-Transfer Arrangement of the Ninoy Aquino International Airport Passenger Terminal III” (1997 Concession Agreement). On November 26, 1998, the 1997 Concession Agreement was superseded by the Amended and Restated Concession Agreement (ARCA) containing certain revisions and modifications from the original contract. A series of supplemental agreements was also entered

148 *Id.*



into by the Government and PIATCO. The First Supplement was signed on August 27, 1999, the Second Supplement on September 4, 2000, and the Third Supplement on June 22, 2001 (collectively, Supplements) (the 1997 Concession Agreement, ARCA and the Supplements collectively referred to as the PIATCO Contracts).

In a decision dated May 5, 2003, the Supreme Court declared the 1997 Concession Agreement, the ARCA and the Supplements null and void. On January 21, 2004, the Supreme Court ruled with finality on the motions for reconsiderations filed.

14. There can be no substantial or material change to the parameters of the project, including the essential terms and conditions of the contract bidden upon, after the contract award. If there were changes and the contracts end up unfavorable to government, the public bidding becomes a mockery and the modified contracts must be struck down.¹⁴⁹
15. The removal of ground handling fees, airline office rentals and portorage fees from the category of “Public Utility Revenues” under the draft Concession Agreement and its re-classification to “Non-Public Utility Revenues” under the 1997 Concession Agreement is significant and has far reaching consequence. The plain purpose in re-classifying ground handling fees, airline office rentals and portorage fees as non-public utility fees is to remove them from regulation by the MIAA. In excluding these fees from government regulation, the danger to public interest cannot be downplayed. Fairly read, it is PIATCO that wields the power to determine the judiciousness of the said fees and charges. In the draft Concession Agreement the power was expressly lodged with the MIAA and any adjustment can only be done once every two years. The changes are not insignificant specks as interpreted by PIATCO.¹⁵⁰
16. Under the draft Concession Agreement, PIATCO may impose fees and charges other than those fees and charges previously imposed or collected at the Ninoy Aquino International Airport Passenger Terminal I, subject to the written approval of MIAA. The draft Concession Agreement provides that MIAA reserves the right to regulate these new fees and charges if, in its judgment, the users of the airport shall be deprived of a free option for the services they cover. In contrast, under the 1997 Concession Agreement, the MIAA merely retained the right to approve any imposition of new fees and charges which were not previously collected at the Ninoy Aquino International Airport Passenger Terminal I. The agreement did not contain an equivalent provision allowing MIAA to reserve the right to regulate the adjustments of these new fees and charges. PIATCO justifies the amendment by arguing that MIAA can establish terms before approval of new fees and charges, inclusive of the mode for their adjustment. The Supreme Court stated that there would have been no need for an amendment if there were no change in the power to regulate on the part of MIAA. The deletion of MIAA’s reservation of its right to regulate the price adjustments of new fees and charges can have no other purpose but to dilute the extent of MIAA’s regulation in the collection of these fees. Again, the amendment diminished the authority of MIAA to protect the public interest in case of abuse by PIATCO.¹⁵¹

149 Agan v. PIATCO (2004).

150 *Id.*

151 *Id.*



17. The Supreme Court found that in case of PIATCO's default, the government will assume PIATCO's Attendant Liabilities as defined in the 1997 Concession Agreement. This obligation is not found in the draft Concession Agreement and the change runs roughshod to the spirit and policy of the BOT Law which was crafted precisely to prevent government from incurring financial risk.¹⁵²
18. Where the contracts made a mockery of the bidding process, the same could not be upheld and must be annulled in their entirety for violating law and public policy. As demonstrated, the contracts were substantially amended after their award to the successful bidder on terms more beneficial to PIATCO and prejudicial to public interest. If this flawed process would be allowed, public bidding will cease to be competitive and worse, government would not be favored with the best bid. Bidders will no longer bid on the basis of the prescribed terms and conditions in the bid documents but will formulate their bid in anticipation of the execution of a future contract containing new and better terms and conditions that were not previously available at the time of the bidding. Such a public bidding will not inure to the public good. The resulting contracts cannot be given half a life but must be struck down as totally lawless.¹⁵³
19. The mere inclusion of a direct government guarantee in an unsolicited proposal is fatal to the proposal. There is more reason to invalidate a contract if a direct government guarantee provision is inserted later in the contract via a backdoor amendment. Such an amendment constitutes a crass circumvention of the BOT Law and renders the entire contract void.¹⁵⁴
20. It is settled that public interest on the occasion of a national emergency is the primary consideration when the government decides to temporarily take over or direct the operation of a public utility or a business affected with public interest. The nature and extent of the emergency is the measure of the duration of the takeover as well as the terms thereof. It is the State that prescribes such reasonable terms which will guide the implementation of the temporary takeover as dictated by the exigencies of the time. This power of the State cannot be negated by any party nor should its exercise be a source of obligation for the State. Section 5.10(c), Article V of the ARCA which provided that PIATCO "shall be entitled to reasonable compensation for the duration of the temporary takeover by GRP, which compensation shall take into account the reasonable cost for the use of the Terminal and/ or Terminal Complex." Such provision clearly obligates the government, in the exercise of its police power, to compensate PIATCO and this obligation is offensive to the Constitution. Police power cannot be diminished, let alone defeated by any contract for its paramount consideration is public welfare and interest.¹⁵⁵

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*



SEC. 10. Section 8 of the same Act is hereby amended to read as follows:

“SEC. 8. *Regulatory Boards.* - The Toll Regulatory Board which was created by Presidential Decree No. 1112 is hereby attached to the Department of Public Works and Highways with the Secretary of Public Works and Highways as Chairman.”

Notes:

1. In recognition of the desirability of attracting private sector investment in government infrastructure projects, Presidential Decree (P.D.) No. 1112 authorized the collection of toll fees for the use of certain public improvements to allow the private sector a reasonable rate of return on its investments. The decree created the Toll Regulatory Board (TRB) composed of the Deputy Director-General for Program and Projects of the National Economic and Development Authority (NEDA) as Chairman, and the Undersecretary of Public Highways and the Undersecretary of Finance as Members.
2. The TRB was vested, among others, with the power and authority to enter into contracts on behalf of the Republic of the Philippines with persons, natural or juridical, for the construction, operation and maintenance of toll facilities; to grant authority to operate a toll facility; to issue therefor the necessary Toll Operation Certificate; and to fix initial toll rates, and, from time to time, adjust the same after due notice and hearing.¹⁵⁶
3. The TRB was attached to the Department of Public Works and Highways by virtue of Republic Act No. 6957, which provided:

Sec. 8. Toll Regulatory Board.– The Toll Regulatory Board is hereby attached to the Department of Public Works and Highways with the Secretary of Public Works and Highways as Chairman.
4. The amended section merely clarifies that the regulatory body referred to therein is the TRB created under P.D. No. 1112.

156 See also Francisco v. TRB (2010).



SEC. 11. Section 9 of the same Act is hereby amended to read as follows:

“SEC. 9. *Project Supervision.* - Every infrastructure project undertaken under the provisions of this Act shall be in accordance with the plans, specifications, standards, and costs approved by the concerned government agency and shall be under the supervision of the said agency or local government unit in the case of local projects.”¹⁵⁷

Notes:

1. There is no substantial amendment to the section other than to clarify that the concerned government agency shall have general supervision of infrastructure projects, as opposed to the more limited scope of “technical supervision” as stated in R.A. No. 6957.
2. The term “Project Supervision” now encompasses a broader range of activities involving the BOT project, including its management, and not just construction, operation, and maintenance as mentioned in R.A. 6957.¹⁵⁸
3. The amendment also emphasizes that that the concerned local government unit shall exercise supervision over local projects.
4. The old provision stated:

Sec. 9. Project Supervision. – Every infrastructure project undertaken under the provisions of this Act shall be constructed, operated, and maintained by the contractor concerned in accordance with the plans, specifications, standards, and costs approved by the concerned government infrastructure agency and under the technical supervision of the said agency.

157 *Bicameral Conference Committee on the Disagreeing Provisions on S.B. No. 1586 and H.B. No. 10943, 11-4, pp. 2-3 (23 March 1994).*

CONGRESSMAN PAYUMO. Mr. Chairman, in lieu of that, we are proposing this paragraph which is different from what was pointed out. In lieu of what we have just deleted--all other regulatory bodies up to by law. The paragraph which was accepted in the last meeting we had to clarify the role of the regulatory body is as follows: “All projects undertaken pursuant to this Act shall be implemented by the concerned implementing agencies or LGU as provided in this Act, provided that if the operation of the infrastructure facility falls under the supervision of a regulatory body, the implementing agency or LGU concerned shall after the construction of the facility turn over the supervision or operation, maintenance and management of the facility with the appropriate regulatory body.” This was accepted in the last meeting. It does not appear in our, nawala nga eh.

SENATOR OSMENA. The regulatory body will not be operating--are you saying the Marina will be operating a shipping copper?

CONGRESSMAN PAYUMO. No, its provision, the supervision of the operation, maintenance and management of the facility.

158 *Id.*



SEC. 12. A new section to be numbered as Section 10 is hereby added to read as follows:

“SEC. 10. *Investment Incentives.* - Among other incentives, projects in excess of One billion pesos [1,000,000,000] shall be entitled to incentives as provided by the Omnibus Investments Code, upon registration with the Board of Investments.”¹⁵⁹

159 *Bicameral Conference Committee on Public Works (21 March 1994).*

SENATOR MACAPAGAL: So BOT projects with a project cost of P1 billion and above shall be eligible for fiscal incentives as provided for by the Omnibus Investment Code.

REP. PAYUMO: Okay. Kasi right now, the investment incentives code might not have limited priority areas.

SEN. MACEDA: Right.

THE CHAIRMAN (REP. ORTEGA): So, pano natin ipapasok ngayon?

REP. DIAZ: Yon sa tax exemptions, ilagay na lang natin, Fiscal Incentives. BOT projects in excess of P1 billion shall be eligible for fiscal incentives as provided by the Omnibus Investments Code. Amended ba yon, wala pa?

SENATOR MACAPAGAL: Wala pa.

THE CHAIRMAN (REP. ORTEGA): Okay na yan.

REP. DIAZ: No incentives pa.

SENATOR MACAPAGAL: We have BOI already.

x x x

REP. DIAZ: But we have to qualify all the incentives they are to register. So, if I were a B-O-T Operator I have to register.

SENATOR MACAPAGAL: By its so, you'll be automatically eligible to register.

REP. PAYUMO: So here they just register and they automatically get exempted.

SEN. MACAPAGAL. Oo. Shall be eh.

See also Record of the Senate, 19 April 1994:

SENATOR TANADA: Now, on the new addition relating to investment incentives, under the new Section 12, it is provided that: “Among other incentives, projects in excess of one billion pesos shall be entitled to incentives as provided by the Omnibus Investments Code upon registration with the Board of Investments.”

My question, Mr. President, is: What had been the basis for fixing the amount at “in excess of one billion pesos”?

SENATOR MACAPAGAL: Mr. President, under the policy thrust of the present Administration, we are supposed to be phasing out incentives. We are not supposed to be passing legislation that provides for additional incentives. In fact, in the Senate version, we did not provide this because we have been trying to hew closely to that directive that we should not legislate incentives.

However, the House version contained incentives. Since they have pushed for this, as a matter of policy, they said that because the incentive scheme is provided for under the BOI, let them qualify as BOI registered firms rather than legislating the incentives.

Secondly, in order to limit the provision of incentives, therefore, as a further compromise with the House version which wanted to have incentives--in fact, it was the House which agreed after we pointed out the thrust against new exemptions--that perhaps it would be more prudent and more in keeping with our trying to trim the budgetary deficit that only large projects should be entitled to these incentives.



RULE 13 - INVESTMENT INCENTIVES AND GOVERNMENT UNDERTAKINGS

SECTION 13.1 - SOURCES OF FINANCING

In the Construction of projects authorized under the Act and these Revised IRR, the Project Proponent may obtain the required financing for the Construction of the project from foreign and/or domestic sources.

SECTION 13.2 - INVESTMENT INCENTIVES

The following Investment Incentives will be made available to Project Proponents:

a. Projects undertaken through Contractual Arrangements authorized under these Revised IRR costing more than PhP 1.0 billion shall, upon registration with the Board of Investments (BOI), be entitled to incentives as provided for under the Omnibus Investment Code.

b. Projects undertaken through Contractual Arrangements authorized under these Revised IRR costing PhP 1.0 billion or less may, upon registration with BOI, avail of incentives provided for under the Omnibus Investment Code subject to inclusion of the project activity or sector in the current Investment Priorities Plan (IPP) of BOI.

c. Projects undertaken through Contractual Arrangements authorized under these Revised IRR shall also be entitled to other incentives, as provided under existing laws, such as, but not limited to incentives under P.D. 535 (1974), otherwise known as the "Tourism Incentives Program of 1974," and R.A. 7156, otherwise known as the "Mini-Hydroelectric Power Incentives Act".

d. LGUs may provide additional tax incentives, exemptions, or reliefs, subject to the provisions of the Local Government Code (LGC) of 1991 and other pertinent laws.

SENATOR TANADA: Mr. President, what would now be these incentives that would be given to these project proponents engaged in projects in excess of P1 billion? Since it states here "among other incentives", they would also be entitled to incentives as provided by the Omnibus Investments Code.

May we just be clarified on what would all these incentives be that will be given to the project proponent?

At this juncture, the Senate President relinquished the Chair to Senator Agapito A. Aquino.

SENATOR MACAPAGAL: Mr. President, first, let us begin with incentives as provided by the Omnibus Investments Code. The incentives that are provided by the BOI are mainly the tax and duty-free importation of capital equipment and, in some cases, income tax holidays. But the most commonly enjoyed incentives are the tax and duty-free importation of capital equipment or tax credits for the purchase of domestic capital equipment.

As far as the other incentives are concerned, the debates on the Floor very clearly indicate that these other incentives include the minimal rules and regulations which include the limited government guarantees on force majeure, and the right of way. These are the incentives that are understood by the layman in a more general sense, and they have been enumerated on the Floor debates.



SECTION 13.3 - GOVERNMENT UNDERTAKINGS

Subject to existing laws, policies, rules and regulations, the Government may provide any form of direct or indirect support or contribution, such as, but not limited, to the following, subject to the conditions for Unsolicited Proposals as specified under Section 10.1 hereof:

a. Cost Sharing - This shall refer to the Agency/LGU concerned bearing a portion of capital expenses associated with the establishment of an infrastructure development facility, such as, the provision of access infrastructure, right-of-way, transfer of ownership over, or usufruct, or possession of land, building or any other real or personal property for direct use in the project and/or any partial financing of the project, or components thereof, Provided, that such shall not exceed fifty percent (50%) of the Project Cost, and the balance to be provided by the Project Proponent. Such government share may be financed from direct government appropriations and/or from Official Development Assistance (ODA) of foreign government or institutions.

b. Credit Enhancements - This shall refer to direct and indirect support to a development facility by the Project Proponent and/or Agency/LGU concerned, the provision of which is contingent upon the occurrence of certain events and/or risks, as stipulated in the contract. Credit enhancements are allocated to the party that is best able to manage and assume the consequences of the risk involved. Credit enhancements may include, but are not limited to, government guarantees on the performance of the obligation of the Agency/LGU under its contract with the Project Proponent, subject to existing laws on indirect guarantees. Indirect Guarantees shall refer to an agreement whereby the Government or any of its Agencies/LGUs assumes full or partial responsibility for or assists in maintaining the financial standing of the Project Proponent or project company in order that the Project Proponent/company avoids defaulting on the Project Loans, subject to fulfillment of the Project Proponent/company of its undertakings and obligations under the project agreement.

c. Direct Government Subsidy - This shall refer to an agreement whereby the Government, or any of its Agencies/LGUs will: (a) defray, pay for or shoulder a portion of the Project Cost or the expenses and costs in operating or maintaining the project; (b) condone or postpone any payments due from the Project Proponent; (c) contribute any property or assets to the project; (d) in the case of LGUs, waive or grant special rates on real property taxes on the project during the term of the contractual arrangement; and/or (e) waive charges or fees relative to business permits or licenses that are to be obtained for the Construction of the project, all without receiving payment or value from the Project Proponent and/or Facility operator for such payment, contribution or support.

d. Direct Government Equity - This shall refer to the subscription by the Government or any of its agencies or Local Government Units of shares of stock or other securities convertible to shares of stock of the project company, whether such subscription will be paid by the money or assets.



e. Performance Undertaking - This shall refer to an undertaking of a department, bureau, office, commission, authority, agency, GOCC, or LGU in assuming responsibility for the performance of the Agency's/LGU's obligations under the contractual arrangement including the payment of monetary obligations, in case of default. These undertakings may be subject to payment of risk premium to the Government or LGU, or any other authorized agency.

f. Legal Assistance - This shall refer to the extension of representation by government lawyers to a Project Proponent but only in cases, hearings, or inquiries where the Agency/LGU and Project Proponent are party-defendants/respondents therein including the adoption by such government lawyers of positions and strategies consistent with upholding the validity of the approved contractual arrangement.

g. Security Assistance - This shall refer to the deployment of government security forces, either from the Philippine National Police (PNP) or the Armed Forces of the Philippines (AFP) in the vicinity of the project site to provide security during the implementation of the project up to completion.

The Agency/LGU may offer any one or more Government Undertakings relative to a project, which shall be submitted to the Approving Body for the purposes of obtaining approval for the project and the contract; provided, that the grant of such Government Undertaking has been pre-cleared in principle, in writing, by the department, bureau, office, commission, authority, agency, GOCC, or LGU that will grant the same.

Notes:

1. The Amended BOT Law provides competitive fiscal and non-fiscal incentives and institutionalizes government support of BOT projects through a host of government undertakings that allow the government to share the cost and risk of these projects.
2. The incentives provided in the law are mainly patterned after the general incentives scheme of Executive Order (E.O.) No. 226,¹⁶⁰ otherwise known as the Omnibus Investments Code (OIC), as amended. Projects costing more than P1 Billion shall, upon registration with the BOI, be entitled to the following incentives:

Fiscal incentives

- a. **Income Tax Holiday (ITH).** – Domestic and foreign businesses in the Philippines incur a company tax rate of 35% on taxable income. BOI-registered enterprises shall be exempt from the payment of income taxes reckoned from the scheduled start of commercial operations as follows:

160 (1987).



- i. New projects with a pioneer¹⁶¹ status for six (6) years
- ii. New projects with a non-pioneer¹⁶² status for four (4) years
- iii. Expansion projects for three (3) years
- iv. New or expansion projects in less developed areas (LDAs) for six (6) years regardless of status
- v. Modernization projects for three (3) years.

As general rule, ITH under an expansion or modernization project, is limited to the resultant incremental sales revenue/volume.

Registered enterprises may extend their ITH in each of the following instances: (i) the utilization of indigenous raw materials at rates set by the BOI; (ii) the project meets the prescribed ratio of capital equipment to employment; (iii) the net foreign exchange savings/earnings average at least US\$500,000.00 annually during the first three (3) years of operation. However, in no case shall a registered pioneer enterprise avail of an ITH for a period exceeding eight (8) years.

- b. **Duty free importation of capital equipment, spare parts, and accessories.** – E.O. No. 528 reinstated the exemption from import duties on capital equipment, spare parts and accessories during its effectivity or until 16 June 2011.¹⁶³ BOI-registered enterprises are imposed zero (0%) duty on any importation of capital equipment, spare parts and accessories under Chapters 40, 59, 68, 69, 70, 73, 76, 82-85, 87, 90, 91 and 96 of the Tariff and Customs Code of the Philippines, as amended, provided that the items to be imported are not manufactured domestically in sufficient quantity, of comparable quality and at a reasonable price.
- c. **Exemption from wharfage dues and export tax, duty, impost and fees.** – Exports of non-traditional export products are exempt from wharfage dues and any export tax, impost and fees.

161 *Id.* at art. 17.

Pioneer enterprise shall mean a registered enterprise (1) engaged in the manufacture, processing or production, and not merely in the assembly or packaging of goods, products, commodities or raw materials that have not been or are not being produced in the Philippines on a commercial scale of (2) which uses a design, formula, scheme, method, process or system of production or transformation of any element, substance or raw materials into another raw material or finished goods which is new and untried in the Philippines or (3) engaged in the pursuit of agricultural, forestry and mining activities and/or services including the industrial aspects of food processing whenever appropriate, pre-determined by the Board, in consultation with the appropriate Department, to be feasible and highly essential to the attainment of the national goal in relation to a declared specific national food and agricultural program for self sufficiency and other social benefits of the project or (4) which produces non-conventional fuels or manufactures equipment which utilize non-conventional sources of energy or uses or converts to coal or other non-conventional fuels or sources of energy in its production, manufacturing or processing operations: *Provided*, That the final product in any of the foregoing instances, involves or will involve substantial use and processing of domestic raw materials, whenever available; taking into account the risks and magnitude of investment; *Provided, further*, That the foregoing definitions shall not in any way limit the rights and incentives granted to less-developed-area enterprises provided under Title V, Book 1 hereof.

162 *Id.* at art. 18.

Non-pioneer enterprise shall include all registered producer enterprises other than pioneer enterprises.

163 E.O. No. 528, entitled *Reducing The Rates Of Duty On Capital Equipment, Spare Parts And Accessories Imported By The Board Of Investments (BOI) Registered New And Expanding Enterprises*, (12 May 2006) (provides that the availment of the benefits under the order shall be for a period of five (5) years from its effectivity or until the enactment of a bill amending the OIC).



- d. **Additional deductions from taxable income.** –
 - i. **Additional deduction for labor expense.** – For the first five (5) years from registration, a registered enterprise may avail of an additional deduction from the taxable income equivalent to 50% of the wages of additional skilled and unskilled workers in the direct labor force if the project meets the prescribed ratio for capital equipment to employment set by the BOI. This additional deduction shall be doubled if the activity is located in an LDA.
 - ii. **Additional deduction for necessary and major infrastructure works.**

Non-Fiscal Incentives

- a. **Employment of foreign nationals.** – Foreign nationals may be employed in supervisory, technical or advisory positions within five (5) years from a project's registration. Positions of president, treasurer, and general manager or their equivalent may be retained by foreign nationals beyond five (5) years for registered enterprises majority of the capital stock of which is owned by foreign investors. The privilege is extended to the spouse and unmarried children under 21 years of age.
 - b. **Simplification of customs procedures.** – Simplification of customs procedures for the importation of equipment, spare parts, raw materials, and supplies and exports of processed products of registered enterprises in the operations of their bonded warehouses.
 - c. **Unrestricted use of consigned equipment.** – No restrictions on the use of consigned equipment provided a re-export bond is posted and that the consigned equipment is for the exclusive use of the registered enterprise.
 - d. **Access to Bonded Manufacturing/ Trading Warehouse System** – Registered export-oriented enterprise shall have access to the utilization of the bonded warehousing system in all areas.
3. Projects costing P1 Billion or less may also be entitled to the foregoing incentives subject to registration with the BOI and its inclusion in the current Investment Priorities Plan.¹⁶⁴
 4. Incentives provided under P.D. No. 535 (Tourism Incentives Program of 1974) and R.A. No. 7156 (Mini-Hydroelectric Power Incentives Act) may also be availed of. In addition, LGUs may provide additional tax incentives, exemptions or reliefs, subject to the provisions of R.A. No. 7160 (Local Government Code of 1991) and other pertinent laws.
 5. Subject to existing laws, policies, rules and regulations, the Government or any of its Implementing Agencies/ LGUs may also provide any form of direct or indirect support or contribution, such as, but not limited to the following, and subject to the conditions for unsolicited proposals:

164 The IPP is the yearly overall plan prepared by the BOI in consultation with appropriate government agencies and the private sector listing the economic activities that shall be granted incentives under the OIC.



- a. **Cost sharing** – Projects may be partially financed from direct government appropriations through the General Appropriations Act (GAA), and/ or official development assistance (ODA) funds, provided that financing from either GAA or ODA should not exceed fifty percent (50%) of the project cost.
- b. **Credit enhancements** – Direct or indirect support provided by government and third parties, the effect of which (i) permits proportionally more debt in the financing plan; and (ii) improves the dependability and adequacy of the revenue stream by reducing many of the major risks involved in building or operating a facility. By convention, a credit enhancement for any particular risk is allocated in the security package to that party, including the government, that is best able to manage the risk involved, agrees to assume the recourse responsibility and possesses adequate credit worthiness to accept the risk involved.¹⁶⁵
- c. **Direct government subsidy** – the Government or any of its implementing agencies/LGUs pays, supports, or contributes to the project cost and expenses.
- d. **Direct government equity** – the Government or any of its implementing agencies/LGUs may subscribe to and acquire shares of stock or other securities convertible to shares of stock of the project company.
- e. **Performance undertaking** - assumption of responsibility for the performance of contractual obligations in case of default.
- f. **Legal and/ or security assistance** - the Government provides legal representation and security during the implementation of the project.

165 Commission on Audit Resolution No. 99-015 (BOT Audit Guide) (1999).



SEC. 13. Section 10 of the same Act is hereby renumbered as Section 11 to read as follows:

“SEC. 11. *Implementing Rules and Regulations.* - A committee composed of one (1) representative each from the Department of Public Works and Highways, the Department of Transportation and Communications, the Department of Energy, the Department of Environment and Natural Resources, the Department of Agriculture, the Department of Trade and Industry, the Department of Finance, the Department of the Interior and Local Government, the National Economic and Development Authority, the Coordinating Council of the Philippine Assistance Program, and other concerned government agencies shall within sixty [60] days from the effectivity of this Act, formulate and prescribe, after public hearing and publication as required by law, the implementing rules and regulations including, among others, the criteria and guidelines for evaluation of bid proposals, list of financial incentives and arrangements that the Government may provide for the project, in order to carry out the provisions of this Act in the most expeditious manner.

“The Chairman of this committee shall be appointed by the President of the Philippines from its members.

“From time to time the Committee may conduct, formulate and prescribe after due public hearing and publication, amendments to the implementing rules and regulations, consistent with the provisions of this Act.”

RULE 15 - FINAL PROVISIONS

SECTION 15.1 - IRR COMMITTEE

The Committee constituted pursuant to Section 11 of R.A. 6957, as amended by R.A. 7718, may be reconvened by its Chairman at his instance, or upon the recommendation of any members of the Committee, formulate and prescribe amendments to these Revised IRR, consistent with the letter and spirit of the Act.

No amendments to these Revised IRR may be adopted and prescribed by the Committee without due public consultation/hearing and publication.

SECTION 15.2 - EFFECTIVITY OF THESE REVISED IRR OR AMENDMENTS THERETO

Amendments to these Revised IRR or amendments thereto shall become effective fifteen (15) days after its complete publication in at least one (1) newspaper of general circulation.



SECTION 15.3 - TRANSITORY PROVISION

For projects endorsed by the Agency/LGU to the Approving Body before the effectivity of the amendments to these Revised IRR, the previous IRR shall govern.

SECTION 15.4 - SEPARABILITY CLAUSE

In the event any of the provisions of these Revised IRR is declared void or unenforceable by final judgment of a court of competent jurisdiction, the other provisions unaffected thereby shall remain in full force and effect.

Notes:

1. The Revised IRR was published in the Philippine Daily Inquirer on 29 March 2006, and took effect fifteen days thereafter on 13 April 2006.

SEC. 14. A new section to be numbered as Section 12 is hereby added to read as follows:

“SEC. 12. Coordination and Monitoring of Projects. - The Coordinating Council of the Philippine Assistance Program [CCPAP] shall be responsible for the coordination and monitoring of projects implemented under this Act.

“Regional development councils and local government units shall periodically submit to CCPAP, information on the status of said projects.

“At the end of every calendar year, the CCPAP shall report to the President and to Congress on the progress of all projects implemented under this Act.”¹⁶⁶

166 *Id.* at pp. 49-50.

REP. DIAZ: May idadagdag lang ako diyan; because we split the function into two, 'yung monitoring. Would you want to go over this?

"Coordination and monitoring of projects implemented under this Act. The coordinating council of the PAP shall be responsible for the coordination of the _____ projects implemented under this act. The LGUs shall periodically submit to CCPAP information and status of said project at the end of every calendar year will report to the President and the Congress all projects implemented under this Act.

SEN. OSMENA: May ICC na tayo.

CONGRESSMAN DIAZ: ICC is approving, CCPAP will simply collect everything because ICC will not approve projects under this bill done by LGUs. The reason why I am proposing CCPAP because CCPAP is doing promotion, BOT promotion. So that in that body, under na rin iyong monitoring. So they also would be computerized. That is the practical reason.

MR. CHAIRMAN (CONGRESSMAN ORTEGA): Sila ang magpreprepare the reports to Congress.

CONGRESSMAN DIAZ: Yes.

MR. CHAIRMAN (CONGRESSMAN ORTEGA): On the status of the BOT projects in a periodical basis.

CONGRESSMAN DIAZ: If a foreign investor would want to know, ano pa ba ang puwedeng gawin, ano ang nagawa na, _____ this type of a project, they just go to this body.



RULE 14 - COORDINATION AND MONITORING OF PROJECTS

SECTION 14.1 - THE BOT CENTER

The BOT Center shall be responsible for the coordination and monitoring of projects implemented under Contractual Arrangements or schemes authorized under these Revised IRR. Project monitoring will be undertaken to ensure that the project complies with these Revised IRR, including the proponent's required environmental clearances from the DENR. For this purpose, concerned Agencies/LGUs shall periodically submit to the BOT Center information on the status of projects implemented by them. In addition, all concerned Agencies/LGUs shall submit to the BOT Center a copy of all Unsolicited Proposals that they receive and all other related documents. The BOT Center is also hereby mandated to guide the Agency/LGU in the preparation and development of the project.

At the end of every calendar year, BOT Center shall report to the ICC, President, and the Congress on the progress of all projects implemented under these Revised IRR.

SECTION 14.2 - TIMELINES

All timelines shall be contained in a flow chart herein attached as Annex A. The BOT Center shall monitor the compliance of the Agencies/LGUs with the timelines prescribed in these Revised IRR.

SECTION 14.3 - BOT UNITS

Each concerned Agency/LGU may create a BOT Unit headed by a senior official of the Agency/LGU and shall designate a senior official as BOT Project Development Officer (PDO), who shall be responsible for planning, overseeing, and monitoring projects of Agencies/LGUs authorized under the Act and these Revised IRR. The PDO shall closely coordinate with BOT Center.

SECTION 14.4 - INFORMING CONGRESS

A report regarding the salient features or a copy of each contract, involving a project entered into under the provisions of these Revised IRR, shall be submitted to Congress for its information.



Notes:

1. CCPAP was created by Administrative Order (A.O.) No. 105, series of 1989, to take the lead role in coordinating efforts to effectively mobilize and utilize international aid. It was placed under the Office of the President for the overall implementation of the Philippine Assistance Program. CCPAP played an active role in the promotion and facilitation of private sector participation in infrastructure development, with its Chairman designated as the Build Operate Transfer (BOT) Action Officer by virtue of Memorandum Order (MO) No. 166, series of 1993.
2. Republic Act No. 7718 institutionalized CCPAP's role in advancing the country's BOT Program, mandating it as the central body responsible for coordinating and monitoring projects implemented under the amended BOT Law. CCPAP was also mandated to guide government agencies and local government units in the preparation and development of BOT projects, and to report to the President and to Congress on the progress of all projects implemented under the amended BOT Law.
3. CCPAP was reorganized and converted to the Coordinating Council for Private Sector Participation (CCPSP), by virtue of A.O. No. 67, series of 1999, mandating CCPSP as the government agency responsible for facilitating, coordinating, and monitoring BOT and Private Sector Participation (PSP) projects. Administrative Order No. 67 was later amended by A.O. No. 103, series of 2000, designating the Chairman of the Presidential Committee on Flagship Programs and Projects as the ex-officio Chairman of CCPSP.
4. Executive Order No. 144 dated 2 November 2002 converted the CCPSP to the BOT Center, and the CCPSP Technical Secretariat to the Project Monitoring Office, and transferred its attachment from the Office of the President to the Department of Trade and Industry.
5. Citing the need to facilitate the coordination and monitoring of Public-Private Partnership (PPP) programs and projects by converging these functions to the National Economic and Development Agency (NEDA), which is mandated as the central planning agency for social and economic development and as oversight agency in the programming, implementation, monitoring and evaluation of the government's programs and projects, E.O. No. 8 dated 9 September 2010, renamed the BOT Center as the PPP Center and transferred it as an attached agency of the NEDA.
6. E.O. No. 8 constituted a working fund of Three Hundred Million Pesos (P300,000,000.00) for the conduct of feasibility studies and activities for selected PPP programs and activities, and mandated that the processing of all qualified solicited PPP proposals shall be completed within a period of six (6) months subject to existing laws, guidelines, rules and regulations.
7. The PPP Center, whose Executive Director shall be appointed by the President upon the recommendation of the Secretary of Socio-economic Planning, shall have the following powers and functions:

Sec. 2. Powers and Functions of the PPP Center— The PPP Center shall cover all the PPP programs and projects including all the variants or Arrangements under the BOT Law and Joint-Venture agreements, among others, and shall have the following powers and functions:



- a) Conduct project facilitation and assistance to the national implementing agencies, including government corporations, and Local Government Units (LGUs) in addressing impediments or bottlenecks in the implementation of PPP programs and projects;
- b) Provide advisory services, technical assistance, trainings and capacity development to agencies/LGUs in PPP project preparation and development;
- c) Recommend plans, policies and implementation guidelines related to PPP in consultation with appropriate oversight committees, implementing agencies, LGUs and the private sectors;
- d) Manage and administer a revolving fund to be known as the Project Development and Monitoring Facility for the preparation of business case, pre-feasibility and feasibility studies and tender documents of PPP programs and projects;
- e) Monitor and facilitate the implementation of the priority PPP Programs and Projects of the agencies/LGUs which shall be formulated by respective agencies/LGUs in coordination with the NEDA Secretariat;
- f) Establish and manage a central database system of PPP Programs and Projects;
- g) Recommend improvements to timelines in processing PPP programs and project proposals, and monitor compliance of all agencies/LGUs;
- h) Prepare reports on the implementation of the PPP programs and projects of the government for submission to the President at the end of each year; and
- i) Perform such other functions which may be critical in expediting and implementing effectively the PPP Programs and Projects of the Government.

8. The Annexes to the Revised IRR provide the following flowcharts prescribing timelines for BOT project implementation. The PPP Center shall monitor compliance to these timelines by implementing agencies/ LGUs.

SEC. 15. Section 11, 12 and 13 of the same Act are hereby renumbered as Sections 13, 14, and 15, respectively.

SEC. 16. *Repealing Clause.* - All laws or parts of any law inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SEC. 17. *Separability Clause.* - If any provision of this Act is held invalid, the other provisions not affected thereby shall continue in operation.

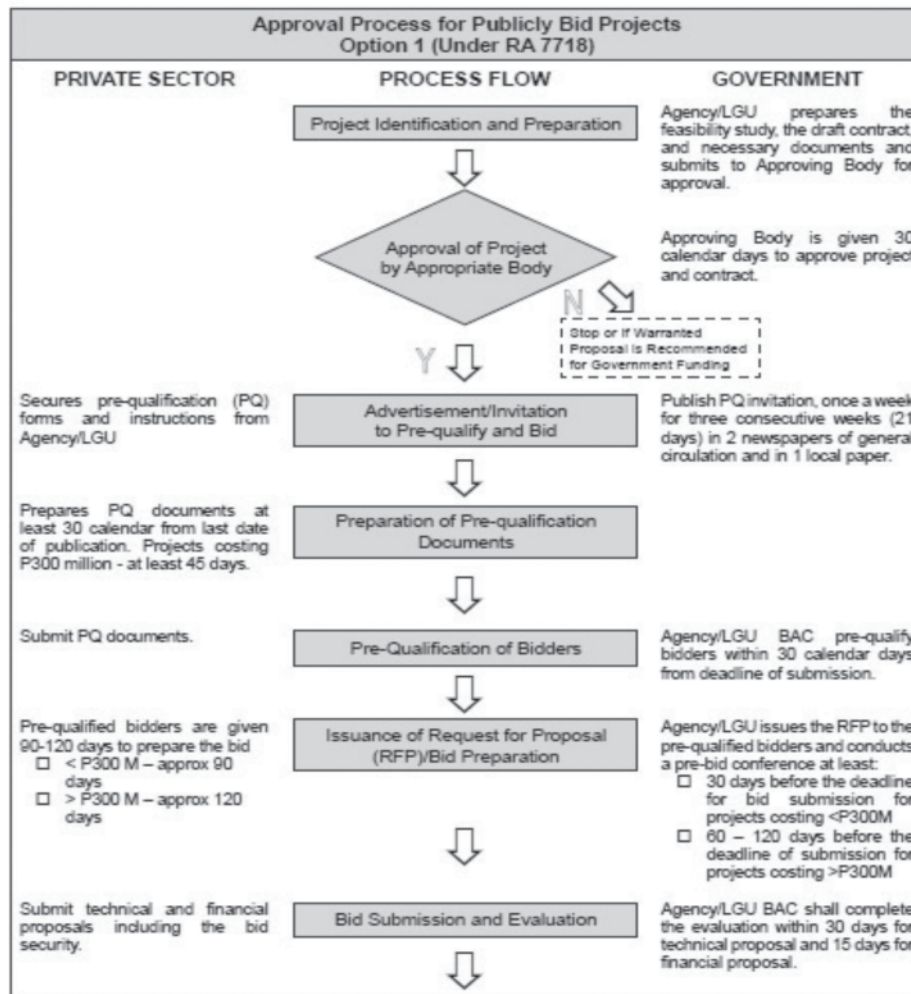
SEC. 18. *Effectivity Clause.* - This Act shall take effect fifteen [15] days after its publication in at least two (2) newspapers of general circulation.

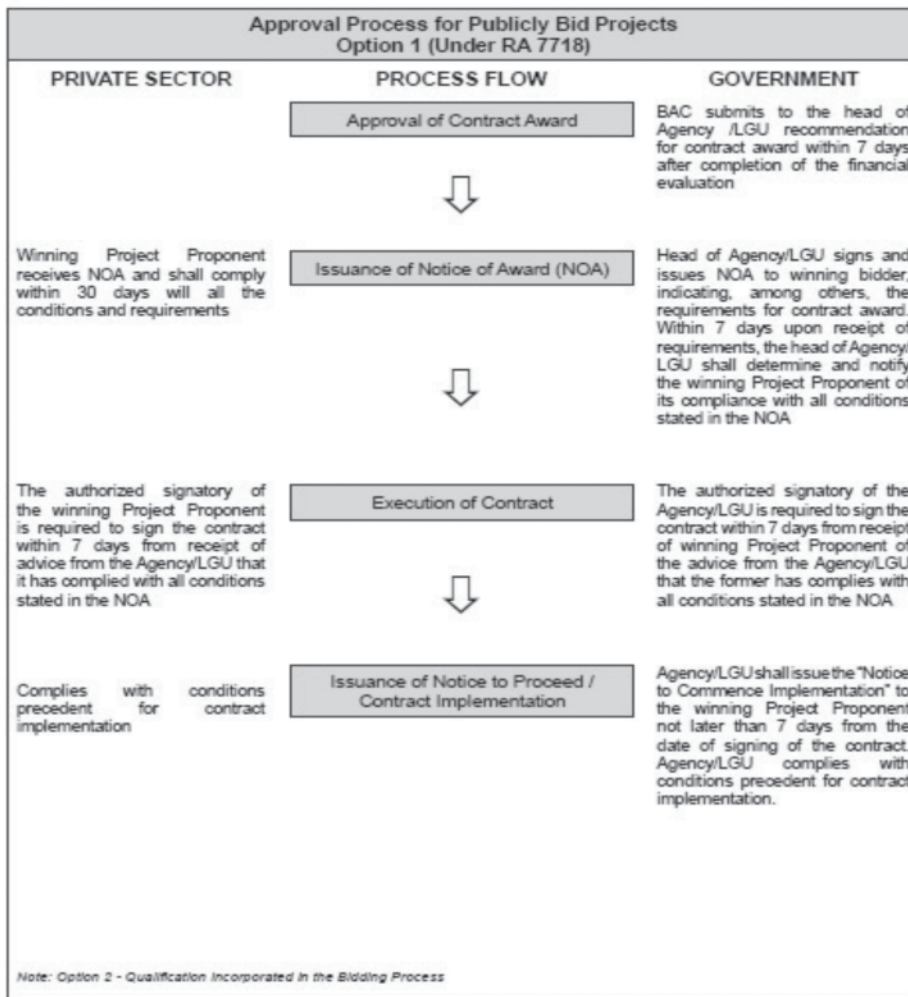
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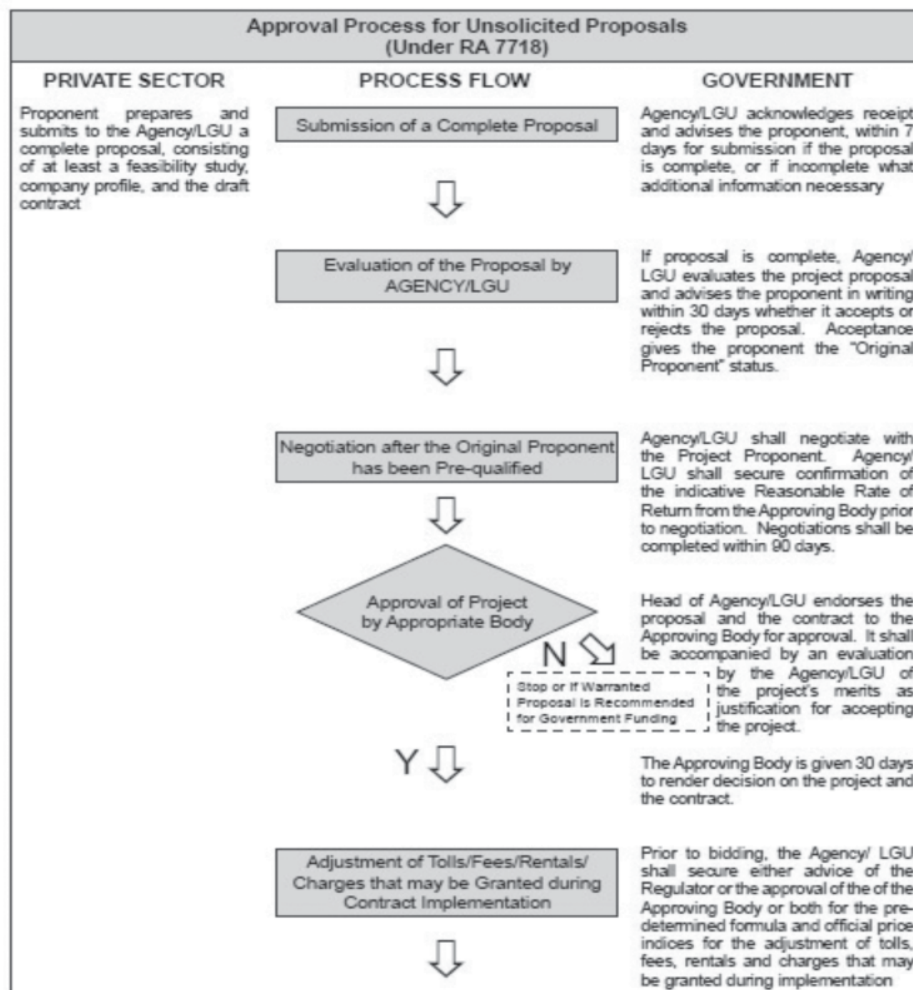
- 1. President Fidel V. Ramos signed R.A. 7718 into law on 5 May 1994. The law was published in two newspapers of general circulation on 12 May 1994, and took effect 15 days thereafter or on 28 May 1994.¹⁶⁷

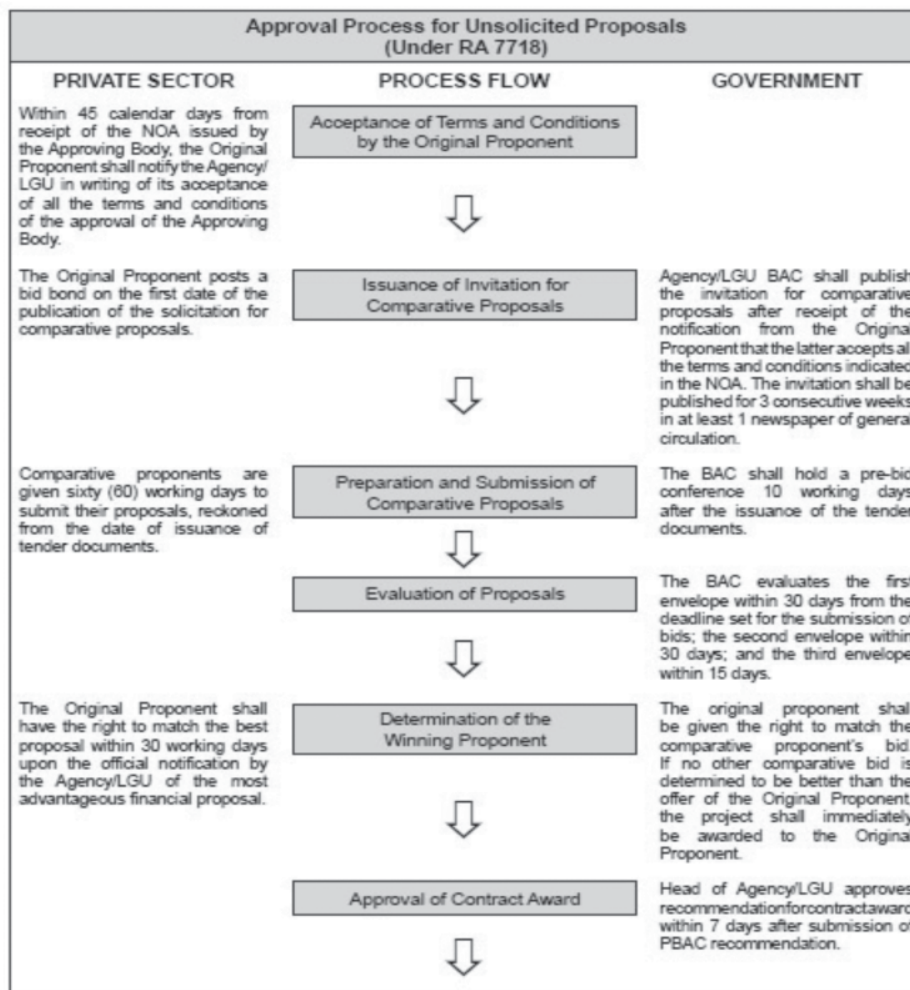
167 Tatad v. Garcia (1995).

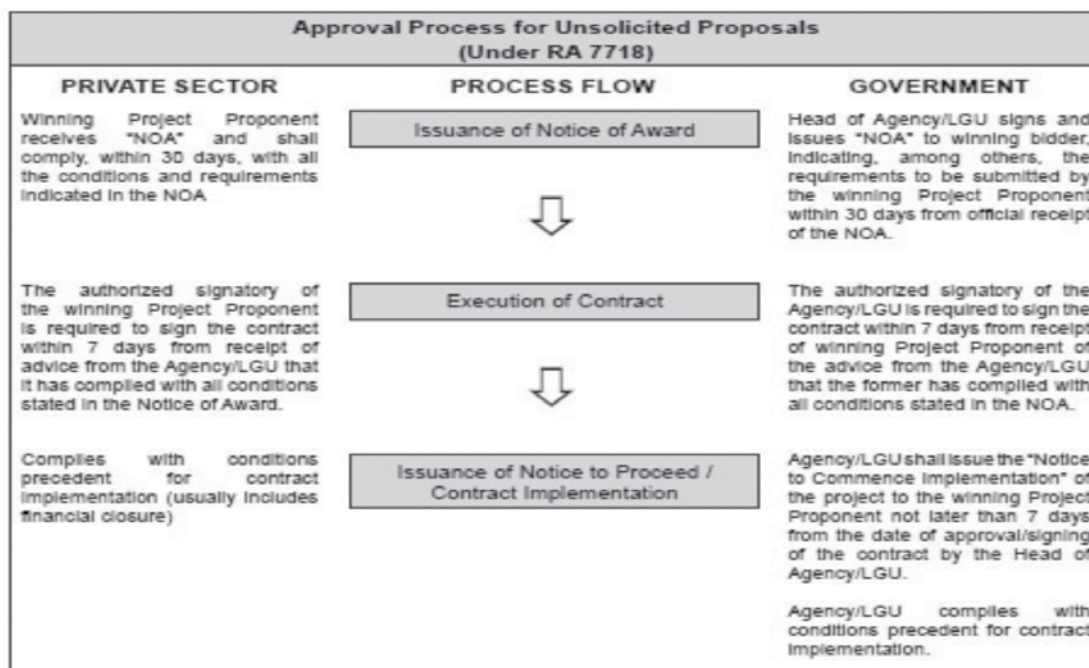












The Public Bidding Process Under R.A. 7718 (BOT Law) OPTION 1: Pre-qualification Undertaken Prior to Issuance of Request for Proposals		
PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
	PROJECT ID AND PREPARATION	Agency/LGU prepares the feasibility study (FS) and the contract including all necessary documents and submits to the Approving Body for approval.
	APPROVAL BY APPROVING BODY (ICC, NEDA BOARD, LOCAL SANGGUNIAN)	Approving Body is given thirty (30) calendar days to approve the project and the contract.
Secures pre-qualification (PQ) forms and instructions from the Agency/LGU	ADVERTISEMENT/INVITATION TO PRE-QUALIFY AND BID	Upon approval of the project and the contract, the Agency/LGUPBAC publishes PQ invitation, once a week for three (3) consecutive weeks (21 days), in two (2) newspapers of general circulation and in one (1) local paper. Said invitation shall also be posted continuously in the website of the Agency/LGU concerned, if available, during the stated period. For projects costing at least US\$ 10 million, the invitation may also be published in at least one (1) international publication. Likewise, Agency/LGU shall issue official notification of the same to project proponents registered with them.
Prepares PQ documents at least thirty (30) calendar days from last date of publication of the invitation. For projects costing at least PhP300 million, period of preparation is at least forty-five (45) calendar days from last date of publication of invitation.	PREPARATION OF PRE-QUALIFICATION (PQ) DOCUMENTS	
<p>Submit PQ documents.</p> <p>Disqualified bidders may within fifteen (15) working days from receipt of notice of disqualification, appeal to the Head of Agency for national projects, or in the case of local projects, to the Head of the Department of Interior and Local Government unit concerned or his authorized representative. A non-refundable appeal fee shall be filed amounting to no less than one-half of one percent (0.5%) of the Project Cost.</p>	PRE-QUALIFICATION OF BIDDERS	<p>Agency/LGU PBAC shall, within thirty (30) calendar days after the deadline for the submission of PQ documents, determine who among the prospective Project Proponents are "pre-qualified" and "disqualified". The PBAC shall inform pre-qualified and disqualified Project Proponents within seven (7) calendar days after approval thereof.</p> <p>In case of an appeal, the Head of Agency or DILG unit concerned shall act on the appeal within forty-five (45) working days from receipt of appeal and upon filing of a nonrefundable appeal fee.</p>



The Public Bidding Process Under R.A. 7718 (BOT Law) OPTION 1: Pre-qualification Undertaken Prior to Issuance of Request for Proposals		
PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
<p>Pre-qualified bidders are given about 90 to 120 days to prepare the bid.</p> <ul style="list-style-type: none"> • projects cost less than P300 M – approximately 90 days • projects cost above P300 M – approximately 120 days 	ISSUANCE OF REQUEST FOR PROPOSAL (RFP)/BID PREPARATION	<p>Agency/LGU issues the request for proposal/ tender documents to the pre-qualified bidders. Agency/LGU shall conduct a pre-bid conference at least:</p> <ul style="list-style-type: none"> a. thirty (30) calendar days before the deadline for bid submission, for projects costing less than PhP300 million; and b. sixty (60) to one hundred twenty (120) calendar days before the deadline for bid submission, for projects costing P300 million and above.
<p>Bidders submit their proposal in two envelopes:</p> <ol style="list-style-type: none"> 1. first envelope - the technical proposal, including the bid security; and 2. second envelope - the financial proposal. 	BID SUBMISSION AND EVALUATION	<p>Agency/LGU PBAC shall complete the evaluation of the technical proposal within thirty (30) calendar days from the date of opening of bids. The evaluation of the financial proposal shall be completed within fifteen (15) calendar days from the date the evaluation of the technical proposal shall have been completed.</p>
	APPROVAL OF CONTRACT AWARD	<p>PBAC submits to the Head of Agency/LGU recommendation for contract award within seven (7) calendar days after completion of the financial evaluation.</p> <p>Head of Agency/LGU approves recommendation for contract award within seven (7) calendar days after submission of PBAC recommendation.</p> <p>All unsuccessful bidders shall be informed in writing of the results of the bidding.</p>
<p>Winning Project Proponent receives "Notice of Award" and shall comply, within thirty (30) calendar days, with all the conditions and requirements indicated therein.</p>	ISSUANCE OF NOTICE OF AWARD	<p>Head of Agency/LGU signs and issues "Notice of Award" to winning bidder, indicating, among others, the requirements for contract award to be submitted by the winning Project Proponent.</p> <p>Within seven (7) calendar days upon receipt of requirements for award, the Head of Agency/ LGU shall determine and notify the winning Project Proponent of its compliance of all conditions stated in the Notice of Award.</p> <p>If deadline is not met, and unless otherwise extended, the Agency/LGU could confiscate bid security.</p>



The Public Bidding Process Under R.A. 7718 (BOT Law)		
OPTION 1: Pre-qualification Undertaken Prior to Issuance of Request for Proposals		
PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
The authorized signatory of the winning Project Proponent is required to sign the contract within seven (7)	EXECUTION/APPROVAL OF CONTRACT	<p>The authorized signatory of the Agency/LGU is required to sign the contract within seven (7) calendar days from receipt of winning Project Proponent of the advice from the Agency/LGU that the former has complied with all conditions stated in the Notice of Award.</p> <p>The contract shall be effective upon signing thereof by the Head of Agency/LGU and unless another date is stipulated therein.</p> <p>An original signed copy of the contract shall be submitted to the Approving Body within seven (7) calendar days after signing.</p>
Complies with conditions precedent for contract implementation (usually includes financial closure)	ISSUANCE OF NOTICE TO COMMENCE IMPLEMENTATION & CONTRACT IMPLEMENTATION	<p>Agency/LGU shall issue the "Notice to Commence Implementation" of the project to the winning Project Proponent not later than seven (7) calendar days from the date of approval/signing of the contract by the Head of Agency/LGU.</p> <p>Agency/LGU complies with conditions precedent for contract implementation.</p>

The Public Bidding Process Under R.A. 7718 (BOT Law)		
OPTION 2: Qualification Incorporated in the Bidding Process		
PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
	PROJECT ID AND PREPARATION	Agency/local government unit (LGU) prepares FS and the contract including all necessary documents and submits to the Approving Body for approval.
	APPROVAL BY APPROVING BODY (ICC, NEDA BOARD, LOCAL SANGGUNIAN(S))	Approving Body is given thirty (30) calendar days to approve the project and the contract.



The Public Bidding Process Under R.A. 7718 (BOT Law)
OPTION 2: Qualification Incorporated in the Bidding Process

PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
	ADVERTISEMENT/INVITATION TO PRE-QUALIFY AND BID	Upon approval of the project and the contract, the Agency/LGU PBAC publishes invitation to qualify and bid, once a week for three (3) consecutive weeks (21 days), in two (2) newspapers of general circulation and in one (1) local paper. Said invitation shall also be posted continuously in the website of the Agency/LGU concerned, if available, during the stated period. For projects costing at least US\$ 10 million, invitation may also be published in at least one (1) international publication. Likewise, Agency/LGU shall issue official notification of the same to Project Proponents registered with them.
<p>Secures qualification forms and tender documents.</p> <p>Bidders prepare their qualification documents and bid proposal in about 90 to 120 days.</p> <ul style="list-style-type: none"> • projects costing less than P300 M: approximately 90 days • projects costing above P300 M: approximately 120 days 	ISSUANCE OF REQUEST FOR PROPOSAL (RFP)/BID PREPARATION	<p>Agency/LGU issues the qualification forms and the request for proposal/tender documents to interested bidders.</p> <p>Agency/LGU shall conduct a pre-bid conference at least:</p> <ul style="list-style-type: none"> a. thirty (30) calendar days before the deadline for bid submission, for projects costing less than Php300 million; and b. sixty (60) to one hundred twenty (120) calendar days before the deadline for bid submission, for projects costing P30 million and above
<p>Bidders submit their proposal in three envelopes:</p> <ol style="list-style-type: none"> 1. first envelope - the qualification documents; 2. second envelope - the technical proposal, including the bid security; and 3. third envelope - the financial proposal. <p>Disqualified bidders may within fifteen (15) working days from receipt of notice of disqualification, appeal to the Head of Agency for national projects, or in the case of local projects, to the Head of the DILG unit concerned or his authorized representative. A non-refundable appeal fee shall be filed amounting to no less than one-half of one percent (0.5%) of the Project Cost.</p>	BID SUBMISSION AND EVALUATION	<p>Agency/LGU PBAC evaluates the qualification documents within fifteen (15) calendar days from the date of opening of the qualification documents. Bidders shall be informed whether they are qualified or disqualified, and for the latter, the reasons for disqualification. Only qualified bidders shall be allowed to participate in the bid evaluation.</p> <p>The technical proposal shall be evaluated within thirty (30) calendar days and the financial proposal within fifteen (15) calendar days.</p> <p>In case of an appeal, the Head of Agency or DILG unit concerned shall act on the appeal within forty-five (45) working days from receipt of appeal and upon filing of a non-refundable appeal fee.</p>



The Public Bidding Process Under R.A. 7718 (BOT Law)
OPTION 2: Qualification Incorporated in the Bidding Process

PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
	APPROVAL OF CONTRACT AWARD	<p>PBAC submits to the Head of Agency/LGU recommendation for contract award within seven (7) calendar days after completion of the financial evaluation.</p> <p>Head of Agency/LGU approves recommendation for contract award within seven (7) calendar days after submission of PBAC recommendation.</p> <p>All unsuccessful bidders shall be informed in writing of the results of the bidding.</p>
Winning Project Proponent receives "Notice of Award" and shall comply, within thirty (30) calendar days, with all the conditions and requirements indicated therein.	ISSUANCE OF NOTICE OF AWARD	<p>Head of Agency/LGU signs and issues "Notice of Award" to winning bidder, indicating, among others, the requirements for contract award to be submitted by the winning Project Proponent.</p> <p>Within seven (7) calendar days upon receipt of requirements for award, the Head of Agency/LGU shall determine and notify the winning Project Proponent of its compliance of all conditions stated in the Notice of Award.</p> <p>If deadline is not met, and unless otherwise extended, the Agency/LGU could confiscate bid security.</p>
The authorized signatory of the winning Project Proponent is required to sign the contract within seven (7) calendar days from receipt of advice from the Agency/LGU that it has complied with all conditions stated in the Notice of Award.	EXECUTION/APPROVAL OF CONTRACT	<p>The authorized signatory of the Agency/LGU is required to sign the contract within seven (7) calendar days from receipt of winning Project Proponent of the advice from the Agency/LGU that the former has complied with all conditions stated in the Notice of Award.</p> <p>The contract shall be effective upon signing thereof by the Head of Agency/LGU and unless another date is stipulated therein.</p> <p>An original signed copy of the contract shall be submitted to the Approving Body within seven (7) calendar days after signing.</p>
Complies with conditions precedent for contract implementation (usually includes financial closure)	ISSUANCE OF NOTICE TO COMMENCE IMPLEMENTATION & CONTRACT IMPLEMENTATION	<p>Agency/LGU shall issue the "Notice to Commence Implementation" of the project to the winning Project Proponent not later than seven (7) calendar days from the date of approval/signing of the contract by the Head of Agency/LGU.</p> <p>Agency/LGU complies with conditions precedent for contract implementation.</p>



Process for Unsolicited Proposals Under R.A. 7718 (BOT Law)		
PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
Proponent prepares and submits to the Agency/LGU a complete proposal, consisting of at least a feasibility study; company profile; and the draft contract.	SUBMISSION OF A COMPLETE PROPOSAL	Agency/LGU acknowledges receipt and advises the proponent, within seven (7) calendar days from submission, if proposal is complete, or if incomplete what additional information is necessary.
	EVALUATION OF THE PROPOSAL	<p>If proposal is complete, Agency/LGU evaluates the project proposal and advises the proponent in writing, within (30) calendar days, whether it accepts or rejects the proposal. Acceptance gives the proponent the "Original Proponent" status.</p> <p>The Agency/LGU shall inform the Approving Body of its decision to accept or to reject the unsolicited proposal. In case of acceptance, the Agency/LGU submits to the Approving Body all pertinent documentation.</p>
	NEGOTIATION WITH ORIGINAL PROPONENT	<p>Agency/LGU shall negotiate with the Project Proponent. The Agency/LGU shall secure confirmation of the indicative Reasonable Rate of Return from the Approving Body prior to negotiation.</p> <p>Negotiations shall be completed within ninety (90) calendar days from receipt by the Project Proponent of written notice from the Agency/LGU to commence negotiation. At the end of the ninety (90)-calendar day negotiation period, the Agency/LGU shall submit a report of the result of its negotiation with the Project Proponent to the Approving Body.</p>
	APPROVAL OF THE PROJECT PROPOSAL AND CONTRACT BY THE APPROVING BODY (ICC, NEDA BOARD OR LOCAL SANGGUNIAN)	<p>Head of Agency/LGU endorses the proposal and the contract to the Approving Body. It shall be accompanied by an evaluation by the Agency/LGU of the project's merits as justification for accepting the project.</p> <p>The Approving Body is given thirty (30) calendar days from receipt of the endorsement by the Agency/LGU to render a decision on the project and the contract. The Approving Body shall issue the Notice of Approval to the Project Proponent.</p>
	ADJUSTMENTS OF TOLLS/ FEES/RENTALS/CHARGES	Prior to bidding, the Agency/LGU shall secure either the advice of the Regulator or the approval of the Approving Body or both, as the case maybe, for the pre-determined formula and official price indices for the adjustment of tolls, fees, rentals and charges that may be granted during contract implementation.



Process for Unsolicited Proposals Under R.A. 7718 (BOT Law)		
PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
<p>Within forty-five (45) calendar days from receipt of the Notice of Approval issued by the Approving Body, the Original Proponent shall notify the Agency/LGU in writing of its acceptance of all the terms and conditions of the approval of the Approving Body.</p> <p>Failure by the Original Proponent to submit such acceptance in writing shall be deemed a rejection of the Agency/LGU of the unsolicited proposal.</p>	ACCEPTANCE OF TERMS AND CONDITIONS BY THE ORIGINAL PROPONENT	
<p>The Original Proponent posts a bid bond on the first date of the publication of the solicitation for comparative proposals.</p> <p>It re-formats and re-submits its proposal according to the requirements of the agreed TOR for the solicitation of comparative proposals.</p>	ISSUANCE OF INVITATION FOR COMPARATIVE PROPOSALS	<p>The Agency/LGU PBAC shall publish the invitation for comparative proposals after receipt of the notification from the Original Proponent that the latter accepts all the terms and conditions indicated in the Notice of Approval. The invitation shall be published for three (3) consecutive weeks in at least one (1) newspaper of general circulation. Said invitation shall also be posted continuously in the website of the Agency/LGU concerned, if available, during the stated period. For projects costing at least US\$ 10 million, the invitation may also be published at least once (1) in at least one (1) international publication.</p>
<p>Comparative proponents are given sixty (60) working days to submit their proposals, reckoned from the date of issuance of tender documents.</p> <p>Proposals shall be prepared and submitted in three envelopes:</p> <ol style="list-style-type: none"> 1. first envelope - the qualification documents; 2. second envelope - the technical proposal, including the bid security; and 3. third envelope - the financial proposal. 	PREPARATION AND SUBMISSION OF COMPARATIVE PROPOSALS	<p>The PBAC shall hold a pre-bid conference ten (10) working days after the issuance of the tender documents.</p>



Process for Unsolicited Proposals Under R.A. 7718 (BOT Law)		
PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
	EVALUATION OF PROPOSALS	<p>The PBAC evaluates the first envelope within thirty (30) calendar days from the deadline set for the submission of bids. The second envelope of qualified comparative proponents shall be evaluated within thirty (30) calendar days. Finally, the third envelope of technically complying comparative proponents shall be evaluated within fifteen (15) calendar days.</p> <p>If the price of the Original Proponent was not disclosed in the tender documents, it shall be revealed upon the opening of the financial proposals of the technically complying comparative proponents.</p>
The Original Proponent shall have the right to match the best proposal within thirty (30) working days upon the official notification by the Agency/LGU of the most advantageous financial proposal.	DETERMINATION OF THE WINNING PROPONENT	<p>If the price of the winning comparative proponent is not matched, the winning comparative proponent shall be considered for award. In the event of refusal, inability or failure of the winning comparative proponent to enter into contract with the Agency/LGU, the Agency/LGU concerned shall consider for award the bidder with the next-ranked complying comparative bid which is better than the offer of the Original Proponent.</p> <p>The original proponent shall again be given the right to match the comparative proponent's bid. If no other comparative bid is determined to be better than the offer of the original proponent, the project shall immediately be awarded to the original proponent.</p>
	APPROVAL OF CONTRACT AWARD	<p>PBAC submits to the Head of Agency/LGU recommendation for contract award within seven (7) calendar days after completion of the financial evaluation.</p> <p>Head of Agency/LGU approves recommendation for contract award within seven (7) calendar days after submission of PBAC recommendation.</p> <p>All unsuccessful bidders shall be informed in writing of the results of the bidding.</p>



Process for Unsolicited Proposals Under R.A. 7718 (BOT Law)		
PRIVATE SECTOR	PROCESS FLOW	GOVERNMENT
Winning Project Proponent receives "Notice of Award" and shall comply, within thirty (30) calendar days, with all the conditions and requirements indicated therein.	ISSUANCE OF NOTICE OF AWARD	<p>Head of Agency/LGU signs and issues "Notice of Award" to winning bidder, indicating, among others, the requirements to be submitted by the winning Project Proponent within thirty (30) calendar days from official receipt of the Notice of Award.</p> <p>Within seven (7) calendar days upon receipt of requirements for award, the Head of Agency/LGU shall determine and notify the winning Project Proponent of its compliance of all conditions stated in the Notice of Award.</p> <p>If deadline is not met, and unless otherwise extended, the Agency/LGU could confiscate bid security.</p>
The authorized signatory of the winning Project Proponent is required to sign the contract within seven (7) calendar days from receipt of advice from the Agency/LGU that it has complied with all conditions stated in the Notice of Award.	EXECUTION/APPROVAL OF CONTRACT	<p>The authorized signatory of the Agency/LGU is required to sign the contract within seven (7) calendar days from receipt of winning Project Proponent of the advice from the Agency/LGU that the former has complied with all conditions stated in the Notice of Award.</p> <p>The contract shall be effective upon signing thereof by the Head of Agency/LGU and unless another date is stipulated therein.</p> <p>An original signed copy of the contract shall be submitted to the Approving Body within seven (7) calendar days after signing.</p>
Complies with conditions precedent for contract implementation (usually includes financial closure)	ISSUANCE OF NOTICE TO COMMENCE IMPLEMENTATION & CONTRACT IMPLEMENTATION	<p>Agency/LGU shall issue the "Notice to Commence Implementation" of the project to the winning Project Proponent not later than seven (7) calendar days from the date of approval/ signing of the contract by the Head of Agency/LGU.</p> <p>AGENCY/LGU complies with conditions precedent for contract implementation.</p>





PART 3

GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AGREEMENTS BETWEEN GOVERNMENT AND PRIVATE ENTITIES

1.0 Legal Basis. These Guidelines are issued pursuant to Section 8 (Joint Venture Agreements) of Executive Order (EO) No. 423 dated 30 April 2005, which mandates the National Economic and Development Authority (NEDA), in consultation with the Government Procurement Policy Board (GPPB), to issue the necessary guidelines on Joint Ventures (JVs). The Office of the Government Corporate Counsel (OGCC), Department of Justice (DOJ), GOCCs and the private sector have also been consulted in the formulation of the Guidelines.

Notes:

1. Section 8 (JV Agreements) of EO No. 423 dated 30 April 2005 mandates the National Economic Development Authority (NEDA), in consultation with the Government Procurement Policy Board (GPPB), to issue the necessary guidelines on JVs.
2. In 2007, the NEDA, in consultation with the GPPB, and with the assistance of the OGCC as the statutory counsel of government corporations covered by the 2008 NEDA JV Guidelines, initiated the preparation of the guidelines.
3. While admittedly there is no law which expressly allows all GOCCs, GCEs, GICPs, GFIs, and SUCs from entering into JVs with the private sector, there is statutory basis for the issuance of the 2008 NEDA JV Guidelines. The 2008 NEDA JV Guidelines are considered supplementary or detailed legislation intended to supply or fill in details of a law. The enabling law in this case is the Law on Partnerships under the Civil Code of the Philippines.



4. Further, Section 8 (JV Agreements) of Executive Order No. 423 dated 30 April 2005 signed by Former President Gloria Macapagal-Arroyo mandates the NEDA, in consultation with the Government Procurement Policy Board (GPPB), to issue the necessary guidelines on JVs. The Office of the Government Corporate Counsel participated in the drafting of the 2008 NEDA JV Guidelines. Earlier, Former President Corazon Aquino released Memorandum Order No. 266 dated 28 November 1989 authorizing GOCCs to enter into JVs. However, said Memorandum Order did not spell out the requirements and procedures.
5. The 2008 NEDA JV Guidelines were endorsed for adoption by the NEDA Infrastructure Committee and the GPPB on 8 March 2008. The 2008 NEDA JV Guidelines were approved by the NEDA Cabinet chaired by Former President Arroyo on 8 April 2008. The 2008 JV Guidelines were published in the Philippine Star on 17 April 2008 with the help of the Institute of Public Corporate Governance, a special unit of the OGCC established and directly under the office of former Justice Secretary Alberto C. Agra, as then Government Corporate Counsel. The 2008 NEDA JV Guidelines became effective on 2 May 2008.

2.0 Principles. The Government shall enter into a JV arrangement consistent with the following principles:

- 2.1 The creation of the JV should not prevent potential players from profitably entering into business venture/market.
- 2.2 The cost of producing the particular product, activity, or service should be efficient or potentially efficient towards earning potential profits for government and the market player/private sector partner.
- 2.3 There should be no barriers to the government's withdrawal of its contribution to the JV investment.
- 2.4 The role of government as regulator of the business of the JV should be clearly and explicitly delineated from its role as implementer of the business to avoid conflicts of interest.
- 2.5 As differentiated from projects procured under Official Development Assistance (ODA), Build Operate and Transfer Law (BOT) and Government Procurement Reform Act (GPRA), where ownership of the asset/business will stay with the government, JV Agreements allow the private sector to take over the undertaking of the projects in its entirety after the government divests itself of any interest in the JV.



Notes:

1. Though the parties to the JV are expressly allowed to profit and earn dividends from the JV activity, it is the clear intention of the 2008 NEDA JV Guidelines that profit-making is not the main purpose for the participation of a Government Entity in a JV activity. The 2008 NEDA JV Guidelines clearly state that government participation is limited (less than 50% of equity; limited period of participation). The development of the particular JV activity involved is of greater importance than the financial impact or financial benefit of the proposed investment to the Government Entity concerned.¹⁶⁸
2. The principles governing the creation and implementation of a JV under the 2008 NEDA JV Guidelines are the following:¹⁶⁹
 - a. **Free Competition.** The JV Agreement should not prevent potential players from profitably entering into business venture/market.
 - b. **Efficiency.** The cost of producing the particular product, activity, or service should be efficient or potentially efficient towards earning potential profits for government and the market player/private sector partner.
 - c. **Government Exit.** There should be no barriers for the government's withdrawal of its contribution to the JV investment.
 - d. **Conflict-Free.** The role of government as regulator of the business of the JV must be clearly and explicitly delineated from its role as implementer of the business to avoid conflicts of interest.
 - e. **Government Divestiture.** The private sector must be allowed to take over the undertaking of the project in its entirety after the government divests itself of any interest.
 - f. **Agency Accountability.** The Head of the Government Entity involved is ultimately accountable for the JV project. The private parties dealing with the Government are similarly held accountable for all their actions relative thereto.
3. JVs formed under the 2008 NEDA JV Guidelines are not covered by the Republic Act No. 9184 (GPRA).¹⁷⁰ Section 4 of the GPRA identifies the entities covered by the provisions of said law:

SECTION 4. Scope and Application. — This Act 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 departments, offices and agencies, including government-owned and/or -controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.” (Emphasis supplied.)

168 Alberto C. Agra, et al., 2008 Joint Venture Guidelines For Government Corporations and the Private Sector: A PRIMER (Revised 23 November 2008).

169 *Id.*

170 *Id.*



4. The term “Procurement”¹⁷¹ is defined as an acquisition made by a “Procuring Entity”¹⁷² which in turn, is defined as any branch, department, office, agency, or instrumentality of the government, including state universities and colleges, government-owned and/ or -controlled corporations, government financial institutions, and local government units.
5. Under Section 6.2(b) of the 2008 NEDA JV Guidelines, the Government Entity’s equity contribution in the JV Company shall only be less than fifty percent (50%) of the outstanding capital stock of the latter. Given government’s minority participation in any JV to be formed under the 2008 NEDA JV Guidelines, the resulting JV cannot be considered a “branch, department, office, agency, or instrumentality of the governments,” within the ambit of the GPRA.¹⁷³ Clearly, when making acquisitions for the purpose of running JV Company’s business, the JV Company may not be considered a “Procuring Entity” covered by the provisions of the GPRA.¹⁷⁴
6. JV activities undertaken under the parameters of the 2008 NEDA JV Guidelines are not subject to audit by the Commission on Audit (COA).¹⁷⁵
7. Section 1, Rule II of the 1997 Revised Rules of Procedure for the Commission on Audit (COA) provides for COA’s general jurisdiction over Government, and its subdivisions, agencies, or instrumentalities, including government-owned and controlled corporations, constitutional bodies, commissions and offices with fiscal autonomy under the Constitution, autonomous state colleges and universities, non-governmental entities receiving subsidy or equity directly or indirectly, from or through the government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity.¹⁷⁶

171 “(n) *Procurement* – refers to the acquisition of Goods, Consulting Services, and the contracting for Infrastructure Projects by the Procuring Entity. Procurement shall also include the lease of goods and real estate. With respect to real property, its procurement shall be governed by the provisions of Republic Act No. 8974, entitled “An Act to Facilitate the Acquisition of Right-of-Way Site or Location for National Government Infrastructure Projects and for Other Purposes”, and other applicable laws, rules and regulations.

172 “(o) *Procuring Entity* - refers to any branch, department, office, agency, or instrumentality of the government, including state universities and colleges, government-owned and/or -controlled corporations, government financial institutions, and local government units procuring Goods, Consulting Services and Infrastructure Projects.”

173 Agra et al., *supra* note 168.

174 *Id.*

175 *Id.*

176 “Section 1. *General jurisdiction.* - The Commission on Audit shall have the power, authority, and duty to examine, audit and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to the Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned and controlled corporations with original charters, and on a post-audit basis: (a) constitutional bodies, commissions and offices that have been granted fiscal autonomy under the Constitution; (b) autonomous state colleges and universities; (c) other government-owned or controlled corporations and their subsidiaries; and (d) such non-governmental entities receiving subsidy or equity directly or indirectly, from or through the government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity. x x x”



8. Under Section 6.2(b) of the 2008 NEDA JV Guidelines, the Government Entity's equity contribution in the JV Company shall only be less than fifty percent (50%) of the outstanding capital stock of the latter. Given government's minority participation in any JV to be formed under the 2008 NEDA JV Guidelines, the resulting JV cannot be considered part of "Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned and controlled corporations with original charters, and on a post-audit basis: (a) constitutional bodies, commissions and offices that have been granted fiscal autonomy under the Constitution; (b) autonomous state colleges and universities; (c) other government-owned or controlled corporations and their subsidiaries; and (d) such non-governmental entities receiving subsidy or equity directly" within the jurisdiction of the COA.¹⁷⁷
9. The equity contribution of the government in a JV undertaking is an investment, not a subsidy. The funds contributed to the JV Company, being a non-government entity separate and distinct from its investors, are not subject to audit by the COA.¹⁷⁸
10. The determining factor of COA's audit jurisdiction, GSIS applicability, or GPRA coverage is government ownership or control of the corporation.¹⁷⁹
11. In *Philippine Veterans Bank Employees Union-NUBE v. Philippine Veterans Bank*, the Supreme Court ruled that the criterion of "ownership and control" is more important than the issue of original charter.¹⁸⁰
12. Under Section 6.2(b) of the 2008 NEDA JV Guidelines, the Government Entity's equity contribution in the JV Company shall only be less than fifty percent (50%) of the outstanding capital stock of the latter. Since a JV Company is not owned or controlled by the Government, it does not fall under the Civil Service and should be regarded as an ordinary commercial corporation.¹⁸¹

2.6 Accountability for the JV project ultimately devolves on the Head of the Government Entity involved in the JV Agreements and the implementation of the JV project. The private parties dealing with the Government are similarly held accountable for all their actions relative thereto.

¹⁷⁷ Agra et al., *supra* note 168.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id. citing* G.R. No. 67125, 189 SCRA 14 (24 August 1990).

¹⁸¹ *Id. citing* *Ranulfo Feliciano v. Commission on Audit*, G.R. No. 147402 (14 January 2004).



Notes:

1. Section 5.3 of the 2008 NEDA JV Guidelines identifies the “Head of the Government Entity” as ‘governing board or its duly authorized official.’ It is the Head of the Government Entity, particularly, its governing board, which ultimately exercises discretion in choosing whether a project ought to be implemented through a joint venture, or any other mode of public-private partnership. It is also the Head of the Government Entity exercises discretion in choosing the JV project, and in choosing the mode by which that project would be implemented.¹⁸²

3.0 Purpose. These Guidelines are formulated to meet the following objectives:

- 3.1 To prescribe the rules, guidelines and procedures in forging JV Agreements between government corporations as defined under section 4.0 below, and private entities;
- 3.2 To encourage pooling of resources and expertise between government and private sector entities through JVs as a viable, efficient, and practical alternative in pursuing development goals of the government; and
- 3.3 To ensure that all JV Agreements are entered into under the policy that all government contracts shall be awarded through a transparent process.

4.0 Coverage.

- 4.1 These guidelines shall apply to all government-owned and/or controlled corporations (GOCCs), government corporate entities (GCEs), government instrumentalities with corporate powers (GICPs), government financial institutions (GFIs), state universities and colleges (SUCs), as defined under Section 5.0 and which are expressly authorized by law or their respective charters to enter into JV Agreements. Local Government Units (LGUs) are not covered by these Guidelines.

Notes:

1. The 2008 NEDA JV Guidelines shall apply to all GOCCs, government corporate entities (GCEs), government instrumentalities with corporate powers (GICPs), government financial institutions (GFIs), and state universities and colleges (SUCs) which are expressly authorized by their respective charters to enter into JV agreements.
2. Government entities can enter into JV agreements if such authority can be necessarily or incidentally implied from their respective mandates.¹⁸³

182 *Id. citing* OGCC Opinion No. 157, series of 2008, dated 6 August 2008.

183 *Id. citing* OGCC Opinion No. 158, series of 2008, dated 6 August 2008



3. Today, there are more than 100 GOCCs, GCEs and GICPs, and some 464 active Water Districts under the jurisdiction of the OGCC. There are other government entities such as the National Power Corporation and Philippine National Oil Company that are not under the jurisdiction of the OGCC.¹⁸⁴
4. The 2008 NEDA JV Guidelines pertain specifically to joint ventures between government and private entities or public-private partnerships. The 2008 NEDA JV Guidelines do not apply to joint ventures entered into between two public corporations.¹⁸⁵
5. The 2008 NEDA JV Guidelines may be applied suppletorily or analogously to public-to-public joint venture. Both public entities can rely primarily on their respective charters for their required authority to enter into joint ventures.¹⁸⁶
6. The exclusionary rule found in Section 4.1 of the 2008 NEDA JV Guidelines expressly pertaining to LGUs and impliedly extending to National Government Agencies (NGAs) does not mean that LGUs and NGAs are proscribed from entering into JVs. The import of the statement on the coverage only defines the scope of the 2008 NEDA JV Guidelines, i.e., the statement does not delineate which entities can and cannot enter into JVs.
7. The LGUs may enter into joint ventures pursuant to Republic Act No. 7160 or the Local Government Code of 1991 (1991 LGC) in particular Sections 3(l), 16, 17(j), 18, 22(d), 34, 35 and 36 thereof and Article 66 of the Implementing Rules and Regulations of the 1991 LGC (1991 LGC-IRR) which reads:

Joint Ventures and Cooperative Programs or Undertakings. — LGUs may enter into joint ventures and such other cooperative arrangements with people's organizations, NGOs or the private sector, to engage in the delivery of certain basic services; capability-building and livelihood projects; develop local enterprises designed to improve productivity and income; diversify agriculture; spur rural industrialization; promote ecological balance; and enhance the economic and social well-being of the people.
8. To date, there are no guidelines issued by any national government agency or government entity outlining the requirements and procedures for JVs by LGUs. This does not mean that LGUs today cannot enter into JVs. The 1991 LGC and its IRR expressly allow LGU JVs. Each LGU may even adopt its own set of procedures for their JVs which may or may not be patterned after the 2008 NEDA JV Guidelines for as long as the three fundamental requirements of government contracts are followed – transparency, accountability and competition.

184 *Id. citing* OGCC Opinion No. 158, series of 2008, dated 6 August 2008

185 *Id. citing* OGCC Opinion No. 217, series of 2008, dated 26 September 2008

186 *Id. citing* OGCC Opinion No. 217, series of 2008, dated 26 September 2008



9. The exclusion of LGUs from the coverage of the 2008 NEDA JV Guidelines is also a recognition that the procedures for LGU contracts vary from GOCC contracts. The local JV process and execution will involve the enactment of ordinances, adoption of resolutions, exercise of veto authority by the mayor or governor concerned, and the review by the supervising LGU insofar as supervised or lower LGUs are concerned.
10. As regards NGAs, the reason for their exclusion from the scope of the 2008 NEDA JV Guidelines is premised on their legal personalities. Unlike GOCCs, GCEs, GICPs, GFIs, and SUCs, NGAs have no juridical or corporate personalities and have not been vested with corporate or proprietary powers. Again, NGAs non-inclusion from the scope of the 2008 NEDA JV Guidelines does not mean NGAs are prohibited from partnering with the private sector under a JV arrangement. A different set of requirements may be prescribed by NEDA.

4.2 Transactions of GFIs in the ordinary course of business as part of their normal and ordinary banking, financial or portfolio management operations shall not be covered by the provisions of these Guidelines.

5.0 Definition of Terms.

5.1 *Government Entity.* Refers to GOCCs, GCEs, GICPs, SUCs, and GFIs, created by law, executive issuances and by the Corporation Code, among others.

Notes:

1. The 1987 Administrative Code defines a GOCC as a stock or non-stock corporation, vested with functions relating to public needs, whether the same be governmental or proprietary in nature, either with its own charter, or created under the general corporation law and is owned or controlled by the government directly or indirectly, to the extent of at least a majority of its outstanding capital stock or of its outstanding voting capital stock.¹⁸⁷
- 5.2 *Government Corporate Entity (GCE) and Government Instrumentality with Corporate Powers (GICP).* Refer to entities exercising both government and corporate powers, but which do not fall under the definition of a GOCC under the Administrative Code.**

187 *Id.*



Notes:

1. A GCE and GICP are entities exercising both government and corporate powers, but which do not fall under the definition of a GOCC under the Administrative Code.¹⁸⁸
2. A government instrumentality refers to any agency of the National Government, not integrated within the department framework, vested with special functions or jurisdiction by law, endowed with some, if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter.¹⁸⁹
3. The Supreme Court's decision, **Manila International Airport Authority (MIAA) v. Court of Appeals et al.**,¹⁹⁰ issued in 2006, differentiates GCEs and GICPs such as the Mactan International Airport Authority (MCIA), Philippine Ports Authority (PPA), Philippine Deposit Insurance Corporation (PDIC), Metropolitan Waterworks and Sewerage System (MWSS), Philippine Rice Research Institute (PRRI), Laguna Lake Development Authority (LLDA), Fisheries Development Authority (FDA), Bases Conversion and Development Authority (BCDA), Cebu Ports Authority (CPA), Cagayan de Oro Port Authority (CDOPA), and San Fernando Port Authority (SFPA), from GOCCs.
4. In the MIAA case, the Supreme Court noted that the MIAA is neither a stock or a non-stock corporation because it "has capital but it is not divided into shares of stock x x x has no stockholders or voting shares [h]ence [it] is not a stock corporation. x x x MIAA is also not a non-stock corporation because it has no members." It was further noted that MIAA is not organized for any of the purposes enumerated in the Corporation Code. "MIAA, a public utility, is organized to operate an international and domestic airport for public use."
5. Since MIAA is neither a stock nor a non-stock corporation, MIAA is not a GOCC. The Court then concluded that "MIAA is a **government instrumentality vested with corporate powers** to perform efficiently its governmental functions. MIAA is like any other government instrumentality, the only difference is that MIAA is vested with corporate powers."
6. This distinction was reflected in EO No. 596 s. 2006, issued by President Gloria Macapagal-Arroyo, expanding the jurisdiction of the OGCC to include GCEs and GICPs.¹⁹¹
7. The 2008 NEDA JV Guidelines apply only to GOCCs that are expressly authorized by law or their charters to enter into JV Agreements with the private sector. However, it was the opinion of the OGCC, as part of the team which drafted the 2008 NEDA JV Guidelines, that in the absence of laws

188 *Id.*

189 *Id.*

190 G.R. No. 155650 (20 July 2006).

191 *Id.*



and executive issuances or orders that lay down the legal requirements that must be followed for JV Agreements between a GOCC and a local government unit, a GOCC, GCE, GICP, GFI or SUC not specifically authorized by law or its charter to enter into a JV, may choose to be guided by the principles and parameters outlined under the 2008 NEDA JV Guidelines; provided that there is no counterpart provision prohibiting it from entering into such arrangements.¹⁹²

8. A government agency or office has express and implied powers conferred by its charter and other pertinent statutes¹⁹³ in accordance with accepted and well-entrenched administrative law principles. Relevantly, implied powers are those that can be inferred or are implicit in the wordings of the law¹⁹⁴ or conferred by necessary or fair implication in the enabling act.¹⁹⁵ The doctrine of necessary implication provides that when a general grant of power is conferred upon a government office or when a duty is enjoined, every particular power necessary for the exercise of the one or the performance of the other is also conferred by necessary implication.¹⁹⁶ When the statute does not specify the particular method to be followed or used by a government agency in the exercise of the power vested in it by law, said agency has the authority to adopt any reasonable method to carry out its functions.¹⁹⁷

X X X

“Finally, the undersigned is of the opinion that the JV Guidelines must be liberally construed to allow GOCCs to enter into JV Agreements, in view of the underlying policy of the Government under Executive Order No. 423 s. 2005, of ensuring the speedy and efficient delivery of quality services to the Filipino people.”¹⁹⁸

9. In addition, such GOCC, GCE, GICP, GFI or SUC may look to the general provisions of the law on partnerships for further guidance on matters that are not expressly covered by the 2008 NEDA JV Guidelines.¹⁹⁹

5.3 Head of Government Entity. Refers to the governing board or its duly authorized official, for GOCCs, GCEs, GICPs, SUCs, and GFIs.

192 *Id. citing* OGCC Opinion No. 115, series of 2008, dated 4 June 2008.

193 *Agra & Fong, supra* note 9 at p.12 *citing* Chavez v. NHA (2007).

194 *Agra & Fong, supra* note 9 at p.12 *citing* Radio Communications of the Philippines, Inc. v. Santiago, Nos. L-29236 & L-29247, 58 SCRA 493 497 (21 August 1974).

195 *Agra & Fong, supra* note 9 at p.12 *citing* Azarcon v. Sandiganbayan, G.R. No. 116033, 268 SCRA 747 761 (26 February 1997).

196 *Agra & Fong, supra* note 9 at p.12 *citing* Angara v. Electoral Commission, 63 Phil. 139 177 (1936).

197 *Agra & Fong, supra* note 9 at p.12 *citing* Agpalo, Administrative Code 14 *citing* Provident Tree Farms, Inc. v. Batario, Jr., G.R. No. 92285, 231 SCRA 463, 469 (28 March 1994).

198 *Id.*

199 *Agra & Fong, supra* note 9 at p.12.



Notes:

1. In OGCC Opinion No. 178, series of 2008, dated 1 September 2008, the OGCC defined matters are within the discretion of the Head of the Government Entity, with regard to its accountability for JV Projects:

“x x x it is within the sound business judgment of the x x x board of trustees, as head of the government entity, to determine whether the development of the subject property ought to be implemented through a joint venture or by some other contractual arrangement. Further, the Board has the sole option to choose the JV project, and the mode by which that project would be implemented.

“Section 2.6 of the 2008 JV Guidelines pertinently states that ‘[a]ccountability for the JV project ultimately devolves on the Head of the Government Entity involved in the JV Agreements and the implementation of the JV project.’

“Thus, x x x Board, as the Head of the Government Entity, has the authority [to determine] whether to implement the Project under the 2008 JV Guidelines or not, and to adopt which mode under the Guidelines should be applied (sic).”

2. In OGCC Opinion No. 157, series of 2008, dated 6 August 2008, the OGCC opined that the discretion on which mode of selecting a JV Partner rests on the Head of Government Entity:

“Section 2.6 of the 2008 JV Guidelines specifically states that ‘[a]ccountability for the JV project ultimately devolves on the Head of the Government Entity involved in the JV Agreements and the implementation of the JV project.’ Section 5.3 identifies the “Head of the Government Entity” as ‘governing board or its duly authorized official.’

“Under the above-quoted provisions of the 2008 JV Guidelines, it is clear that the Head of the Government Entity, particularly, its governing board, ultimately exercises discretion in choosing whether a project ought to be implemented through a joint venture, or any other mode of public-private partnership. It is further clear that the Head of the Government Entity exercises discretion in choosing the JV project, and in choosing the mode by which that project would be implemented.

“Relevantly, the Board of Directors of the Bases Conversion and Development Authority (BCDA), as the Head of Agency, has the discretion whether to implement the Project under the 2008 JV Guidelines or not, and to choose which mode under the Guidelines should be applied.”

5.4 Joint Venture (JV). A contractual arrangement whereby a private sector entity or a group of private sector entities on one hand, and a Government Entity or a group of Government Entities on the other hand, contribute money/capital, services, assets (including equipment, land or intellectual property), or a combination of any or all of the foregoing. Parties to a JV share risks to jointly undertake an investment activity in order to accomplish a specific, limited or special goal or purpose with the end view of facilitating



private sector initiative in a particular industry or sector, and eventually transferring ownership of the investment activity to the private sector under competitive market conditions. It involves a community or pooling of interests in the performance of the service, function, business or activity, with each party having a right to direct and govern the policy in connection therewith, and with a view of sharing both profits and losses, subject to agreement by the parties. A JV may be a contractual JV, or a corporate JV.

5.5 JV Company. An entity registered with the Securities and Exchange Commission (SEC) by the JV partners that shall perform the primary functions and obligations of the JV as stipulated under the JV Agreement. The JV Company shall possess the characteristics stipulated under these Guidelines.

5.6 Contractual JV. A legal and binding agreement under which the JV partners shall perform the primary functions and obligations under the JV Agreement without forming a JV Company.

Notes:

1. The 2008 NEDA JV Guidelines does not identify any specific documentary requirement as regards the choice of modes to implement the JV. All that Section 6.3 requires is a determination by the Government Entity that the formation of a JV Company is not the best mode to implement a JV activity, and that it is opting to implement the JV project through a contractual agreement. This determination is a business judgment/ policy decision to be made by the GOCC's governing board.²⁰⁰
2. While no specific documents were identified in the 2008 NEDA JV Guidelines, the government entity concerned should ensure that there is complete documentation on the justification for implementing the JV activity through a contractual arrangement rather than a JV company. Such documentation may include management reports, comparative analyses, board resolutions and the like to show the mandate of the concerned GOCC, the authorities relied upon, the attendant liabilities relevant to the project, and other considerations that may impact on the decision on whether a JV corporation is the best mode to implement the JV activity. All of the documents and attendant circumstances must be taken in its totality when determining the mode of implementation of the JV activity.²⁰¹

5.7 Competitive Selection. Refers to a process of selection by a Government Entity of a JV partner(s), based on transparent criteria, which should not constrain or limit competition, and is open to participation by any interested and qualified private entity.

5.8 Competitive Challenge. An alternative selection process wherein third parties shall be invited to submit comparative proposals to an unsolicited proposal. Accordingly, the private sector entity that submitted the unsolicited proposal is accorded the right to match any superior offers given by a comparative private sector participant.

200 Agra et al., *supra* note 168.

201 *Id.* citing OGCC Opinion No. 115, series of 2008, dated 4 June 2008.



5.9 *Negotiated Projects.* Refers to instances where the desired project is the result of an unsolicited proposal from a private sector proponent or, if the government has failed to identify an eligible private sector partner for a desired activity after subjecting the same to a competitive selection.

5.10 *Unsolicited Proposal.* Refer to project proposals submitted by the private sector to undertake Infrastructure or Development Projects without a formal solicitation issued by a Government Entity. These projects may be entered into by the Government Entity on a negotiated basis, provided, however, that there shall be no direct government guarantees for JVs resulting from an unsolicited proposal.

Notes:

1. There are three procedures for the selection of a joint venture partner formulated under the 2008 NEDA JV Guidelines. Each procedure is embodied in the 3 Annexes.
 - a. Annex “A” or Competitive Selection Procedure applies to all government initiated contracts. The Competitive Selection Procedure is a selection process based largely on the procurement law. It must be stressed though, that the selection of a JV partner is *not a procurement undertaking by the government*. It envisions transparent criteria and is designed not to constrain or limit competition. It is open to participation by any interested and qualified private entity.
 - b. Annex “B” on Limited Negotiations may be used whenever there is a failure of the competitive selection process. Of the three, this is the only procedure that presumes the conduct of the competitive selection procedure under Annex “A,” and a declaration of failure thereafter.
 - c. Annex “C” or Competitive Challenge is patterned after the Swiss Challenge framework used under the BOT Law.
2. In all three procedures, the three principles of public bidding may be suppletorily applied: the offer to the public, an opportunity for competition, and a basis for an exact comparison of bids.
3. The 3 principles of public bidding are all present for *unsolicited proposal* under the BOT Law after which Annex “C” was patterned. First, the project is offered to the public through the publication of the invitation for comparative proposals. Second, the challengers are given the opportunity to compete for the project through the submission of their tender/bid documents. And third, the exact comparison of the bids is ensured by using the same requirements/ qualifications/ criteria for the original proponent and the challengers.²⁰²
4. The process of unsolicited proposals involves a form of public bidding where, in the end, the government is free to choose the bid or proposal most advantageous to it.²⁰³
5. By adoption of the Swiss Challenge, special consideration is given in said process to the original proponent of the project, namely, the right to be awarded the project should it be able to match the

202 AEDC v. DOTC (2009).

203 AEDC v. DOTC (2009).



lowest or most advantageous proposal within 30 working days from notice.²⁰⁴

6. Projects initiated by the government may take the following route in selecting a JV partner under these 2008 NEDA JV Guidelines:
 - a. Annex A alone – conduct of Competitive Selection Process is successful.
 - b. Annex “A” then Annex “B” – conduct of Competitive Selection Process was declared a failure because only a single interest private sector participant remained eligible under the various stages of the process, and the Head of the Government Entity opts to pursue the project under Annex “B” of the 2008 NEDA JV Guidelines.²⁰⁵
 - c. Annex “A” then Annex “C” – conduct of Competitive Selection Process was declared a failure because no proposals were received or no private sector entity is found qualified for the JV undertaking, and the Head of the Government Entity opted to pursue the JV undertaking under Annex “C.”
 - d. Annex “A” then project implementation modes other than JV – conduct of Competitive Selection Process was declared a failure for whatever reason, and the Head of the Government Entity opted to pursue the undertaking under a mode other than JV.²⁰⁶

6.0 General Guidelines.

6.1 JV Agreements entered into shall consider the following parameters:

- a. **Investments or JV Agreements must be made only in activities directly and immediately related to and in furtherance of the primary corporate purpose, mandate, or charter of the investing Government Entity;**

Notes:

1. A Government Corporation may only enter into JV Activity under the 2008 NEDA JV Guidelines if the concerned activity is “directly and immediately related to and in furtherance of the primary corporate purpose, mandate, or charter of the investing Government Entity.”
2. Entering into a JV for a project *outside* the government corporations primary corporate purpose as stated in its charter, are beyond its corporate powers and may be considered *ultra vires*.

204 AEDC v. DOTC (2009).

205 2008 NEDA JV Guidelines, *supra* note 14, at Annex “A,” Part VII, § 6.

206 *Id.* at § 2.6.



3. Though the parties to the JV are expressly allowed to profit and earn dividends from the JV activity, it is the clear intention of the 2008 NEDA JV Guidelines that profit-making is not the main purpose for the participation of a Government Entity in a JV activity. The 2008 NEDA JV Guidelines clearly state that government participation is limited (less than 50% of equity; limited period of participation). The development of the particular JV activity involved is of greater importance than the financial impact or financial benefit of the proposed investment to the Government Entity concerned.²⁰⁷
 - b. **The JV should be clear in its intent to undertake a specific activity that is responsive to national development goals and objectives; and**
 - c. **The JV should not tend to crowd out private sector initiative in a particular industry or sector. The DTI, BOI and NEDA shall issue a negative list of industries or sectors on a periodic basis where the formation of a JV is likely to crowd out private sector initiative.**

Notes:

1. The non-issuance of a negative list shall not prevent Government Corporations from entering into JVs with the private sector under the provisions of the 2008 NEDA JV Guidelines. The negative list to be issued by the Department of Trade and Industry, Board of Investments and NEDA shall apply prospectively.²⁰⁸

6.2 The preferred mode of implementing a JV Agreement shall be through a JV Company to be formed by the Government Entity and the private sector entity, under the following parameters:

- a. **The JV Company shall be registered as a stock corporation in accordance with the provisions of the Corporation Code, as amended, and the prevailing and applicable rules and regulations promulgated by the SEC;**
- b. **Ownership and nationality requirements under the Constitution and other pertinent laws should be complied with; provided, that the Government Entity's equity contribution in the JV Company shall only be less than fifty percent (50%) of the outstanding capital stock of the latter. Government's contribution may be through assets (including money, equipment, land, intellectual property or any thing of value) which shall be subject to a 3rd party independent valuation. For as long as the Government Entity is involved in the JV undertaking, the private sector party shall not sell/transfer its interest in the JV Company without the express written consent of the Government Entity;**

²⁰⁷ Agra et al., *supra* note 168.

²⁰⁸ *Id.*



Notes:

1. The preferred mode of implementing a project through a JV is through a JV Company to be formed by the Government Entity and the private sector entity. However, the JV Agreement may be performed by the parties without necessarily forming a JV Company, if forming a corporation would not be the best mode to implement the JV activity. This is the Contractual JV.
2. The following guidelines must be considered when forming a JV company:
 - a. The JV Company shall be registered as a stock corporation in accordance with the provisions of the Corporation Code, as amended, and the prevailing and applicable rules and regulations promulgated by the SEC;
 - b. The ownership and nationality requirements under the Constitution and other pertinent laws should be complied with;
 - c. The Government Entity's equity contribution in the JV Company shall only be less than fifty percent (50%) of the outstanding capital stock of the latter;
 - d. The Government Entity shall be represented in the Board of the JV Company in proportion to its investment;
 - e. The JV Company shall be permitted to derive income from the activities authorized under the JV Agreement during its term;
 - f. The Government Entity and the private sector partner shall be entitled to receive dividends and/or any other form of share from net profits earned by the JV Company in accordance with the JV Agreement; and
 - g. The relationship between the Government Entity and the private sector participant must be clearly stated in the JV documents.
3. Government's contribution may be through assets (including money, capital, equipment, land, intellectual property or anything of value) which shall be subject to a third party independent valuation.
4. Equipment, intellectual property, permits and approvals, the physical data, engineering, environmental and model test reports, contract plans and specifications and other construction tender documents, socio-economic surveys, water demand studies and other documents and data prepared for the Project, are all items with a determinable monetary value.
5. The ownership of the land acquired by the Government Corporation for the JV Project cannot be transferred to the JV Company as part of its capital contribution if a majority of the JV Company's stock will be owned and controlled by a foreign corporation.²⁰⁹

209 *Id.*



6. Article XII, Sections 2 and 7 of the 1987 Constitution provides:

“Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. 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 sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

X X X

“Section 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.” (Emphases supplied.)

7. The constitutional prohibition against foreign ownership of land is clear and unequivocal. Only Filipino individuals, or corporations 60% of whose stockholdings are owned by Filipinos, are qualified to hold private lands. Any attempt or scheme to circumvent the constitutional prohibition against foreign ownership of land in the Philippines will result in a transfer that is null and void.²¹⁰
8. If the percentage of Filipino ownership in the private sector participant is at least 60%, the private sector participant shall be considered fully Filipino, and its entire shareholdings in the JV Company shall be considered Filipino. The foreign component of the investing private sector participant is considered as Filipino in determining compliance with the 60-40.²¹¹
9. If the shareholdings of Filipino nationals go below 60%, only the number of shares that corresponds to actual Filipino owned percentage shall be treated as of Philippine nationality.²¹²
10. The control test shall be applied to JV activities requiring a public utility franchise.²¹³

210 *Id. citing* OGCC Opinion No. 115 (4 June 2008) citing Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary*, 1034 (1996 ed.).

211 *Id.*

212 DOJ Opinion, No. 18 (19 January 1989); SEC Opinion (7 December 1993).

213 Agra et al., *supra* note 168.



11. The 2008 NEDA JV Guidelines proceed from MO 266, which covers Government's minority investments in private corporations. The intent of the 2008 NEDA JV Guidelines is to facilitate the entry of the private sector (bringing with it a wealth of resources, technology and efficiencies) into areas of industry or service that either only Government can enter, or that requires Government facilitation. Hence, the limitation on Government's equity contribution.²¹⁴
12. Government Entity's equity contribution in the JV Company shall only be less than fifty percent (50%) of the outstanding capital stock of the latter. It shall, in no case, be considered a "branch, department, office, agency, or instrumentality of the governments," within the ambit of the GPRA. Clearly, when making acquisitions for the purpose of running JV Company's business, the JV Company may not be considered a "Procuring Entity" covered by the provisions of the GPRA.²¹⁵
13. The SSL does not apply to employees of a JV Company.²¹⁶ The coverage of Republic Act No. 6758, otherwise known as the Compensation and Position Classification Act of 1989, is stated in Section 2 thereof:

"Section 2. The Compensation and Position Classification System herein provided shall apply to all positions, appointive or elective, on full or part-time basis, now existing or hereafter created in government, including government-owned or – controlled corporations and government financial institutions.

"The term "government" refers to the Executive, the Legislative and the Judicial Branches and the Constitutional Commissions and shall include all, but shall not be limited to, department bureaus, offices, boards, commissions, courts, tribunals, councils, authorities, administrations, centers, institutes, state colleges and universities, local government units and the armed forces. The term "government-owned and – controlled corporations and financial institutions" shall include all corporations and financial institutions owned and controlled by the National Government, whether such corporations and financial institutions perform governmental or proprietary functions."
14. Section 6.2(b) of the 2008 NEDA JV Guidelines limits the Government Entity's equity contribution in the JV Company to less than fifty percent (50%) of the outstanding capital stock of the latter. Hence, the JV Company cannot be considered "Government" as defined. Neither will the JV Company fall under the definition of a government-owned or –controlled corporation within the ambit of the SSL because of the minority investment limitation. The SSL may not be then applied to employees of a JV Company since the latter is a non-government entity separate and distinct from its investors.²¹⁷

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*



15. Employees of a JV Company are not covered by the GSIS.²¹⁸ Republic Act No. 8291, otherwise known as the Revised Government Service Insurance Act of 1997, defines an employee or a “member” as “[a]ny person receiving compensation while in the service of”²¹⁹ “[t]he national government, its political subdivisions, branches, agencies or instrumentalities, including government-owned or controlled corporations, and financial institutions with original charters, the constitutional commissions and the judiciary.”²²⁰
16. Under Section 6.2(b) of the 2008 NEDA JV Guidelines, the Government Entity’s equity contribution in the JV Company shall only be less than fifty percent (50%) of the outstanding capital stock of the latter. It shall, in no case, be considered “[t]he national government, its political subdivisions, branches, agencies or instrumentalities, including government-owned or controlled corporations, and financial institutions with original charters, the constitutional commissions and the judiciary” within the contemplation of the Revised Government Service Act of 1997. Clearly, employees of a JV Company are not “government employees” covered by the GSIS.²²¹
 - c. **The Government Entity shall be represented in the Board of the JV Company in proportion to its investment;**
 - d. **The JV Company shall be permitted to derive income from the activities authorized under the JV Agreement thereof during the term thereof. The Government Entity and the private sector partner shall be entitled to receive dividends and/or any other form of share from net profits earned by the JV Company in accordance with the JV Agreement. The determination of net profits shall be subject to a verification process for allowable operations and management expenses specified therein;**

Notes:

1. Though the parties to the JV are expressly allowed to profit and earn dividends from the JV activity, it is the clear intention of the 2008 NEDA JV Guidelines that profit-making is not the main purpose for the participation of a Government Entity in a JV activity. The 2008 NEDA JV Guidelines clearly state that government participation is limited (less than 50% of equity; limited period of participation). The development of the particular JV activity involved is of greater importance than the financial impact or financial benefit of the proposed investment to the Government Entity concerned.²²²
2. There is no law or regulation that imposes a maximum return on rate for all government investments in private undertakings, such as a JV Company.²²³

218 *Id.*

219 Republic Act No. 8291, § 2(d) (1997).

220 *Id.* at § 2(c).

221 Agra et al., *supra* note 168.

222 *Id.*

223 *Id.*



3. Under the BOT law, the return on rate base is to be determined by the NEDA in the case of a negotiated contract.²²⁴ Further, a twelve percent (12%) cap on the return on rate base shall be imposed only on the public utility monopoly component of negotiated projects composed of both public utility monopoly and non-public utility components.²²⁵ No such cap is indicated in, or contemplated by the 2008 NEDA JV Guidelines.²²⁶
4. However, the regulation of the rate on return for the JV Company is subject to the issuances of any regulatory body that may have jurisdiction over the JV activity (such as the Energy Regulatory Commission) or presidential issuances specifically applicable to the activity or the company (such as in the case of the National Power Corporation under Executive Order No. 86, s. 1993).²²⁷
 - e. **The JV Company is encouraged to stipulate a fixed period for the participation of the Government Entity. This period shall be determined by the attainment of the Government Entity's objective in pursuing the investment, or when the private sector partner is projected to be able to proceed with the JV activity without further need of government support. Further, the withdrawal of the Government Entity's capital contribution before the expiration of the said period is likewise encouraged; provided, that the divestment is made through competitive selection, initial public offering (IPO), or any other means that promote competition, fairness and transparency. The foregoing factors shall be accorded greater importance than the financial impact or financial benefit of the proposed investment to the Government Entity concerned.**

Notes:

1. Section 6.2 (e) of the 2008 NEDA JV Guidelines encourages the stipulation of a fixed period for Government participation in the project. A minority participation in the undertaking will facilitate Government exit and underlines the temporary nature of government's participation in the endeavor.²²⁸
2. The exit of Government, predicated on "the attainment of the Government Entity's objective in pursuing the investment, or when the private sector partner is projected to be able to proceed with the JV activity without further need of government support" is merely *encouraged*, not mandated under the 2008 NEDA JV Guidelines.
3. The Government Entity may exit at any time. The JV Company is encouraged to stipulate a fixed period for the participation of the Government Entity, but it may withdraw its capital contribution even before the expiration of period.

224 Republic Act No. 6957, as amended by Republic Act No. 7718, § 2(o).

225 *Id.*; BOT Law IRR, *supra* note 26 at § 12.15.2.

226 Agra et al., *supra* note 168.

227 *Id.*

228 *Id.*



4. The Government Entity may exit once its objective in pursuing the investment is attained, or when the private sector partner is projected to be able to proceed with the JV activity without further need of government support.²²⁹
5. The Government Entity's capital contribution in the JV Company must be divested through competitive selection, initial public offering (IPO), or any other means that promote competition, fairness and transparency, if the shares are to be transferred to a private entity.²³⁰
6. The Government Entity concerned may also opt to transfer its capital contribution through a government-to-government transfer under relevant laws and issuances, if the JV was not incorporated. Similarly, the Government Entity in an unincorporated JV may choose to retain their capital contribution, and seek a reversion of the assets to their possession.²³¹
 - f. **In drafting the incorporation documents of the JV Company and other contracts governing the relationship between the Government Entity and the private sector participant, the parties should consider the following guidelines: (1) clearly defined business objectives; (2) specified degree of participation and the management roles of each party in the JV Activity; (3) defined contribution of capital and ownership rights to property; (4) specified division of the profits and losses; (5) identified dispute mechanism to avoid management impasses that may produce deadlock or litigation; (6) specified termination/liquidation of the JV Company and indicate buy-out provisions; (7) specified confidentiality terms; and (8) stipulated indemnification mechanisms.**

6.3 If the formation of a JV Company is not the best mode to implement a JV Activity as determined by the Government Entity, it may opt to implement the JV project through a contractual agreement. Prior to entering into a Contractual JV, the parameters similar to those governing JV Companies under Section 6.2 (f) herein shall be observed.

Notes:

1. The 2008 NEDA JV Guidelines does not identify any specific documentary requirement as regards the choice of modes to implement the JV. All that Section 6.3 requires is a determination by the Government Entity that the formation of a JV Company is not the best mode to implement a JV activity, and that it is opting to implement the JV project through a contractual agreement. This determination is a business judgment/ policy decision to be made by the GOCC's governing board.²³²

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id. citing OGCC Opinion No. 115 (4 June 2008).*



2. While no specific documents were identified in the 2008 NEDA JV Guidelines, the government entity concerned should ensure that there is complete documentation on the justification for implementing the JV activity through a contractual arrangement rather than a JV company. Such documentation may include management reports, comparative analyses, board resolutions and the like to show the mandate of the concerned GOCC, the authorities relied upon, the attendant liabilities relevant to the project, and other considerations that may impact on the decision on whether a JV corporation is the best mode to implement the JV activity. All of the documents and attendant circumstances must be taken in its totality when determining the mode of implementation of the JV activity.²³³
3. It is the opinion of the OGCC in its Opinion No. 115, series of 2008, as a member of the team which drafted the 2008 NEDA JV Guidelines, that a GC may register a subsidiary corporation with the SEC for the purpose of entering into a Contractual JV under the doctrine of necessary implication.²³⁴ However, all proposals to acquire a government corporation, including proposals to establish subsidiary corporations shall be submitted the President of the Philippines for decision/approval.²³⁵
4. Further, it must be noted that Section 2.4 of the 2008 NEDA JV Guidelines specifically states that “the role of government as regulator of the business of the JV should be clearly and explicitly delineated from its role as implementer of the business to avoid conflicts of interest.” Given the regulatory functions discharged by certain GCs such as the MWSS, the formation of a subsidiary company to participate in the JV activity may be the prudent alternative to avoid any possible conflict of interest should the proposed JV involve the undertaking of a regulated activity. To avoid any possible conflict of interest situation, the subsidiary company must be formed with a clear delineation between the regulatory GC and the subsidiary company as regards property, rights, obligations, capital and other relevant matters.²³⁶
5. The GC may further assign to the JV, by contract, lands it acquired for the Project, for so long as all applicable laws, rules and regulations are complied with and are not violated. The withdrawal of government’s capital contribution, at the sole option of the GC, through initial public offering or other competitive means without terminating the Contractual JV, may be facilitated by this arrangement.²³⁷

233 *Id.*

234 Presidential Decree (PD) No. 198, Otherwise known as the “Local Water District Law,” as amended by Presidential Decree Nos. 768 and 1479, R.A. 9286, (1973).

235 *Id. citing* Administrative Order No. 59, art. 5 §17 (1988).

236 *Id.*

237 *Id.*



- 7.0 Process for Entering into JV Agreements.** Prior to entering into a JV Agreement, the proposed JV activity shall be approved in principle, in accordance with the procedure stipulated below:
- 7.1 Approval in Principle by the Head of a Government Entity.** For JV Agreements regardless of cost, the Head of the Government Entity concerned shall have the authority to approve the proposed JV Agreement in principle, subject to compliance with the conditions listed hereunder:
- a. Justification that the JV activity is within the mandate and charter of the Government Entity concerned as certified and notarized by the head of the Government Entity;
 - b. Clear description of the proposed investment, including its activities, objectives, source(s) of funding, extent and nature of the proposed participation of the investing Government Entity, period of participation of the Government Entity, and the relevant terms and conditions of the undertaking under the proposed JV Agreement, among others;
 - c. Justification as to the responsiveness and relative priority of the proposed JV activity in meeting national or specific development goals and objectives; and
 - d. All other components of the JV Agreement, including the technical, financial, legal and other aspects in determining the over-all feasibility of the proposed JV activity, among others, shall be established.

Notes:

1. Prior to entering into a JV Agreement, the JV activity must be approved in principle by the Head of the Government Entity regardless of the cost²³⁸ or of the mode of selection chosen.
2. Approval by Department of Finance (DOF) and/or the Department of Budget and Management (DBM), as the case may be, is necessary only in case where the JV activities require national government undertakings, subsidies or guarantees. Therefore, not all JV activities require sovereign guarantees.
3. NEDA- Investment Coordination Committee (ICC) approval is also not required.²³⁹

7.2 For JV activity that will require national government undertakings, subsidies or guarantees, clearance/approval of the Department of Finance (DOF) and/or the Department of Budget and Management (DBM), as the case may be, shall be secured.

7.3 Modes of Selecting a JV Partner

²³⁸ Agra et al., *supra* note 168.

²³⁹ *Id.*



Notes:

1. The modes for selecting a JV Partner are:
 - a. Competitive Selection under Annex “A”; and
 - b. Negotiated Agreements through Annexes “B” and “C” of the 2008 NEDA JV Guidelines.
2. Each mode can be pursued independently of the other and neither shall be considered as the general rule to the exception of the other, and vice versa.
3. In determining the mode of selecting a JV partner, the party initiating the process is the indicative. Section 7.3(b)(i) of the 2008 NEDA JV Guidelines is clear in that the Competitive Challenge mode (Annex “C”) may be resorted to if the government receives an unsolicited proposal. Annex “C” should be applied in the event the Head of the Government Entity makes a determination that a JV is the best way to implement the Project. Ultimately, the choice of mode is a decision within the sound discretion of the Head of the Government Entity involved.
4. The selection of a JV Partner can take one of 4 paths:²⁴⁰
 - a. A successful Competitive Selection under Annex “A,” when it is the Government Entity who solicits a JV Partner for a project, activity or undertaking it has identified and there are two (2) or more eligible bidders. This may also be the case where a first round of Competitive Selection fails, and the Head of the Government Entity opts to subject the solicitation of a JV Partner to a second round of Competitive Selection, in the following instances:
 - i. If there is only a single party who submits eligibility documents within the deadline stipulated in Invitation to Apply for Eligibility and to Submit a Proposal;
 - ii. If at anytime prior to the issuance of the notice of eligibility, should interested parties withdraw from the competitive selection process outlined in Annex “A”, with the effect that there is only one interested party remaining;
 - iii. If there is only one interested party who is determined to be eligible to submit a proposal;
 - iv. If at anytime after the issuance of the notice of eligibility until deadline for submission of proposals, eligible private sector participants withdraw from the competitive selection process outlined in Annex “A” with the effect that there is only one eligible private sector participant remaining and eligible to submit a proposal;
 - v. If there is only one eligible private sector participant that submits a proposal;
 - vi. No Technical Proposal is rated “passed”;
 - vii. If there is only one eligible private sector participant whose Technical Proposal is rated “passed,” but whose Financial Proposal does not meet the financial parameters set for in the Tender Documents; and
 - viii. No Financial Proposal of any eligible private sector participant whose Technical Proposal is rated “passed”, meets the financial parameters set forth in the Tender Documents.;



In the case of item “f”, the Government Entity must conduct a second round of Competitive Selection under Annex “A”.

A failed Competitive Selection under Annex “A” due to the following causes:

- i. When there is failure of competition, i.e., there is only a single interested party remaining as defined under VIII(6) of Annex A;²⁴¹
- ii. If there is only a single party who submits eligibility documents within the deadline stipulated in Invitation to Apply for Eligibility and to Submit a Proposal;
- iii. If at anytime prior to the issuance of the notice of eligibility, should interested parties withdraw from the competitive selection process outlined in Annex “A”, with the effect that there is only one interested party remaining;
- iv. If there is only one interested party who is determined to be eligible to submit a proposal;
- v. If at anytime after the issuance of the notice of eligibility until deadline for submission of proposals, eligible private sector participants withdraw from the competitive selection process outlined in Annex “A” with the effect that there is only one eligible private sector participant remaining and eligible to submit a proposal;
- vi. If there is only one eligible private sector participant that submits a proposal;
- vii. If there is only one eligible private sector participant whose Technical Proposal is rated “passed,” but whose Financial Proposal does not meet the financial parameters set for in the Tender Documents; and
- viii. No Financial Proposal of any eligible private sector participant whose Technical Proposal is rated “passed”, meets the financial parameters set forth in the Tender Documents.

In the case of item “a”, the Government Entity shall proceed with Annex “B”. For items “b” to “h” the Government Entity may elect to proceed with Annex “B,” or it may choose to subject the project to a second round of Competitive Selection.

A failed Competitive Selection under Annex “A” when there is failure of competition when no proposals are received or no private sector participant is found qualified and the Government Entity decides to seek out a JV partner

The Government Entity then proceeds with Annex “C;”

A successful Competitive Challenge under Annex “C,” when the Government Entity receives an unsolicited proposal.

5. The Government Entity need not first go through Annex “A” and proceed only to Annex “B” or “C” under exceptional circumstances.²⁴²

241 2008 NEDA JV Guidelines, *supra* note 14 at §7.2(b).

242 Agra et al., *supra* note 168.



6. Annex “A” is not a “general rule” to be applied in “default,” with Annexes “B” and “C” applicable only in exceptional circumstances. Annex “A” and “C” were intended to be available to the Government Entity in any case, subject only to the discretion of the Head of the Government Entity, using criteria of fairness and transparency in proceedings, and depending on the nature, scope, size, and complexity of the proposed JV activity.²⁴³
- a. **Competitive Selection – The process for the conduct of Competitive Selection, contract award and final approval shall be stipulated under Annex A of these guidelines. In the conduct of the Competitive Selection process, the Government Entity shall ensure the following:**

Notes:

1. Competitive Selection is a process of selection by a Government Entity of a JV partner(s), based on transparent criteria, which should not constrain or limit competition, and is open to participation by any interested and qualified private entity.
- i. **all activities during the competitive selection, award, and final approval are conducted in a transparent and competitive process that promotes accountability and efficiency; and**
- ii. **the competitive selection parameters are clearly defined and shall include the parameters as approved by the Head of the Government Entity.**
- b. **Negotiated Agreements – Negotiated agreements may be entered under the following circumstances:**
- i. **When a Government Entity receives an unsolicited proposal;**
- ii. **When there is failure of competition when no proposals are received or no private sector participant is found qualified and the Government Entity decides to seek out a JV partner; and**
- iii. **When there is failure of competition, i.e., there is only a single interested party remaining as defined under VIII(6) of Annex A.**

In the case of subsection b(iii) above, the procedures outlined in Annex B (Limited Negotiation Procedures in case of Failed Competitive Selection under Section 6 of Annex “A” of the Guidelines) shall apply. Subsections b(i) and b(ii) shall be governed by the rules under Annex C (Detailed Guidelines for Competitive Challenge Type Procedure Public-Private Joint Ventures).

²⁴³ *Id.*



Notes:

1. A negotiated project is one that results from instances where the desired project is the result of an unsolicited proposal from a private sector proponent or, if the government has failed to identify an eligible private sector partner for a desired activity after subjecting the same to a competitive selection or, if there was one eligible bidder remaining after a failed procedure is declared in the competitive selection mode.²⁴⁴
 2. Government may not enter into a JV arrangement on a purely negotiated basis because the JV Agreement is still, in essence a government contract. The principles of competition, fairness and transparency must characterize the selection of the JV Partner. Even if the participation of the Government is in the nature of a minority investment, the Government contribution is still taken from Government funds or property, and the resulting relationship is fiduciary in character.²⁴⁵
 3. An unsolicited proposal is any project proposal submitted by the private sector to undertake Infrastructure or Development Projects without a formal solicitation issued by a Government Entity. These projects may be entered into by the Government Entity on a negotiated basis, provided, however, that there shall be no direct government guarantees for JVs resulting from an unsolicited proposal. Negotiations shall comply with the process, requirements and conditions stipulated under Sections 6 (General Guidelines) and 7 (Process for Entering into JV Agreements) of the 2008 NEDA JV Guidelines.²⁴⁶
 4. A Competitive Challenge Type of Procedure under Annex C of the 2008 NEDA JV Guidelines is mode of procuring JV partner wherein a proponent's project proposal is subjected to a challenge similar to a Swiss Challenge. Third parties shall be invited to submit comparative proposals to an unsolicited proposal and the original private sector proponent is accorded the right to match any superior offer given by a comparative private sector participant.²⁴⁷
- 7.4 Deviations and Amendments to the JV Agreement. The concerned Government Entity shall not proceed with the award and signing of the contract if there are material deviations from the parameters and terms and conditions set forth in the proposal/tender documents that tend to increase the financial exposure, liabilities, and risks of government or any other factors that would cause disadvantage to government and any deviation that will cause prejudice to losing private sector participants. Said material deviations and amendments shall be subjected to the approval requirements under Sections 7.1 and 7.2 hereof. The Head of the Government Entity concerned shall be responsible for compliance with this policy. Violation of this provision shall render the award and/or the signed JV Agreement invalid.**

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*



Any amendment to a JV Agreement after award and signing of contract, which does not materially affect the substance of the competitive selection, shall be subjected to the requirements stipulated under Sections 7.1 and 7.2 hereof. Non-compliance with the corresponding approval process stated shall render the amendment null and void.

Notes:

1. Material deviations from the parameters and terms and conditions of the contract are not allowed under the 2008 NEDA JV Guidelines.²⁴⁸
2. In cases where there are material deviations from the original contract parameters, terms and conditions, the concerned Government Entity shall not proceed with the award and signing of the contract.²⁴⁹
3. If the material deviations tend to increase the financial exposure, liabilities, and risks of government or any other factors that would cause disadvantage to government and any deviation that will cause prejudice to losing private sector participants, and the Government Entity deems it justifiable to proceed with the agreement despite such deviations, the same must be approved by the Head of the Government Entity, and the DOF/DBM if necessary, in the same manner as the original JV project.²⁵⁰
4. If these material deviations were not approved by the Head of the Government Entity and the contract was signed and awarded anyway, the award and/or signing of the contract will be invalid and the amendment considered as null and void. The Head of the Government Entity shall be accountable for violation of the policy against material deviations.²⁵¹

8.0 Reporting Requirement. During the course of implementation of the JV Agreement, the concerned Government Entity shall submit an annual report on the status of its implementation during a current year to the Department of Finance, for monitoring purposes. The annual report shall be submitted within the first quarter of the succeeding year. The report shall use current standards in the production of corporate annual reports and shall include the audited financial statements of the JV. In addition, the report shall also contain the JV's work program for a period of three (3) years starting from the year the annual report is issued.

Pursuant to Section 10 of EO No. 423, the heads of government entities as defined in Section 5 of these Guidelines, shall submit to NEDA the salient features and a copy of JV Agreements amounting to at least Three Hundred Million Pesos (PhP300,000,000.00) together with all documents required thereto for monitoring of compliance with relevant policies, procedures and conditions for approval of the JV undertaking.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*



9.0 Amendments. These Guidelines may be amended and/or modified from time to time by NEDA through its Director-General, in consultation with the GPPB and the OGCC.

10.0 Separability. If any provision of these Guidelines is held or declared void or unenforceable by final judgment of a court of competent jurisdiction, the other provisions unaffected thereby shall remain in full force and effect.

11.0 Effectivity. These Guidelines and any subsequent amendment or modification shall take effect fifteen (15) calendar days from the date of its publication in a newspaper of general circulation or the Official Gazette or other modes legally acceptable, and a copy thereof shall be submitted to the Office of the National Administrative Registry (ONAR) and the UP Law Center.

Notes:

1. The 2008 NEDA JV Guidelines were published in the Philippine Star on 17 April 2008 by the NEDA with the help of the IPCG under the OGCC, and became effective on 2 May 2008.





ANNEX A

DETAILED GUIDELINES AND PROCEDURES FOR COMPETITIVE SELECTION FOR PUBLIC-PRIVATE JOINT VENTURES

I. The Joint Venture Selection Committee (JV-SC)

1. **Composition.** The Head of the Government Entity shall create a JV-SC for purposes of selecting a private partner for a proposed JV. The JV-SC shall be composed of the following:

Notes:

1. The JV-SC is composed of both Regular, who are voting members and Provisional, who are non-voting Members.

Regular Members (voting):

- a. **Chairman** – At least a third ranking officer of the Government Entity;
- b. **Secretary** – representative from the Government Entity's statutory counsel (OGCC or the OSG) or any legal officer of the concerned Government Entity;
- c. **One (1) officer knowledgeable in finance;**
- d. **One (1) officer knowledgeable in management/operation of the JV;**
- e. **One (1) officer knowledgeable with the technical aspects or requirements of the project, duly designated by the Head of the Government Entity concerned on a project-to-project basis, and**
- f. **One (1) representative from the National Economic and Development Authority.**



Provisional Members (non-voting):

- a. One (1) technical officer from a concerned regulatory body, when applicable, knowledgeable with the project at hand, to be invited by the Government Entity concerned on a project-to-project basis; and
- b. Three (3) Observers –
 - I. Two (2) representatives from the private sector – one (1) representative from a duly recognized association related to the project at hand, and one (1) representative from either the facility users, if applicable, or duly recognized accounting associations; and
 - II. Observer – One (1) representative from the Commission on Audit (COA).

Observers will be notified at least two (2) calendar days before the following stages: pre-selection conference, opening of technical and financial proposals, evaluation of technical and financial proposals, contract award, and special meetings of the JV-SC. The absence of observers will not nullify the JV-SC proceedings, provided that they have been duly invited in writing.

Notes:

- 1. In a letter dated 25 July 2008 addressed to the BCDA, the COA stated that “as a matter of policy, the Commission has consistently enjoined its Auditors from actively participating in activities which primarily involve the discharge of Management functions and prerogatives, citing Section 2 of P.D. 1445.²⁵²
- 2. Observers will be notified at least two (2) calendar days before they are required to be present before the following stages:
 - a. Pre-selection conference
 - b. Opening of technical and financial proposals
 - c. Evaluation of technical and financial proposals
 - d. Contract award
 - e. Special meetings of the JV-SC.
- 3. The absence of observers does not nullify the JV-SC proceedings, provided that they have been duly invited in writing.
- 4. The 2008 NEDA JV Guidelines is silent on effect of absence of the other members, though by implication, the absence of voting members would not invalidate proceedings, for so long as there is a quorum to do business.
- 5. While the 2008 NEDA JV Guidelines is similarly silent on the effect of the absence of the only other remaining non-voting member (technical non-voting member), it is believed that his/ her absence will not render the proceedings void.

252 P.D. 1445, Section 2 states:

“It is the declared policy of the State that all resources of the government shall be managed, expended or utilized with law and regulations, and safeguarded against loss or wastage through illegal or improper disposition, with a view to ensuring efficiency, economy and effectiveness in the operations of government. The responsibility to take care that such policy is faithfully adhered to rests directly with the chief or head of the government agency concerned.”



2. **Responsibilities.** The JV-SC shall be responsible for all aspects of the pre-selection and selection process, including, among others, the preparation of the selection/tender documents, publication of the invitation to apply for eligibility and submit proposal, pre-qualification of prospective private sector participants, conduct of pre-selection conferences and issuance of supplemental notices, interpretation of the rules regarding the selection process, the conduct of the selection process, evaluation of the financial and technical proposals, resolution of disputes between private sector participants, and recommendation for the acceptance of the proposal and/or for the award of the contract.
3. **Quorum.** A quorum of the JV-SC shall be composed of a simple majority of all voting members. The Chairman shall vote only in case of a tie.

Notes:

1. The JV-SC shall be responsible for:
 - a. **Preparation** of the selection/tender documents;
 - b. **Publication** of the invitation to apply for eligibility and submit proposal;
 - c. **Pre-qualification** of prospective private sector participants;
 - d. Conduct of **Pre-selection** conferences;
 - e. **Issuance** of supplemental notices
 - f. **Interpretation** of the rules regarding the selection process, the conduct of the selection process, evaluation of the financial and technical proposals
 - g. **Resolution of disputes** between private sector participants; and
 - h. **Recommendation** for the acceptance of the proposal and/or for the award of the contract.

II. Selection/Tender Documents

2. **Selection/Tender Documents.** The Government Entity concerned shall prepare the selection/tender documents, which shall include the following:
 - a. **Instructions to Private Sector Participants;**
 - b. **Minimum Design, Performance Standards/Specifications, and other Financial and Economic Parameters, where applicable, among others;**
 - c. **Feasibility Study or a Business Case/Pre-feasibility Study of the Project;**
 - d. **Draft Contract reflecting the terms and conditions in undertaking the JV activity, including, among others, the contractual obligations of the contracting parties;**
 - e. **Selection Form reflecting the required information to properly evaluate the technical and financial proposal;**
 - f. **Forms of technical and financial proposals and performance securities;**
 - g. **Current applicable rules and regulations of the BSP, as applicable;**
 - h. **Other documents as may be required by the Government Entity concerned.**

The documents enumerated above are just for guidance/reference. The Government Entity concerned is given full discretion to select the appropriate provisions as it may deem suitable for a particular contract/project.



Notes:

1. Annex A discusses several “suggested” inclusions for the selection/ tender documents. However, it discusses, in detail, the Instructions to Bidders, the minimum standards for the project, and the draft contract. It is believed that these documents, while falling under the enumeration of documents meant for “guidance/reference,” are essential to the selection tender documents.
3. **Instructions to Private Sector Participants.** The instructions to private sector participants, which establish the rules of the selection process, shall be clear, comprehensive and fair to all private sector participants and shall, as far as necessary and practicable, include the following information:
 - a. General description and objectives of the JV activity;
 - b. Proposal submission procedures and requirements, which shall include information on the manner of proposal submission, the number of copies of the technical and financial proposal to be submitted, where the proposals are to be submitted, the deadline for the submission of proposals, permissible mode of transmission of technical and financial proposals, etc.;
 - c. Amount and form of proposal security and proposal security validity period;
 - d. Milestones;
 - e. Method, parameters and criteria for the evaluation of the proposals;
 - f. Minimum amount of equity of the prospective JV partner;
 - g. Requirements of concerned regulatory bodies;
 - h. BSP’s current rules and regulations;
 - i. Revenue sharing arrangement, if any; and
 - j. Nationality and ownership requirements as, required by law.
4. **Minimum Designs, Performance Standards/Specifications and Economic Parameters.** Minimum design and performance standards/specifications, including appropriate environmental standards by the DENR, shall be clearly defined and shall refer to the desired quantity and quality of the outputs of the JV activity and should state that non-conformity with any of these minimum requirements shall render the proposals as non-responsive. Likewise, for the purpose of evaluating proposals, the following economic parameters, among others and where applicable, shall be prescribed:
 - a. discount rate, foreign exchange rate and inflation factor;
 - b. maximum period of project construction;
 - c. fixed term and price indices to be used in the adjustments of tolls/fees/rentals/charges, if applicable; and
 - d. minimum period of repayment, if applicable.



Notes:

1. “Minimum Designs, Performance Standards/Specifications and Economic Parameters” refers to the desired quantity and quality of the outputs of the JV activity. Non-conformity with any of these minimum requirements shall render the proposals as non-responsive. For the purpose of evaluating proposals, the following economic parameters, among others and where applicable, shall be prescribed:
 - a. Discount rate, foreign exchange rate and inflation factor;
 - b. Maximum period of project construction;
 - c. Fixed term and price indices to be used in the adjustments of tolls/fees/rentals/charges, if applicable; and
 - d. Minimum period of repayment, if applicable.
5. **Draft Contract.** The draft contract should clearly define the basic and legal relationship between the parties and their rights and responsibilities including specific Government Undertakings to be provided by the Government Entity relative to the JV activity, if any. Specifically, the draft contract shall also contain provisions on the following matters, as far as practicable:
 - a. the date on which the agreement is established, executed, and considered effective;
 - b. the names, addresses and identification of the parties, including the type of business of each member of the JV;
 - c. the name under which the JV will do business;
 - d. the principal place of business of the JV;
 - e. purpose, term and scope of the JV;
 - f. project specifications and features;
 - g. a statement that the parties are actually co-venturers for the project, whether or not the contract is in the name of all members;
 - h. the establishment of a fund by the parties to finance the work, together with the amounts to be contributed by each party, with the fund being deposited in a special bank account under dual control, and all progress payments and other revenues being deposited in such account;
 - i. procedure for additional capital infusions, if required;
 - j. a declaration of the participation of the parties and percentage in which profits and losses are shared, in proportion to the contributions of the party to the working fund. The amount of contribution of funds by parties can be increased or decreased, depending on the contributions of equipment or expertise;
 - k. If equity other than cash is to be contributed, a statement as to how the property will be valued, and the ownership of the property during and after the effectivity of the JV Agreement;
 - l. designation of one of the parties as general manager of the project, with authority to bind the JV Company/Partnership/Parties; or, in the alternative, the constitution of a management committee, with a provision for remuneration. Management duties, other duties of the co-venturers and procedures to be followed in dealing with unusual situations or problems that may develop;



- m. implementation milestones, regular meeting schedules, financial and periodic JV and progress reporting procedure;
- n. establishment of a JV bank account, and the appointment of a chartered accountant and lawyer;
- o. provide for the acquisition of licenses in the name of the JV or each co-venturer, as required;
- p. type of insurance carried by the JV and clearly defined liabilities to be insured against by each participant;
- q. definition of items which are to be considered as costs to the JV for the purpose of determining profit or loss, and a description of items which are not reimbursable to members of the JV;
- r. confidentiality of trade information passed between the co-venturers;
- s. ownership or retention of patents, technology, and consultant reports;
- t. performance security requirements of the project and the bonding obligations of the co-venturers;
- u. undivided pro-rata interests held by the co-venturers on all assets of the JV;
- v. restriction regarding assignment of private sector participant's undivided pro-rata interests in assets of the JV;
- w. cost recovery scheme;
- x. indemnification and liquidated damages;
- y. performance and warranty bonds;
- z. minimum insurance coverage;
- aa. acceptance tests and procedures;
- bb. warranty period and procedures;
- cc. grounds for and effects of contract termination including modes for settling disputes and procedure for handling guarantees, defects, and insurance after termination;
- dd. the manner and procedures for the resolution of warranty against corruption;
- ee. compliance with all other laws, rules and regulations;
- ff. procedure for exit of the Government Entity and Substitution or addition of parties;
- gg. payout of funds; and
- hh. disputes arbitration clause.



III. Publication of Invitation to Apply for Eligibility and to Submit a Proposal (IAESP)

1. The IAESPs shall be advertised once in a newspaper of general nationwide circulation, and posted continuously for a period of seven (7) calendar days, starting on the date of advertisement, at the following:
 - a. Website of the Government Entity concerned, if available;
 - b. Website of the Government Entity's service provider, if any; and
 - c. Any conspicuous place within the premises of the procuring entity.
2. Private sector participants shall be given at least thirty (30) calendar days from the last date of publication of the IAESP to apply for eligibility and to submit a proposal. Notwithstanding, the Government Entity concerned may adjust said period as may be appropriate for the nature, scope, size, and complexity of the proposed JV activity. Provided, that the principles of transparency, competition and accountability are observed

IV. Qualification of Private Sector Participants

1. Who may Participate. Any individual, partnership, corporation or firm, or consortium, whether local or foreign, subject to the limits set herein.
2. Eligibility Requirements
 - a. **Legal Requirements.** If the JV activity requires a public utility franchise, the private sector participant must be duly registered with the SEC and be at least 60% Filipino-owned. For projects other than these, prospective private sector participant shall comply with nationality and ownership requirements under the Constitution and other applicable laws and issuances.
For JV activities to be operated by the prospective JV Partner or a facility operator where operation of the facility does not require a public utility franchise, the JV partner or facility operator or concessionaire may be Filipino or foreign-owned, as maybe allowed under applicable laws, rules, and regulations.
 - b. **Technical Requirements.** The prospective JV Partner must have completed a similar or related project costing at least 50% of the JV activity subject of the selection process within the relevant period as determined by the Government Entity. The prospective JV Partner shall submit a statement of all its ongoing and completed government and private contracts similar or related to the JV activity subject of the selection process, including contracts awarded but not yet started, if any.
 - c. **Financial Capability.** The Government Entity shall determine before evaluation of eligibility, the minimum amount of equity needed for the JV activity.



The following documents shall be submitted by the prospective JV Partner:

- i. Audited financial statements for the past three calendar years. If the prospective JV Partner is Filipino, the audited financial statements to be submitted must be stamped “received” by the BIR or its duly accredited and authorized institutions; and
 - ii. Latest tax returns, if the JV Partner is Filipino.
- d. In case of consortia, all member entities of the prospective JV Partner shall also submit the above legal, technical and financial eligibility requirements to determine the overall capability of the consortia for the JV undertaking.
- e. Acceptance of Criteria and Waiver of Rights to Enjoin JV Activity. In addition to the above, all prospective private sector participants shall be required to submit, as part of their qualification documents, a statement stipulating that the private sector participant (i) has accepted the qualification criteria established by the JV-SC of the Government Entity concerned; and (ii) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the concerned Government Entity or its JV-SC to prevent or restrain the qualification proceedings related thereto, the award of the contract to a successful private sector participant, and the execution of the awarded contract. Such waiver shall, however be, without prejudice to the right of a disqualified or losing private sector participant to question the lawfulness of its disqualification or the rejection of its proposal by appropriate administrative or judicial processes not involving the issuance of a writ of injunction or prohibition or restraining order.

Financial capability shall be measured in terms of the following:

- i) proof of ability of the prospective JV Partner to provide a minimum amount of equity to the JV activity, measured in terms of the net worth of the company, or a deposit equivalent to the minimum equity required set aside or ear-marked for the proposed JV Activity; and
- ii) a letter from a domestic universal/commercial bank, or an international bank with a subsidiary/branch in the Philippines, or any international bank recognized by the BSP, attesting that the prospective JV Partner is one of its current clients and is in good financial standing.

Notes:

1. Under the 2008 NEDA JV Guidelines, the general rule is that anyone may participate in the selection process, subject to certain requirements:
 - a. Legal requirements
 - i. Nationality and Ownership requirements
 - ii. If a Public Utility Franchise is required for the JV undertaking, the private party must be:
 1. SEC registered; and
 2. 60% Filipino.
 - b. Technical requirements
 - i. Completion of a similar or related project costing at least 50% of the JV activity; and
 - ii. statement of all ongoing and completed contracts similar or related to the JV activity
 - c. Financial capability requirements.



- i. Audited financial statements for the past 3 calendar years. If Filipino, the financial statements must be stamped “received” by the BIR;
 - ii. Latest tax returns, if Filipino.
 - iii. Proof of financial Capacity
 1. Statement on the net worth of the company;
 2. Deposit certificate; and
 3. Bank opinion of good financial standing.
2. Nationality and ownership requirements under the Constitution and other applicable laws and issuances must be complied with.
3. When the JV activity requires a public utility franchise, the private sector participant must be duly registered with the SEC and be at least 60% Filipino-owned. It is submitted that the preferred mode for JVs is the only mode of implementing the JV.
4. For JV activities to be operated by the prospective JV Partner or a facility operator where operation of the facility does not require a public utility franchise, the JV partner or facility operator or concessionaire may be Filipino or foreign-owned, as maybe allowed under applicable laws, rules, and regulations.
5. When the activity requires a public utility franchise, the interested bidder/ consortium need not register with the SEC *prior* to participating in the JV partner selection procedure.
6. The provisions of the 2008 NEDA JV Guidelines taken in its entirety clearly show that registration of a consortium with the SEC is not required prior to the actual award of the contract.²⁵³
7. Section IV, Paragraph 2 (d) of Annex “A” of the 2008 NEDA JV Guidelines requires all the members of the consortium to submit the documents forming part of the Eligibility Requirements under Annex “A,” Section IV, Paragraph 2(a) to (e). Section IV, Paragraph 2(a) of Annex “A” of the 2008 NEDA JV Guidelines requires, in the JV activity requires a public utility franchise, that the private sector participant be a) duly registered with the SEC; and b) at least 60% Filipino-owned.
8. The intention of Section IV, Paragraph 2 (d) of Annex “A” of the 2008 NEDA JV Guidelines was the individual compliance by the members with the eligibility requirements identified by the government entity, in view of the absence of a specific requirement for the consortium to submit the same requirements as a singular unit. If there is no specific requirement for a consortium to submit requirements as a group, it cannot be reasonably inferred that the 2008 NEDA JV Guidelines intended the consortium to register with the SEC prior to participating in the JV selection procedure.²⁵⁴
9. If the JV activity requires the formation of a JV Company, then private sector parties participating as a consortium will be required to incorporate and register with the SEC once they prevail in the selection process and are awarded the contract.²⁵⁵

253 Agra et al., *supra* note 168 citing OGCC Opinion No. 155 (30 July 2008).

254 *Id.*

255 *Id.*



10. Section IV, Paragraph 2(a) of Annex “A” of the 2008 NEDA JV Guidelines, also *deliberately* makes a distinction between the eligibility requirements for a [private sector participant] in a JV activity requiring a public utility franchise, and the requirements of a [private sector participant] for all other activities. Registration with the SEC and compliance with the 60% Filipino ownership was required of “the private sector participant,” while compliance with nationality and ownership requirements under the Constitution and other laws was made mandatory for all “prospective” [private sector participant] for all other activities not requiring a public utility franchise. The distinction, in the opinion of this Office, is deliberate. Hence, a [private sector participant] is only required to register with the SEC and comply with the 60% Filipino ownership when (a) the JV activity involved requires a public utility franchise; and (b) when a particular [private sector participant] has already been chosen as “the” [private sector participant], which is necessarily after the conclusion of the selection process when the [private sector participant] is no longer “prospective” but “the” [private sector participant]. In cases not involving a public utility franchise, the 2008 NEDA JV Guidelines are clear in requiring all “prospective” [private sector participants] to comply with the nationality and ownership requirements at the stage of eligibility determination prior to selection of “the” [private sector participant].²⁵⁶
11. The distinction made in Section IV, Paragraph 2(a) of Annex “A” of the 2008 NEDA JV Guidelines is based on practicality. The 2008 NEDA JV Guidelines is intended to facilitate the participation of the private sector. The 2008 NEDA JV Guidelines “encourage pooling of resources and expertise between government and private sector entities through JVs as a viable, efficient, and practical alternative in pursuing development goals of the government,” while at all times observing “the principles of transparency, competition and accountability.” To require a [private sector participant] to register with the SEC *prior* to its selection is not only impractical, but also unduly burdensome to all prospective [private sector participants]. In all stages prior to its selection, a [private sector participant’s] interest in the JV activity is inchoate and incipient. For as long as the proposed equity sharing of the [private sector participant] is revealed to the government entity involved, in accordance with the Terms of Reference issued for the selection process, this Office sees no legal requirement under the 2008 NEDA JV Guidelines or practical purpose served in requiring registration at this early stage.²⁵⁷
12. It was the conclusion of former Secretary of Justice Alberto C. Agra, as then Government Corporate Counsel and as part of the team which drafted the 2008 NEDA JV Guidelines, that the winning [private sector participant] consortium may be allowed to incorporate at any time prior to the signing of the JV Agreement provided that: (a) the consortium has submitted a signed and notarized Consortium Agreement; (b) all the members of the consortium have executed a statement that they shall be jointly and severally liable for compliance with the stipulations of the Selection/Tender Documents and performance of the JV Agreement; and (c) all the members of the Consortium have submitted all the eligibility requirements. The incorporation of the consortium shall be a condition precedent to the execution of the JV Agreement.²⁵⁸

256 *Id.*

257 *Id.*

258 *Id.*



13. The nationality requirement (60% Filipino-owned) applies only to the consortium as a whole. There is a distinction between references to “the” private sector participant (as in Section IV, Paragraph 2(a) of Annex “A” of the 2008 NEDA JV Guidelines) and references to “prospective private sector participant” found in other parts of the 2008 NEDA JV Guidelines. The reference used in requiring at least 60% Filipino owner was “the” private sector participant. Hence, the OGCC concluded, the distinction, while subtle, indicated that the ownership criterion was to be applied to the consortium as a whole, not to the individual members. Consequently, a wholly owned foreign national may be part of a consortium-prospective private sector participant, for so long as the foreign interest in the JV must be no more than 40%, if the JV activity necessitates a public utility franchise.²⁵⁹
14. The nationality requirement in Section 11, Article XII of the Philippine Constitution is imposed on the operation of a public utility. In the case of a JV activity, “it is the JV Company (or “the” chosen [private sector participant]) which shall be authorized x x x to operate” the public utility.²⁶⁰
15. The “JV Partner is not required to maintain a 60% Filipino ownership provided that ownership structure of the JV Company is compliant with 60% Filipino nationality requirement and the executive and managing officers thereof are Filipinos.”²⁶¹
16. The technical requirements for a prospective JV Partner are:
 - a. The prospective JV Partner must have completed a similar or related project costing at least 50% of the JV activity subject of the selection process within the relevant period as determined by the Government Entity; and
 - b. The prospective JV Partner shall submit a statement of all its ongoing and completed government and private contracts similar or related to the JV activity subject of the selection process, including contracts awarded but not yet started, if any.
17. The documents needed for the evaluation of the financial capability of the prospective JV Partner are:
 - a. Audited financial statements for the past three (3) calendar years. If the prospective JV Partner is Filipino, the audited financial statements to be submitted must be stamped “received” by the BIR or its duly accredited and authorized institutions; and
 - b. Latest tax returns, if the JV Partner is Filipino.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*



18. Aside from the legal, technical and financial capability documents, all prospective private sector participants shall submit a statement stipulating that the private sector participant:
- a. Accepted the qualification criteria established by the JV-SC of the Government Entity concerned; and
 - b. Waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the concerned Government Entity or its JV-SC to prevent or restrain the qualification proceedings related thereto, the award of the contract to a successful private sector participant, and the execution of the awarded contract. Such waiver shall, however be, without prejudice to the right of a disqualified or losing private sector participant to question the lawfulness of its disqualification or the rejection of its proposal by appropriate administrative or judicial processes not involving the issuance of a writ of injunction or prohibition or restraining order.
19. In case of consortia, each member of the prospective JV Partner shall submit all the legal, technical and financial eligibility requirements to determine the overall capability of the consortia for the JV undertaking.
20. Financial capability shall be measured in terms of the following:
- a. proof of ability of the prospective JV Partner to provide a minimum amount of equity to the JV activity, measured in terms of the net worth of the company, or a deposit equivalent to the minimum equity required set aside or ear-marked for the proposed JV Activity; and
 - b. a letter from a domestic universal/commercial bank, or an international bank with a subsidiary/branch in the Philippines, or any international bank recognized by the BSP, attesting that the prospective JV Partner is one of its current clients, and is in good financial standing.

3. **Eligible and Ineligible.** The Government Entity, through its JV-SC, shall within a period of fifteen (15) calendar days after the deadline set for the submission of the eligibility documents, complete the evaluation of the eligibility documents of the prospective JV Partners, and determine which among them are “eligible” and “ineligible”. Accordingly, the JV-SC shall duly inform the eligible JV Partners within seven (7) calendar days after approval thereof. Ineligible private sector participants shall be similarly given notice of such ineligibility, stating therein the grounds for ineligibility within the same period.

Those ineligible may appeal their ineligibility to the Head of the Government Entity or his authorized representative, within seven (7) calendar days from receipt of the notice of ineligibility. The selection process will be suspended for a maximum period of thirty (30) calendar days while the appeal is being evaluated. The Head of the Government Entity or his authorized representative shall act on the appeal within the thirty (30) calendar day period of suspension of the selection process. The decision of the Head of the Government Entity, or his authorized representative, on the appeal shall be final and immediately executory. If the appeal is not resolved within said period, the appeal is deemed denied, and the selection process will proceed.



Notes:

1. The Government entity has Fifteen (15) calendar days, after the deadline set for the submission of the eligibility documents, to determine the prospective JV partners.
 2. The Government entity must inform the eligible JV Partners of its decision seven (7) calendar days after approval or disapproval of the eligibility proposal. Notice to ineligible private sector participants shall state the grounds for ineligibility.
 3. Those declared ineligible may appeal their ineligibility to the Head of the Government Entity or his authorized representative, within seven (7) calendar days from receipt of the notice of ineligibility.
 4. The selection process will be suspended for a maximum period of thirty (30) calendar days while the appeal is being evaluated.
 5. The Head of the Government Entity or his authorized representative shall act on the appeal within the thirty (30) calendar day period of suspension of the selection process.
 6. The decision of the Head of the Government Entity, or his authorized representative, on the appeal shall be final and immediately executory.
 7. If the appeal is not resolved within said period, the appeal is deemed denied, and the selection process will proceed.
4. **Issuance of Tender Documents.** The Government Entity concerned shall make available the related competitive selection documents to all eligible private sector participants as soon as practicable to provide respective private sector participants ample time to examine the same and to prepare their respective proposals prior to the date of opening of the proposals. The time period from the last day of the issuance of tender documents to the date of opening of the proposal shall not exceed sixty (60) calendar days for JV Agreements costing more than PhP500 Million, and thirty (30) calendar days for JVAs costing less than PhP500 Million.

The proposal parameters for the proposed JV activity should be transparent and fair. It should not, in any way, be tailor-made for or meant to favor or give advantage to a particular private sector participant.

Notes:

1. Competitive selection documents shall be made available to all eligible private sector participants as soon as practicable to provide respective private sector participants ample time to examine the same and to prepare their respective proposals prior to the date of opening of the proposals.
2. The proposals shall be opened no more than sixty (60) calendar days from the last day of the issuance of tender documents for JV Agreements costing more than P500 Million, and thirty (30) calendar days for JVAs costing less than P500 Million.



V. Supplemental Competitive Selection Bulletins and Pre-Selection Conferences

1. **Responsibility of the Private Sector Participant.** The prospective private sector participant shall be solely responsible for taking all the necessary steps to carefully examine and acquaint himself with the requirements and terms and conditions of the selection documents with respect to the cost, duration, and execution/operation of the project as it affects the preparation and submission of its proposal. The Government Entity concerned shall not assume any responsibility regarding erroneous interpretations or conclusions by the prospective private sector participant based on data furnished or indicated in the competitive selection documents.

Notes:

1. The prospective private sector participant is ultimately responsible for ensuring comprehension and compliance with the selection procedure and the required documents. It shall be solely responsible for taking all the necessary steps to carefully examine and acquaint himself with the requirements and terms and conditions of the selection documents with respect to the cost, duration, and execution/operation of the project as it affects the preparation and submission of its proposal.
 2. The Government Entity concerned does not assume any responsibility regarding erroneous interpretations or conclusions by the prospective private sector participant based on data furnished or indicated in the competitive selection documents.
-
2. **Supplemental Notices.** A prospective private sector participant may submit a written request to the Government Entity concerned on or before the Pre-Selection Conference clarifying the meaning of any data or requirements or any part of the selection documents. Any substantive interpretation given by the concerned Government Entity shall be issued in the form of a Supplemental Notice, and furnished to all prospective private sector participants. The Government Entity concerned may also issue Supplemental Notices to all prospective private sector participants at any time for purposes of clarifying any provisions of the selection documents, provided that the same is issued within a reasonable period to allow all private sector participants to consider the same in the preparation of their proposals. Receipt of all Supplemental Notices shall be duly acknowledged by each private sector participants prior to the submission of his proposal and shall be so indicated in the proposal.



Notes:

1. Supplemental Notices are notices given by the Government Entity, furnished to all prospective private sector participants, concerning any substantive interpretation of the meaning of any data or requirement or any part of the selection document made upon the written request of a prospective private sector participant. It is also issued for the purpose of clarifying any provisions of the selection documents, provided that the same is issued within a reasonable period to allow all private sector participants to consider the same in the preparation of their proposals. Receipt of all Supplemental Notices shall be duly acknowledged by each private sector participants prior to the submission of his proposal and shall be so indicated in the proposal.
3. **Pre-Selection Conference.** For JV activities involving government exposure of less than Php500 million, pre-selection conference shall be conducted by the Government Entity at least fifteen (15) calendar days before the deadline for the submission of proposals. For JV activities involving government exposure of at least Php500 million, the pre-selection conference shall be conducted at least thirty (30) calendar days before the submission of proposals. Notwithstanding, the Government Entity concerned may adjust said period as may be appropriate for the nature, scope, size, and complexity of the proposed JV activity. Provided, that the principles of transparency, competition and accountability are observed.

Notes:

1. The Pre-Selection Conference shall be held:
 - a. At least fifteen (15) calendar days before the deadline for the submission of proposals for JV activities involving government exposure of less than P500 Million; and
 - b. At least thirty (30) calendar days before the submission of proposals for JV activities involving government exposure of at least P500 Million.
2. Notwithstanding the foregoing, the Government Entity concerned may adjust said period as may be appropriate for the nature, scope, size, and complexity of the proposed JV activity.²⁶²

262 *Id.*



VI. Submission and Receipt of Proposals

1. **Requirements for Submission of Proposals.** Private sector participants shall be required to submit their proposals on or before the deadline stipulated in the “Instructions to Participants”. For eligible participants, proposals shall be submitted in two (2) separate sealed envelopes, the first being the technical proposal and the second the financial proposal.
 - a. The technical proposal shall contain the following, as applicable:
 - 1) compliance statements with regard to the technical parameters as stated in the tender documents;
 - 2) operational feasibility;
 - 3) technical soundness, including proposed project timeline;
 - 4) preliminary environmental assessment;
 - 5) cost and financing plan of the JV activity; and
 - 6) proposal security in accordance with the following schedule:

Cost of JV activity as estimated by the government entity	Required Proposal Security
Less than PhP 5.0 billion	2.0% of the cost of the JV activity
less than PhP 5.0 billion to less than PhP 10.0 billion	1.5% of the cost of the JV activity or PhP 100 million, whichever is higher
PhP 10.0 billion and more	1.0% of the cost of the JV activity or PhP 150 million, whichever is higher

- 7) other documents to support the private sector participant’s technical proposal, as may be required by the concerned Government Entity.
- b. The financial proposal shall contain the following, as the case may be:
 - a. compliance statements with regard to the financial parameters stated in the tender documents
 - b. proposed cost of the JV activity, operation and maintenance cost, the amount of equity to be infused and debt to be obtained for the project, sources of financing, and all other related costs
 - c. financial proposal corresponding to the parameters set by the concerned Government Entity

Fifty percent (50%) of the equity to be provided by the private sector entity should as much as possible come from its own resources and not borrowed.

The government entity concerned is not precluded from specifying other requirements for the technical and financial proposals that are best suited for the specific JV activity.



2. **Submission of late proposals.** Proposals submitted after the deadline for submission prescribed in the “Instructions to Private Sector Participants” shall be considered late and shall be returned unopened.

Notes:

1. Eligible private sector participants shall submit their proposals in two (2) separate sealed envelopes, the first being the technical proposal and the second the financial proposal.
2. Private sector participants shall be required to submit their proposals on or before the deadline stipulated in the “Instructions to Participants.”
3. The technical proposal shall contain the following:
 - a. Compliance statements with regard to the technical parameters as stated in the tender documents;
 - b. operational feasibility;
 - c. Technical soundness, including proposed project timeline;
 - d. Preliminary environmental assessment;
 - e. Cost and financing plan of the JV activity;
 - f. Proposal security in accordance with the following schedule:

Cost of JV activity as estimated by the government entity	Required Proposal Security
Less than PhP 5.0 billion	2.0% of the cost of the JV activity
less than PhP 5.0 billion to less than PhP 10.0 billion	1.5% of the cost of the JV activity or PhP 100 million, whichever is higher
PhP 10.0 billion and more	1.0% of the cost of the JV activity or PhP 150 million, whichever is higher

- g. Other documents to support the private sector participant’s technical proposal, as may be required by the concerned Government Entity.
4. The financial proposal shall contain the following:
 - a. Compliance statements with regard to the financial parameters stated in the tender documents;
 - b. Proposed cost of the JV activity, operation and maintenance cost, the amount of equity to be infused and debt to be obtained for the project, sources of financing, and all other related costs; and
 - c. Financial proposal corresponding to the parameters set by the concerned Government Entity



5. Fifty percent (50%) of the equity to be provided by the private sector entity should as much as possible come from its own resources and not borrowed.
6. Additional requirements best suited for the specific JV activity maybe imposed by the Government Entity concerned for the technical and financial proposals.
7. Proposals submitted after the deadline for submission shall be considered late. They shall not be considered or evaluated, and shall be returned unopened.
8. The proposal security may be forfeited for the following reasons:
 - a. Withdrawal of proposal after the proposal opening date;²⁶³ or
 - b. Refusal, inability or failure of the winning private sector participant to enter into contract with the Government Entity concerned²⁶⁴

VII. Opening and Evaluation of Proposals

1. **Opening of the envelope for the technical proposal.** At the date and time of the proposal opening stipulated in the “Instructions to Private Sector Participants”, the JV-SC shall open only the first envelope containing the technical proposal and ascertain (a) whether the same is complete in terms of the data/information required under Section VI.1 (a) above; and (b) whether the same is accompanied by the required proposal security in the prescribed form, amount, and period of validity. All private sector participants, or their representatives, present at the opening of the envelopes containing the technical proposal shall sign a register of the proposal opening.

Notes:

1. In opening the envelope for the technical proposal, the JV-SC shall open only the first envelope containing technical proposal and ascertain: (a) whether the same is complete in terms of the data/information required; and (b) whether the same is accompanied by the required proposal security in the prescribed form, amount, and period of validity.
2. All private sector participants, or their representatives, present at the opening of the envelopes containing the technical proposal shall sign a register of the proposal opening.
2. **Evaluation of the technical proposal.** The evaluation of the first envelope containing the technical proposal shall involve the assessment of the technical, operational, environmental, and financing viability of the proposal, vis-à-vis the prescribed requirements and criteria/minimum standards, and basic parameters prescribed in the competitive selection documents.

²⁶³ 2008 NEDA JV Guidelines, *supra* note 14 at Annex C, Part VII, § 8.

²⁶⁴ *Id.* at Annex C, Part VIII, § 7.



The JV-SC of the Government Entity concerned shall complete the evaluation of the technical proposal within fifteen (15) calendar days from the date the proposals are opened. Only those proposals that have been determined to have positively passed the evaluation of the technical proposal shall be qualified and considered for the evaluation of the financial proposal.

Notes:

1. The technical proposal shall be assessed on technical, operational, environmental, and financing viability of the proposal, vis-à-vis the prescribed requirements and criteria/minimum standards, and basic parameters prescribed in the competitive selection documents.
2. The technical proposal must be evaluated within fifteen (15) calendar days from the date the proposals are opened. Only those proposals that have been determined to have positively passed the evaluation of the technical proposal shall be qualified and considered for the evaluation of the financial proposal.
3. **Opening of the envelope for the financial/technical proposal.** Only the financial proposals of private sector participants who passed the evaluation described under Section VII.2 hereof, shall be opened for further evaluation. The financial proposals tendered by private sector participants who failed the technical proposal evaluation under Section VII.2 hereof, shall not be considered further, and shall be returned, unopened, together with a notice stating the reasons for disqualification from further consideration.

The JV-SC shall notify the private sector participants qualifying for the second stage of evaluation of the date, time and place of the opening of the envelopes for the financial proposal. The opening thereof shall follow the same procedure prescribed for the opening of the envelopes containing technical proposals.

Notes:

1. Only the financial proposals of private sector participants who passed the evaluation described. Proposals failing the technical evaluation shall not be considered and shall be returned, unopened, together with a notice stating the reasons for disqualification from further consideration.
2. The notice requirement still applies in the second stage of evaluation. The JV-SC shall notify the private sector participants qualifying for the second stage of evaluation of the date, time and place of the opening of the envelopes for the financial proposal. The same procedure prescribed in the evaluation of the technical proposals will be followed.²⁶⁵
4. **Evaluation of the financial proposal.** The evaluation of the financial proposal shall involve the assessment and comparison of the financial proposals against the financial parameters stated in the tender documents and proposal parameters set by the Government Entity concerned. The proposed financing plan must show that the same adequately meets the costs relative to the JV activity. The evaluation of financial proposals shall be completed by the JV-SC of the concerned Government Entity within fifteen (15) calendar days.

²⁶⁵ *Agra et al., supra note 168.*



Notes:

1. The evaluation of the financial proposal involves the assessment and comparison of the financial proposals against the financial parameters stated in the tender documents and proposal parameters set by the Government Entity concerned. The proposed financing plan must show that the same adequately meets the costs relative to the JV activity.
2. The evaluation must be completed within fifteen (15) calendar days from the opening of the proposal.
5. **Simultaneous evaluation of the technical and financial proposals.** Subject to the determination of the Head of the Government Entity wherein the nature of the JV activity shall warrant the appreciation of both the technical and financial proposals as a whole in order to determine the best proposal, simultaneous evaluation of the technical and financial proposals may be resorted to. Provided, that, said evaluation procedure shall be explicitly stated in the proposal documents. Simultaneous evaluation of the technical and financial proposals shall be completed within thirty (30) calendar days from the date the proposals are opened.

Notes:

1. The technical and financial proposals may be evaluated simultaneously if the Head of the Government Entity determines that the nature of the JV activity warrants the appreciation of both the technical and financial proposals as a whole in order to determine the best proposal; provided, that, said evaluation procedure shall be explicitly stated in the proposal documents.
2. Simultaneous evaluation of the technical and financial proposals shall be completed within thirty (30) calendar days from the date the proposals are opened.
6. **Prescriptive periods.** The periods stated for the evaluation of the technical and financial proposals are prescriptive. The Government Entity concerned may adjust said periods as may be appropriate for the nature, scope, size, and complexity of the proposed JV activity. Provided, that the principles of transparency, competition and accountability are observed.

Notes:

1. The concerned Government Entity may adjust the period prescribed for the evaluation of the technical and financial proposal. Periods appropriate for the nature, scope, size, and complexity of the proposed JV activity may be prescribed by the concerned government entity in lieu of those stated in the 2008 NEDA JV Guidelines.
2. In adjusting the period prescribed in the 2008 NEDA JV Guidelines, the principles of transparency, competition and accountability must at all times be observed.
7. **Rejection of proposals.** Non-compliance with the information required on either the first or second envelope shall be grounds for rejection of proposals.



8. **Withdrawal and/or modification of proposals.** Withdrawal and/or modification of proposals may be allowed upon written notice by the private sector participant concerned, to the Government Entity prior to the time and date set for the opening of the envelope containing the technical proposal as specified in the “Instructions to Private Sector Participants”. No proposals shall thereafter be modified or withdrawn. Proposal modifications received after said period shall be considered late and will be returned unopened. Withdrawal of proposals after the proposal opening date shall cause the forfeiture of the private sector participant’s proposal security.

Notes:

1. Withdrawal or modification of the proposal may be made prior to the opening of the envelope containing the technical proposal, and upon written notice by the private sector participant concerned, to the Government Entity. Proposal modifications received after said period shall be considered late and will be returned unopened.
2. If the proposal is withdrawn after the opening date, the private sector participant’s proposal security will be forfeited.
9. **Right to Reject All Proposals.** The Government Entity concerned reserves the right to reject any or all proposals, waive any minor defects therein and accept the offer it deems most advantageous to the government.

VIII. Award and Approval of Contract

1. **Recommendation to Award.** Within seven (7) calendar days from the date the evaluation procedure adopted is completed, the JV-SC shall submit the recommendation of award to the Head of the Government Entity concerned. The JV-SC shall include as part of its recommendation, a detailed evaluation/assessment report on its decision regarding the evaluation of the proposals, and explain in clear terms the basis of its recommendations.

Notes:

1. The JV-SC must submit its recommendation to the Head of the Government Entity within seven (7) calendar days from the completion of the evaluation.
2. A detailed evaluation/ assessment report on its decision regarding the evaluation of the proposals, and an explanation in clear terms the basis of its recommendations must be included in the submission of the JV-SC.



2. **Decision to Award.** Within seven (7) calendar days from the submission by JV-SC of the recommendation to award, the Head of the Government Entity shall approve or reject the same. The approval shall be manifested by signing and issuing the “Notice of Award” to the winning private sector participant within seven (7) calendar days from approval thereof.

All participating private sector participants shall be informed of the award in writing. Such decision shall be made available to the public upon request.

Notes:

1. The Head of the Government Entity must decide within seven (7) calendar days from receipt of the recommendation whether to approve or reject the recommendation.
2. A “Notice of Award” shall be issued to the winning private sector participant within seven (7) calendar days from approval thereof, signifying the approval of the recommendation to award by the Head of the Government Entity.
3. All participating private sector participants shall be informed of the award in writing. Such decision shall be made available to the public upon request.
3. **Notice of Award.** The “Notice of Award” to be issued by the Head of Government Entity concerned, shall contain among others, an instruction to the winning private sector participant to comply with conditions precedent for the execution of the JV Agreement and to submit compliance statements with regard thereto, within fifteen (15) calendar days from receipt of the “Notice of Award”.

Failure to comply with the conditions precedent for the execution of the contract within the prescribed fifteen (15)-calendar day period will result the confiscation of the proposal security. Within seven (7)-calendar days from receipt of the compliance statements from the winning private sector participant, the Head of the Government Entity shall determine the sufficiency of the same, and notify the winning private sector participant accordingly.

Notes:

1. The Notice of Award shall include an instruction to the winning private sector participant to:
 - a. comply with conditions precedent for the execution of the JV Agreement; and
 - b. submit compliance statements with regard thereto, within fifteen (15) calendar days from receipt of the “Notice of Award.”
2. If the private sector participant fails to comply with the fifteen (15)-calendar day period for submission, the corresponding proposal security shall be forfeited.
3. The Head of the Government Entity shall determine the sufficiency of the compliance statements within seven (7)-calendar days from receipt. The winning private sector participant shall be notified accordingly.



4. **Validity of Proposals/Return of Proposal Security.** The execution of the JV Agreement shall be made within the period of the validity of the proposal security. The required proposal security shall be valid for a reasonable period, but in no case beyond one hundred eighty (180) calendar days following the opening of the proposals. Proposal securities shall be returned to the unsuccessful private sector participants upon signing of the JV Agreement by the winning private sector participant.

Notes:

1. The JV Agreement must be executed within the validity period of the proposal security.
2. The proposal security must be valid for a reasonable period, but in no case beyond one hundred eighty (180) calendar days from the opening of the proposals.
3. The proposal security of unsuccessful private sector participants shall be returned to them upon signing of the JV Agreement.
5. **Extension of Validity of Proposals.** When an extension of the validity of proposals is considered necessary, those who submitted proposals shall be requested in writing, to extend the validity of their proposals before the expiration date of the same. However, private sector participants shall not be allowed to modify or revise the price or other substantial aspect of their proposals.

Private sector participants shall have the right to refuse such an extension without forfeiting their proposal security. As a condition of the extension of the validity of their proposals, the participating private sector participants must correspondingly extend the validity of their proposal security.

6. **Failure of Competitive Selection.** There shall be a failure of competitive selection in any of the following instances:
 - a) If there is only a single party who submits eligibility documents within the deadline stipulated in Invitation to Apply for Eligibility and to Submit a Proposal;
 - b) If at anytime prior to the issuance of the notice of eligibility, should interested parties withdraw from the competitive selection process outlined in Annex “A”, with the effect that there is only one interested party remaining;
 - c) If there is only one interested party who is determined to be eligible to submit a proposal;
 - d) If at anytime after the issuance of the notice of eligibility until deadline for submission of proposals, eligible private sector participants withdraw from the competitive selection process outlined in Annex “A” with the effect that there is only one eligible private sector participant remaining and eligible to submit a proposal;
 - e) If there is only one eligible private sector participant that submits a proposal;
 - f) No Technical Proposal is rated “passed”;
 - g) If there is only one eligible private sector participant whose Technical Proposal is rated “passed,” but whose Financial Proposal does not meet the financial parameters set for in the Tender Documents: and



- h) No Financial Proposal of any eligible private sector participant whose Technical Proposal is rated “passed”, meets the financial parameters set forth in the Tender Documents.
- i) No proposals were received or no private sector entity is found qualified for the JV undertaking.

In the event of a failed competitive selection brought about by instances stipulated under items a., b., c., d., e, g. and h. above, the JV Activity, at the sole decision of the Head of the Government Entity concerned, may again be subjected to a competitive selection, or, may be the subject of limited negotiations in accordance with Annex “B” hereof. In the event of a failed competitive selection brought about by an instance stipulated under item f. above, a competitive selection shall be conducted again by the Government Entity. In the event of a failed competition brought about by item (i) above, the Head of Agency concerned may seek private sector entities for the JV undertaking subject to Annex “C” hereof.

Notes:

1. There shall be a failure of competitive selection in any of the following instances:
 - a) When only one party submits eligibility documents within the deadline stipulated in IAESP;
 - b) When interested parties withdraw from the competitive selection process any time prior to the issuance of the notice of eligibility, with the effect that there is only a one interested party remaining;
 - c) When only one interested party is determined as eligible to submit a proposal;
 - d) When eligible private sector participants withdraw from the competitive selection process any time after the issuance of the notice of eligibility until deadline for submission of proposals, with the effect that there is only one eligible private sector participant remains and is eligible to submit a proposal;
 - e) When only one eligible private sector participant submits a proposal;
 - f) When no Technical Proposal is rated “passed”;
 - g) When only one eligible private sector participant obtains a passing rate for its technical proposal but whose Financial Proposal fails the financial parameters set for in the Tender Documents;
 - h) When no Financial Proposal of any eligible private sector participant, whose Technical Proposal is rated “passed”, meets the financial parameters set forth in the Tender Documents; and
 - i) When no proposals were received or no private sector entity is found qualified for the JV undertaking.
2. In the event of a failed competitive selection brought about by instances stipulated under items a., b., c., d., e, g. and h. above, the JV Activity, at the sole decision of the Head of the Government Entity concerned, may be subjected to another competitive selection under Annex “A” of the 2008 NEDA JV Guidelines. Alternatively, the JV Activity may be the subject of limited negotiations under Annex “B” of the 2008 NEDA JV Guidelines.
3. In the event of a failed competitive selection brought about by an instance stipulated under item f. above, a competitive selection under Annex “A” shall again be conducted by the Government Entity. In the event of a failed competition brought about by item (i), the Head of Agency concerned may seek private sector entities for the JV undertaking.



7. **Execution/Approval of the JV Agreement.** The authorized signatory(ies) of the winning private sector participant and the Government Entity concerned, shall execute and sign the JV Agreement, within seven (7) calendar days from receipt by the winning private sector participant of the notice referred to in VIII.3 above.

Consistent with Article 1159 of the New Civil Code, said JV Agreement is considered the law between the parties, and the parties shall perform their respective prestations, obligations, and undertakings thereunder with utmost good faith, with a view to attaining the objective thereof. An original signed copy of the contract shall be submitted to:

- a.) The Office of the President;
- b.) NEDA
- c.) Statutory Counsel
- d.) GPPB; and
- e.) DOF in case of GOCCs and GFIs, and DBM in case of other entities;

In the event of refusal, inability or failure of the winning private sector participant to enter into contract with the Government Entity concerned, within the time provided therefore, said Government Entity shall forfeit its proposal security. In such event, the Government Entity concerned shall consider the private sector participant with the next ranked complying proposal as the winning private sector participant, and notify said private sector participant accordingly. If the next ranked complying private sector participant shall likewise refuse or fail to enter into contract with the Government, its proposal security shall likewise be forfeited and the Government Entity concerned shall consider the next ranked complying proposal, and so on, until a contract shall have been entered into. In the event that the concerned Government Entity is unable to execute the contract with any of the complying private sector participants, a failure of competitive selection will be declared and the JV may be subjected to a competitive selection again.

Notes:

- 1. The JV Agreement shall be executed and signed within seven (7) calendar days from receipt by the winning private sector participant of the Notice of Award.
- 2. Once signed, the JV Agreement becomes the law between the parties, which shall perform their respective prestations, obligations, and undertakings thereunder with utmost good faith, with a view to attaining the objective thereof.
- 3. The following offices/agencies must be furnished copies of the original signed copy of the contract:
 - a. The Office of the President;
 - b. NEDA;
 - c. Statutory Counsel (OGCC or OSG);
 - d. GPPB; and
 - e. DOF, in case of GOCCs and GFIs, and DBM in case of other entities;



4. The proposal security shall be forfeited if the winning private sector proponent refuses, is unable, or otherwise fails to enter into a contract with the concerned Government Entity.
5. If the winning private sector proponent refuses, is unable, or otherwise fails to enter into a contract with the concerned Government Entity, the private sector participant with the next ranked complying proposal shall be considered as the winning private sector participant and shall be notified accordingly. This procedure shall be repeated until a JV Agreement is signed by the concerned Government Entity.
6. If no JV Agreement is entered into, the a failure of proceedings will be declared and the JV activity may again be subjected to competitive selection, limited negotiations, or competitive challenge.²⁶⁶
8. **Other Approvals for Contract.** The entity tasked under the JV Agreement shall, as may be required under existing laws, rules and regulations, secure any and all other approvals for the contract, or the implementation thereof, from government agencies or bodies including the Regulator, in the case of Public Utility Projects. This includes securing the necessary and appropriate environmental clearances from the DENR prior to actual project implementation. The DENR shall act on the environmental clearance of the JV activity within the time frame prescribed and following the guidelines of the DENR Administrative Order No. 96-37 and subsequent guidelines as may be issued from time to time. The Government Entity may provide the necessary assistance to its JV partner in securing all the required clearances. The contract shall provide milestones in securing such other approvals required for the implementation of the contract.

Prior to the execution of the JV Agreement, the OGCC, OSG or other entity prescribed by law/ issuances as the statutory counsel of GOCCs, GCEs and GICPs, shall issue the corresponding Counsel's Opinion.

Notes:

1. The other approvals required for the implementation of the contract are:
 - a. Approvals from the Regulator, in case of public utility projects;
 - b. Department of Environment and Natural Resources (DENR), if necessary and appropriate;
 - c. Counsel's Opinion from the OGCC, OSG or other entity prescribed by law/issuances as the statutory counsel of GOCCs, GCEs and GICPs.
3. The party responsible for securing the other approvals under this section shall be that so named under the JV Agreement.
4. The DENR shall act on the environmental clearance of the JV activity within the time frame prescribed and following the guidelines of the DENR Administrative Order No. 96-37 and subsequent guidelines as may be issued from time to time.

266 *Id.*



5. The Government Entity may provide the necessary assistance to its JV partner in securing all the required clearances.
6. The contract shall provide milestones in securing such other approvals required for the implementation of the contract; and
7. The Counsel's Opinion from the OGCC, OSG or other entity prescribed by law/issuances as the statutory counsel of GOCCs, GCEs and GICPs, shall be secured prior to the execution of the JV Agreement.
9. **Contract Effectivity.** The contract shall be effective upon signing thereof by the Head of Government Entity and unless another date is stipulated therein.

IX. Appeals Mechanism

1. Decisions of the JV-SC with respect to conduct of the competitive selection process may be appealed in writing to the Head of the Government Entity concerned: Provided, however, that a prior motion for reconsideration should have been filed by the party concerned, and the same has been resolved JV-SC. The appeal must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the JV-SC denying its motion for reconsideration. An appeal may be made by filing a verified position paper with the Head of the Government Entity concerned, accompanied by the payment of a non-refundable appeal fee. The non-refundable appeal fee shall be in an amount equivalent to no less than one-half (1/2) of one percent (1%) of the project cost.

Notes:

1. Appeal Body: Head of the Government Entity
2. Conditions Precedent:
 - c. Filing a motion for reconsideration by the party concerned; and
 - d. Resolution of the same by JV-SC.
3. Appeal Period: Seven (7) calendar days from receipt by the party concerned of the JV-SC's resolution denying its motion for reconsideration.
4. Form of Appeal: Verified position paper, accompanied by the payment of a non-refundable appeal fee.
5. Appeal Fee: Non-refundable, and shall be in an amount equivalent to no less than one-half (1/2) of one percent (1%) of the project cost.



X. Final Approval

1. **Contract Award and Final Approval.** Subject to the charter of the Government Entity concerned, no further and higher approval is necessary, unless the same is required by Law to be acted upon by the President. In which case, the procedure stipulated under Section 6 (Government Contracts Requiring Presidential Action and/or Approval) of EO No. 423, as amended by EO No. 645, shall be followed. Upon approval of the JV Agreement, the Government Entity concerned shall adhere to the requirements of Section 10 (Submission of Government Contracts) of the same EO, as deemed applicable.

Notes:

1. **General Rule:** No further and higher approval is necessary apart from those discussed in the 2008 NEDA JV Guidelines.
2. **Exceptions:**
 - a. Further approvals as required by the charter of the Government Entity concerned, if any; and
 - b. Required by Law to be acted upon by the President.
3. If action by the President is required by law, the procedure stipulated under Section 6 (Government Contracts Requiring Presidential Action and/or Approval) of EO No. 423, as amended by EO No. 645, shall be followed. Upon approval of the JV Agreement, the Government Entity concerned shall adhere to the requirements of Section 10 (Submission of Government Contracts) of the same EO, as deemed applicable.





ANNEX B

DETAILED GUIDELINES FOR LIMITED NEGOTIATION PROCEDURES IN CASE OF FAILED COMPETITIVE SELECTION UNDER SECTION 6 OF ANNEX “A” OF THE GUIDELINES

Upon the declaration of a failed competitive selection under Section VIII.6 of Annex A of the Guidelines, the Government Entity concerned shall enter into limited negotiations.

The Government Entity concerned shall set the timetable of the various activities for the limited negotiations. The Government Entity concerned may terminate the limited negotiations should the party it is negotiating with fail to observe the said timetable.

The negotiations shall be in accordance with the following procedures:

- I. Should there be a failure of competitive selection brought about by instances stipulated under Section VIII.6.a and 6.b as outlined in Annex “A”, with the effect that there is only one (1) interested party remaining, the following procedure shall be observed:
 - (a) The Government Entity concerned shall proceed with the determination of the eligibility of the sole private sector entity;
 - (b) The sole private sector entity’s eligibility documents shall be evaluated in accordance with the rules set forth in Annex “A” of the Guidelines;



- (c) If the eligibility documents are found to be insufficient and rated “failed”, the Government Entity concerned shall terminate the negotiations. In the event the negotiations are terminated, the Head of the Government Entity, at its sole option, may conduct again a competitive selection or decide to pursue the proposed activity through alternative routes other than JV;
- (d) If the eligibility documents are found sufficient and rated “passed”, the Government Entity concerned shall give the sole private sector entity the draft tender documents in accordance with Annex “A” of the Guidelines;
- (e) The sole private sector entity shall submit a proposal in accordance and compliance with Annex “A” of the Guidelines;
- (f) The Government Entity concerned shall simultaneously evaluate the technical and financial proposals of the sole private sector entity in accordance with Annex “A” of the Guidelines;
- (g) If the proposal of the sole private sector entity is rated “failed”, the Government Entity concerned shall terminate the negotiations and, the Head of the Government Entity, at its sole option, may conduct again a competitive selection or decide to pursue the proposed activity through alternative routes other than JV.
- (h) Should the proposal of the sole private sector entity meet the parameters set forth in the tender documents, the Government Entity concerned shall enter into the JV Agreement with the sole private sector entity concerned. In the event that an agreement is not reached, negotiations shall be terminated.

II. Should there be a failure of competitive selection brought about by instances stipulated under Section VIII.6.c and 6.d as outlined in Annex “A” with the effect that there is only one (1) interested party remaining and eligible to submit a proposal the following procedure shall be observed:

- (a) The sole eligible party shall be instructed to submit a proposal; and
- (b) The process outlined in I(d) to (h) above shall then be observed and followed.

III. Should there be a failure of competitive selection brought about by Section VIII.6.e as outlined in Annex “A” such that only one (1) proposal is received by the Government Entity, the process outlined in I(f) to (h) above shall then be observed and followed.

IV. Should there be a failure of competitive selection brought about by Section VIII.6.g and 6.h as outlined in Annex “A”, the following procedure shall be observed:

- (a) The negotiation shall be on a “Financial Proposal” only basis. The Technical Proposal shall remain valid and binding.
- (b) The eligible private sector participant/s whose Technical Proposal/s was/were rated “passed” but whose Financial Proposal/s is/are non-compliant with the Financial Parameters outlined in the Tender Documents, shall be asked to submit a revised Financial Proposal.
- (c) Should there be more than one revised Financial Proposal, the revised Financial Proposal/s shall be evaluated in accordance with Annex “A” of the Guidelines.
- (d) Should the revised Financial Proposal meet the Financial Parameters outlined in the Tender Documents, the Government Entity concerned shall enter into the JV Agreement with the eligible Private sector participant (if there is only one remaining) or with the eligible private sector participant submitting the most advantageous Financial Proposal, in accordance with Annex “A” of the Guidelines. Should the eligible private sector participant still fail to meet the



Financial Parameters outlined in the Tender Documents, the Government Entity concerned shall terminate the negotiations with the said eligible private sector participant/s, and, the Head of the Government Entity, at its sole option, may conduct another round of competitive selection, or decide to pursue the proposed activity through alternative routes other than JV.

Notes:

1. When a failed competitive selection is declared, the Government Entity shall enter into limited negotiations and set the timetable of the various activities therefor.
2. The Government Entity concerned may terminate the limited negotiations should the sole private sector entity fail to observe the said timetable.
3. Negotiations shall be conducted in the following manner:
 - a. Determination of the eligibility of the sole private sector entity by the Government Entity concerned;
 - b. Evaluation of the sole private sector entity's eligibility documents in accordance with Annex "A" of the 2008 NEDA JV Guidelines;
 - c. *If the eligibility documents are insufficient and rated "failed," then negotiations shall be terminated and the Head of the Government Entity, at its sole option, may again conduct a competitive selection or decide to pursue the proposed activity through alternative routes other than JV;*
 - d. *If the eligibility documents are sufficient and rated "passed," then draft tender documents shall be given to the sole private sector entity in accordance with Annex "A" of the 2008 NEDA JV Guidelines;*
 - e. Submission of a proposal by the sole private sector entity in accordance with Annex "A" of the 2008 NEDA JV Guidelines;
 - f. Simultaneous evaluation of the technical and financial proposals by the Government Entity concerned in accordance with Annex "A" of the 2008 NEDA JV Guidelines;
 - g. *If the proposal is rated "failed," then negotiations shall be terminated and the Head of the Government Entity, at its sole option, may again conduct a competitive selection or decide to pursue the proposed activity through alternative routes other than JV; and*
 - h. *If the proposal meets the parameters set in the tender documents, then a JV Agreement shall be executed between the Government Entity concerned and the private sector entity concerned.*
 - i. *If an agreement is not reached, then negotiations shall be terminated.*





ANNEX C

DETAILED GUIDELINES FOR COMPETITIVE CHALLENGE PROCEDURE FOR PUBLIC-PRIVATE JOINT VENTURES

- I. *Negotiated JVs* – Any Government Entity may directly negotiate a JV activity with a private sector entity whenever allowed under the Guidelines issued by the NEDA.
- II. *Competitive Challenge Procedure* – In all cases where the Government Entity directly negotiates with a private sector participant for a proposed JV undertaking, the negotiated terms shall be subjected to a competitive challenge wherein other private sector entities shall be invited to submit comparative proposals, to ensure that JV Agreements are entered into under a transparent and competitive process that promotes accountability in government transactions.
- III. *Three-Stage Framework* – Negotiated JV Agreements shall be subjected to a three-stage process, summarized as follows:

Stage One – A private sector entity submits an unsolicited proposal to the Government Entity, or the Government Entity seeks out a JV partner after failed competition for a JV activity deemed manifestly advantageous to Government. The private sector entity submits a proposal to the Government Entity for a projected JV activity/undertaking. The Government Entity, through its JV-SC, is tasked with the initial evaluation of the proposal. Upon completion of the initial evaluation, the Head of the Government Entity, upon recommendation of the JV-SC, shall either issue an acceptance or non-acceptance of the proposal. The Government



Entity concerned shall act on the proposal within ten (10) working days upon submission of complete documents by the private sector entity. An acceptance shall not bind the Government Entity to enter into the JV activity, but, shall mean that authorization is given to proceed with detailed negotiations on the terms and conditions of the JV activity. In case of non-acceptance, the private sector entity shall be informed of the reasons/grounds for non-acceptance.

Stage Two – The parties negotiate and agree on the terms and conditions of the JV activity. The following rules shall be adhered to in the conduct of detailed negotiations and the preparation of the proposal documents in case of a successful negotiations:

1. Both parties shall negotiate on, among others, the purpose, terms and conditions, scope, as well as all legal, technical, and financial aspects of the JV activity.
2. The JV-SC shall determine the eligibility of the private sector entity to enter into the JV activity in accordance with Sec. IV.2 (Eligibility Requirements) under Annex A hereof.
3. Negotiations shall comply with the process, requirements and conditions as stipulated under Sections 6 (General Guidelines) and 7 (Process for Entering into JV Agreements) of the Guidelines. Once negotiations are successful, the Head of the Government Entity and the authorized representative of the private sector entity shall issue a signed certification that an agreement has been reached by both parties. Said certification shall also state that the Government Entity has found the private sector participant eligible to enter into the proposed JV activity and shall commence the activities for the solicitation for comparative proposals. However, should negotiations not result to an agreement acceptable to both parties, the Government Entity shall have the option to reject the proposal by informing the private sector participant in writing stating the grounds for rejection and thereafter may accept a new proposal from private sector participants, or decide to pursue the proposed activity through alternative routes other than JV. The parties shall complete the Stage Two process within thirty (30) calendar days from acceptance of the proposal under Stage One above.
4. After an agreement is reached, the contract documents, including the selection documents for the competitive challenge are prepared.

Stage Three – Once the negotiations have been successfully completed, the JV activity shall be subjected to a competitive challenge, as follows:

1. The Government Entity shall prepare the tender documents pursuant to Section II (Selection/Tender Documents) of Annex A hereof. The eligibility criteria used in determining the eligibility of the private sector entity shall be the same as those stated in the tender documents. Proprietary information shall, however, be respected and protected, and treated with confidentiality. As such, it shall not form part of the tender and related documents. The Head of the Government Entity shall approve all tender documents including the draft contract before the publication of the invitation for comparative proposals.



2. Within seven (7) calendar days from the issuance of the Certification of a successful negotiation referred to in Stage Two above, the JV-SC shall publish the invitation for comparative proposals in accordance with Section III.2. (Publication of Invitation to Apply for Eligibility and to Submit Proposal) under Annex A hereof.
3. The private sector entity shall post the proposal security at the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.
4. The procedure for the determination of eligibility of comparative proponents/private sector participants, issuance of supplemental competitive selection bulletins and pre-selection conferences, submission and receipt of proposals, opening and evaluation of proposals shall follow the procedure stipulated under Annex A hereof. In the evaluation of proposals, the best offer shall be determined to include the original proposal of the private sector entity. If the Government Entity determines that an offer made by a comparative private sector participant other than the original proponent is superior or more advantageous to the government than the original proposal, the private sector entity which submitted the original proposal shall be given the right to match such superior or more advantageous offer within thirty (30) calendar days from receipt of notification from the Government Entity of the results of the competitive selection. Should no matching offer be received within the stated period, the JV activity shall be awarded to the comparative private sector participant submitting the most advantageous proposal. If a matching offer is received within the prescribed period, the JV activity shall be awarded to the original proponent. If no comparative proposal is received by the Government Entity, the JV activity shall be immediately awarded to the original private sector proponent.
5. Within seven (7) calendar days from the date of completion of the Competitive Challenge, the JV-SC shall submit the recommendation of award to the Head of the Government Entity. Succeeding activities shall be in accordance with Sections VIII. (Award and Approval of Contract) and X (Final Approval) of Annex A hereof.



Notes:

1. In all cases where the Government Entity directly negotiates with a private sector participant for a proposed JV undertaking under Annex “C” of the 2008 NEDA JV Guidelines, the negotiated terms shall be subjected to a competitive challenge wherein other private sector entities shall be invited to submit comparative proposals. This procedure ensures that JV Agreements are entered into under a transparent and competitive process that promotes accountability in government transactions.

2. Negotiated JV Agreements shall be subjected to a three-stage process:

Stage One – submission, evaluation, and recommendation to accept or reject an unsolicited proposal.

Stage Two – Negotiation of the terms and conditions of the JV Activity

Stage Three – Competitive Challenge

3. The following procedure shall be observed in Stage One:

- a. A private sector entity submits an unsolicited proposal to the Government Entity, or the Government Entity seeks a JV partner after failed competition for a JV activity deemed manifestly advantageous to Government;
- b. The private sector entity submits a proposal to the Government Entity for a projected JV activity/undertaking;
- c. The Government Entity, through its JV-SC, undertakes the initial evaluation of the proposal;
- d. The Head of the Government Entity, upon recommendation of the JV-SC, shall either issue an acceptance or non-acceptance of the proposal;
- e. The Government Entity concerned shall act on the proposal within ten (10) working days upon submission of complete documents by the private sector entity; and
- f. An acceptance shall not bind the Government Entity to enter into the JV activity, but, shall mean that authorization is given to proceed with detailed negotiations on the terms and conditions of the JV activity.

In case of non-acceptance, the private sector entity shall be informed of the reasons/grounds therefor.

4. Under Stage Two in the direct negotiation, the parties shall negotiate and agree on the terms and conditions of the JV activity. The following rules shall be adhered to in the conduct of detailed negotiations and the preparation of the proposal documents in case of a successful negotiations:

- a. Both parties shall negotiate on, among others, the purpose, terms and conditions, scope, as well as all legal, technical, and financial aspects of the JV activity;
- b. The JV-SC shall determine the eligibility of the private sector entity to enter into the JV activity in accordance with the Eligibility Requirements under Annex A hereof;
- c. Negotiations shall comply with the process, requirements and conditions as stipulated under the General Guidelines and the Process for Entering into JV Agreements of the 2008 NEDA JV Guidelines;



- d. Once negotiations are successful, the Head of the Government Entity and the authorized representative of the private sector entity shall issue a signed certification that an agreement has been reached by both parties. Said certification shall also state that the Government Entity has found the private sector participant eligible to enter into the proposed JV activity and shall commence the activities for the solicitation for comparative proposals;
 - e. Should negotiations not result to an agreement acceptable to both parties, the Government Entity shall have the option to reject the proposal by informing the private sector participant in writing, stating the grounds for rejection, and thereafter may accept a new proposal from private sector participants, or decide to pursue the proposed activity through alternative routes other than JV;
 - f. After an agreement is reached, the contract documents, including the selection documents for the competitive challenge are prepared; and
 - g. The parties shall complete the Stage Two process within thirty (30) calendar days upon acceptance of the proposal under Stage One above.
- 5. Under Stage Three in the direct negotiation, once the negotiations have been successfully completed, the JV activity shall be subjected to a competitive challenge, as follows:
 - a. The Government Entity shall prepare the tender documents pursuant to Section II (Selection/ Tender Documents) of Annex A of the 2008 NEDA JV Guidelines;
 - b. The eligibility criteria used in determining the eligibility of the private sector entity shall be the same as those stated in the tender documents;
 - c. Proprietary information shall be respected and protected, and treated with confidentiality, and shall not form part of the tender and related documents;
 - d. The Head of the Government Entity shall approve all tender documents including the draft contract before the publication of the invitation for comparative proposals.
- 6. The JV-SC shall publish the invitation for comparative proposals within seven (7) calendar days from the issuance of the Certification of a successful negotiation.
- 7. The proposal security must be posted at the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.
- 8. The procedure stipulated in Annex “A” of the 2008 NEDA JV Guidelines shall be followed in the determination of eligibility of comparative proponents/private sector participants, issuance of supplemental competitive selection bulletins and pre-selection conferences. The best offer shall be determined to include the original proposal of the private sector entity.
- 9. *If* the offer made by a comparative private sector participant, other than the original proponent, is superior or more advantageous to the government than the original proposal, *then* the private sector entity which submitted the original proposal shall be given the right to match such superior or more advantageous offer within thirty (30) calendar days from receipt of notification from the Government Entity of the results of the competitive selection.



10. *If no matching offer be received within the stated period, then the JV activity shall be awarded to the comparative private sector participant submitting the most advantageous proposal.*
11. *If a matching offer is received within the prescribed period, then the JV activity shall be awarded to the original proponent.*
12. *If no comparative proposal is received, then the JV Activity shall be immediately awarded to the original private sector proponent.*
13. The JV-SC must submit the recommendation of award to the Head of the Government Entity within seven (7) calendar days from the date of completion of the Competitive Challenge.
14. The 2008 NEDA JV Guidelines allow the concerned government entity to adjust the periods indicated therein, as may be appropriate for the nature, scope, size and complexity of the proposed JV activity; provided that the principles of transparency, competition, and accountability are observed.
15. “The periods specified under Annex “C” are only recommendatory and may be shortened by the Head of Agency, considering the urgency, nature, scope, size and complexity of the proposed JV activity; provided, that the requirements for the selection process are duly complied with for purposes of transparency, competitiveness, and accountability. x x x the 2008 NEDA JV Guidelines allows [government entities], through its [governing boards], to best determine the appropriate time frame for the completion of the project.”²⁶⁷

267 *Id. citing OGCC Opinion Nos. 139 (10 July 2008) and 262 (10 November 2008).*



16. The following chart²⁶⁸ indicates the extent to which periods under Annex “C” may be shortened:

	PERIODS PRESCRIBED UNDER 2008 NEDA JV Guidelines	SHORTENED PERIODS FOR PURPOSE OF COMPLETING ANNEX “C” IN LESS THAN 90 DAYS
STAGE ONE		
Evaluation and acceptance/non-acceptance by government entity of unsolicited proposal submitted by private sector entity	Within 10 working days from submission of complete documents by private sector entity	Within 3 working days.
STAGE TWO		
Detailed negotiations and preparation of proposal documents 8. Negotiations on, among others, purpose, terms and conditions, scope, and legal, technical and financial aspects of JV activity 9. Evaluation by JVSC of eligibility of private sector entity to enter into JV activity 10. After successful negotiations, government entity and private sector entity to issue signed certification that: (a) they have reached an agreement; (b) government entity has found the private sector entity eligible; and (c) they shall commence the activities for the solicitation for comparative proposals OR After unsuccessful negotiations, BCDA to reject the unsolicited proposal by informing the private sector entity in writing, stating the grounds for rejection	Within 30 calendar days	Within 10 calendar days
STAGE THREE		
Competitive challenge (in case of successful negotiations)		
Preparation and approval of Tender/Competitive Challenge documents by government entity	No specific period	Before issuance of Tender/ Competitive Challenge Documents

²⁶⁸ *Id.*



	PERIODS PRESCRIBED UNDER 2008 NEDA JV Guidelines	SHORTENED PERIODS FOR PURPOSE OF COMPLETING ANNEX “C” IN LESS THAN 90 DAYS
Publication of invitation for comparative proposals (once in a newspaper of general circulation and posted continuously for 7 days starting from date of publication, at the following: website of government entity; website of government entity's service provider, if any; and any conspicuous place within the premises of government entity)	Within 7 calendar days from issuance of signed certification under Stage Two	Within 3 calendar days from issuance of signed certification under Stage Two
Posting of proposal security by original private sector proponent	On first day of publication	On first day of publication
Issuance of Tender/Competitive Challenge Documents (Eligibility/Technical/Financials)	No specific period	Day after last day of publication
Pre-Selection Conference	At least 15 calendar days before deadline of submission of proposals (for JV activity <P500M) At least 30 calendar days (for JV activity >P500M) Government entity may adjust periods as necessary	At least 7 days before deadline of submission of proposals
Submission and Opening of Eligibility/Technical/Financial documents	Shall not exceed 60 calendar days (for JV activity > P500M) and 30 calendar days (for JV activity <P500M) from date of issuance of tender/competitive challenge documents Government entity may adjust period as necessary	At least 15 calendar days from date of issuance of Tender/Competitive Challenge Documents
Simultaneous post-qualification of Eligibility/Technical/Financial documents; approval of eligible proponents by government entity	Within 15 calendar days after deadline for submission of eligibility documents	Within 7 calendar days
Issuance of notices to eligible and ineligible proponents	Within 7 calendar days from approval by government entity	Within 2 calendar days
Appeal period for ineligible proponents	Within 7 calendar days from receipt of notice of ineligibility	Within 7 calendar days
Evaluation of appeal	Within maximum period of 30 calendar days (during which competitive challenge process shall be suspended)	Within 5 calendar days



	PERIODS PRESCRIBED UNDER 2008 NEDA JV Guidelines	SHORTENED PERIODS FOR PURPOSE OF COMPLETING ANNEX “C” IN LESS THAN 90 DAYS
Notice to original private sector proponent of a superior/more advantageous offer that it may wish to match	No specific period	Immediately after period for evaluation of appeal
Deadline for right to match of original private sector proponent	Within 30 calendar days from notice	Within 7 calendar days
JVSC to submit recommendation of award to government entity	Within 7 calendar days from completion of Competitive Challenge	Within 2 calendar days
Government entity decision to award/reject	Within 7 calendar days from receipt of JVSC recommendation	Within 2 calendar days
Issuance of Notice of Award and instruction to comply with conditions precedent to execution of JV Agreement	Within 7 calendar days from approval of JVSC recommendation	Within 2 calendar days
Submission of compliance statements and compliance with conditions precedent for execution of JV Agreement	Not later than 15 calendar days from Notice of Award	Within 5 calendar days
Issuance of notice of acceptance of compliance statements submitted	Within 7 calendar days from receipt of compliance statements from winning private sector participant	Within 2 calendar days
Issuance by OGCC of Counsel's Opinion	Prior to execution of JV Agreement	Prior to execution of JV Agreement
Execution/Approval of the JV Agreement	Within 7 calendar days from receipt by winning private sector participant of acceptance by government entity of compliance statements	Within 2 calendar days
TOTAL	APPROXIMATELY 231 DAYS	APPROXIMATELY 75 DAYS



17. The selection process under the 2008 NEDA JV Guidelines will not impede the performance of the Government Entity of its work commitments and other obligations. An award under Republic Act No. 9184, or the Government Procurement Reform Act, may take as many as 200 days, while an award under Republic Act No. 7718, as amended, or the BOT Law, may take as many as 410 days. Comparatively, under the 2008 NEDA JV Guidelines, a contract may be awarded in as little as 45 days, depending on the nature of the undertaking. The timeframe for the award is flexible under 2008 NEDA JV Guidelines, and may be shortened to suit the urgency of the undertaking, for so long as the general steps or procedural milestones indicated in the 2008 NEDA JV Guidelines are complied with.²⁶⁹
18. Pilot projects involving new, experimental or unproven technology may be subject of an unsolicited proposal under Annex “C” of the 2008 NEDA JV Guidelines. There is not limitation or prohibition in this respect.²⁷⁰
19. The conduct of a feasibility study may be made part of Stage 1, preparatory to a Competitive Challenge under Annex “C”. In the event that the proponent is not awarded the contract after the competitive challenge procedure, it may be compensated for its efforts in the feasibility study and other matters it undertook for the project.²⁷¹
20. Procedures for compensation for the conduct of a feasibility study by a private sector entity which is ultimately not awarded the JV activity are not specified under the 2008 NEDA JV Guidelines. However, it was the opinion of former Secretary of Justice Alberto C. Agra, as then Government Corporate Counsel and part of the team which drafted the 2008 NEDA JV Guidelines, that the same may be incorporated in the documentation to be developed by the GOCC for the particular project.²⁷²
21. Section 2.6 of the 2008 NEDA JV Guidelines specifically states that “[a]ccountability for the JV project ultimately devolves on the Head of the Government Entity involved in the JV Agreements and the implementation of the JV project.” Section 5.3 identifies the “Head of the Government Entity” as “governing board or its duly authorized official.”²⁷³ This, according to former Justice Secretary Agra, makes it clear that the Head of the Government Entity, particularly, its governing board, ultimately exercises discretion in the implementation of its development projects, as well as the procedures undertaken in furtherance of its development program. This necessarily includes tailor-fitting the general procedures for the solicitation of a JV partner under the 2008 NEDA JV Guidelines.”²⁷⁴

269 *Id.*

270 *Id.*

271 *Id. citing OGCC Opinion No. 158 (6 August 2008).*

272 *Id.*

273 *Id.*

274 *Id.*



22. In determining which of several proponents which submitted unsolicited proposals for the same JV activity shall be given the original proponent status, the first in time rule is not binding.²⁷⁵
23. One of the prominent features of the 2008 NEDA JV Guidelines is that the Head of Agency wields discretion in making determinations in implementing JV projects.²⁷⁶
24. Under Section III of Annex “C” of the 2008 NEDA JV Guidelines, the government entity, through its governing board, has the discretion to accept or reject the project, based on its own analysis of the merits of the project. This initial evaluation enables the government entity to choose the best framework for the project, and allows government the flexibility to determine which among several proposals for the same project, best suits the purpose of the government entity.²⁷⁷
25. Former Justice Secretary Agra, as then Government Corporate Counsel noted that the 2008 NEDA JV Guidelines in no way, intended to limit government’s choice of JV Partner to the entity which was first in line, and that the language of the 2008 NEDA JV Guidelines sufficiently permits this flexibility.²⁷⁸
26. The Government Entity is not bound to apply the first-in-time rule,²⁷⁹ nor does the submission of a proposal ipso facto bind the Government Entity into accepting the same for competitive challenge.
27. The 2008 NEDA JV Guidelines arm the Head of the Government Entity with sufficient discretion to determine the best proposal for the project. The submission of a proposal does not bind the Government Entity to negotiate with a proponent. The Government Entity is similarly not bound to enter an agreement if the proposal is “accepted.” And acceptance of a project proposed under Annex “C” of the 2008 NEDA JV Guidelines only means that the same will be subjected to the competitive challenge procedure.²⁸⁰

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*; See also 2008 NEDA JV Guidelines, *supra* note 14 at Annex “C,” Section III:

‘The private sector entity submits a proposal to the Government Entity for a projected JV activity/undertaking. **The Government Entity, through its JV-SC, is tasked with the initial evaluation of the proposal.** Upon completion of the initial evaluation, the Head of the Government Entity, upon recommendation of the JV-SC, shall either issue an acceptance or non-acceptance of the proposal. The Government Entity concerned shall act on the proposal within ten (10) working days upon submission of complete documents by the private sector entity. **An acceptance shall not bind the Government Entity to enter into the JV activity,** but, shall mean that authorization is given to proceed with detailed negotiations on the terms and conditions of the JV activity.’ (Emphasis supplied.)

²⁷⁸ Agra et al., *supra* note 168. *citing* OGCC Opinion No. 158 (6 August 2008).

²⁷⁹ *Id.*

²⁸⁰ *Id.*



28. It must be stressed that until and unless there has been issued a formal acceptance of the project proposal, no rights under the 2008 NEDA JV Guidelines vest on any party. Even then, an acceptance of a proposal does not bind government to enter into any agreement, as is clearly stated in the above-quoted provision. If negotiations with an accepted proponent fail, government is not precluded from a) pursuing the Project with another project proponent under Annex “C” of the 2008 NEDA JV Guidelines; b) selecting a JV partner for the project under Annex “A” of the 2008 NEDA JV Guidelines; or c) pursuing the Project under another public-private partnership mode altogether.”²⁸¹
29. It must be emphasized that unlike projects implemented under the BOT law (where the conferment of “original proponent status” on the entity that submits a proposal for a project ahead of others means Government is bound to negotiate with said proponent, giving it the right to match or better any comparative proposals) a proponent submitting a project first-in-time, under the 2008 NEDA JV Guidelines, is not given any preferential right over other proponents for the same project. However, once a certificate of acceptance is issued by the Government Entity to the proponent, the right to match now vests on such proponent.²⁸²
30. As opposed to the first in time rule, the “completeness” test is to be applied, coupled with a finding of superiority in terms of the proposal, in determining which among several proposals is to be subjected to a competitive challenge under Annex “C.”²⁸³
31. The government entity involved *must* determine if the proposal indicates a suggested technical, legal and financial eligibility standard, and prospective revenue sources, *and* if the indicated/ proposed terms are comparatively superior to others who submitted the same or similar project.²⁸⁴
32. It was the opinion of former Justice Secretary Agra, as then Government Corporate Counsel, that said 2008 NEDA JV Guidelines allow government sufficient leeway in determining which among a theoretical many proponents, is worth negotiating with, based on a criteria which shall consist of sufficiency and completeness of the proposal submitted, responsiveness to the [Government Entity]’s developmental goals, and over-all benefit to the government and the public, among others.²⁸⁵
33. A proposal must indicated suggested technical, legal and financial eligibility standards, and prospective revenue sources for the government entity concerned, to be considered sufficiently complete for evaluation and consideration. It is the head of the government entity concerned which has full discretion in determining the completeness of the proposal.²⁸⁶

281 *Id.*

282 *Id.*

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.*



34. Allowable periods under Annex “C”:²⁸⁷

	PERIODS PRESCRIBED UNDER 2008 NEDA JV Guidelines	SHORTENED PERIODS FOR PURPOSE OF COMPLETING ANNEX “C” IN LESS THAN 90 DAYS
STAGE ONE		
Evaluation and acceptance/non-acceptance by government entity of unsolicited proposal submitted by private sector entity	Within 10 working days from submission of complete documents by private sector entity	Within 3 working days.
STAGE TWO		
Detailed negotiations and preparation of proposal documents <ol style="list-style-type: none"> 11. Negotiations on, among others, purpose, terms and conditions, scope, and legal, technical and financial aspects of JV activity 12. Evaluation by JVSC of eligibility of private sector entity to enter into JV activity 13. After successful negotiations, government entity and private sector entity to issue <u>signed certification</u> that: (a) they have reached an agreement; (b) government entity has found the private sector entity eligible; and (c) they shall commence the activities for the solicitation for comparative proposals <p>OR</p> <p>After unsuccessful negotiations, BCDA to reject the unsolicited proposal by informing the private sector entity in writing, stating the grounds for rejection</p>	Within 30 calendar days	Within 10 calendar days
STAGE THREE		
Competitive challenge (in case of successful negotiations)		
Preparation and approval of Tender/Competitive Challenge documents by government entity	No specific period	Before issuance of Tender/ Competitive Challenge Documents

²⁸⁷ *Id.*



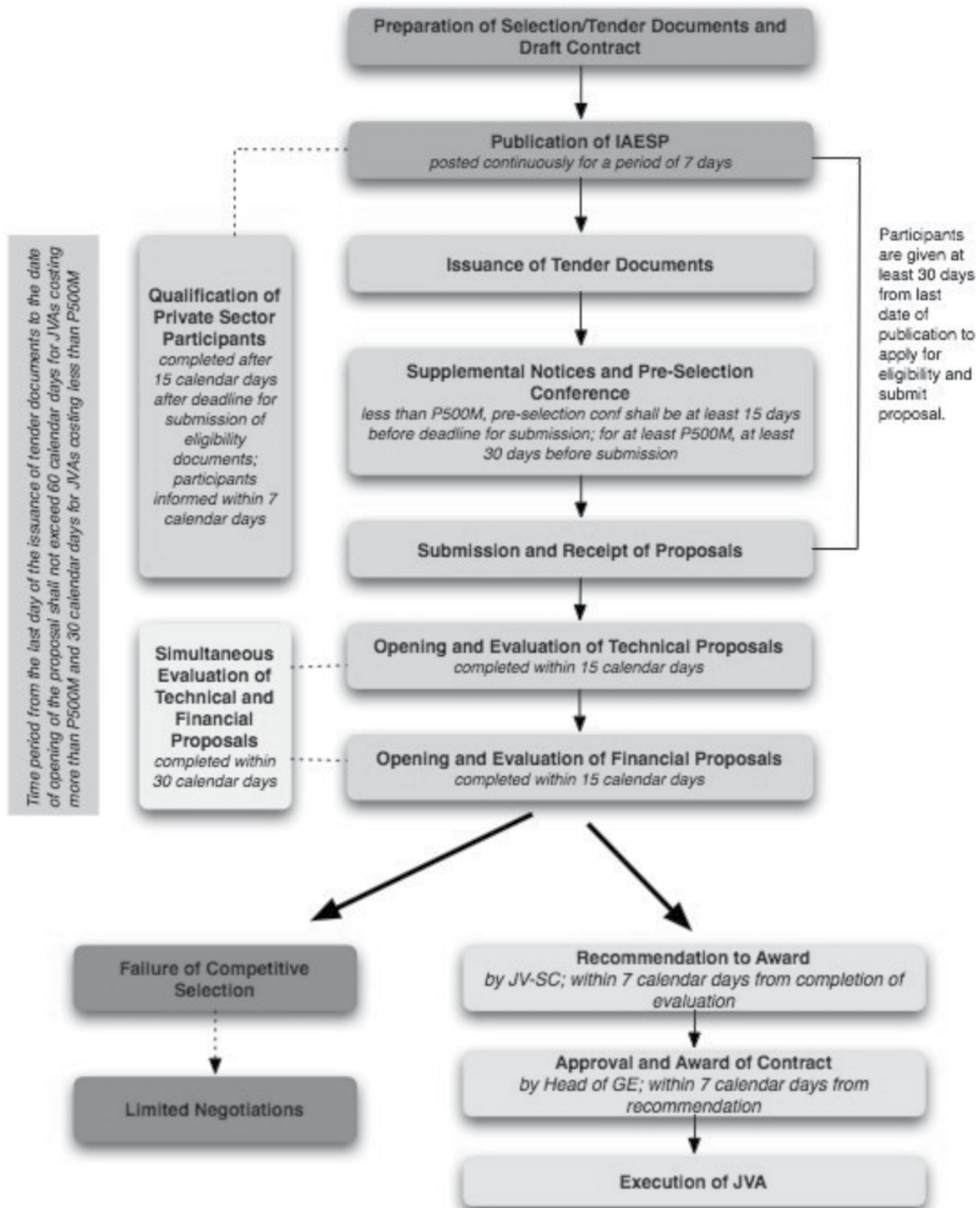
Publication of invitation for comparative proposals (once in a newspaper of general circulation and posted continuously for 7 days starting from date of publication, at the following: website of government entity; website of government entity's service provider, if any; and any conspicuous place within the premises of government entity)	Within 7 calendar days from issuance of signed certification under Stage Two	Within 3 calendar days from issuance of signed certification under Stage Two
Posting of proposal security by original private sector proponent	On first day of publication	On first day of publication
Issuance of Tender/Competitive Challenge Documents (Eligibility/Technical/Financials)	No specific period	Day after last day of publication
Pre-Selection Conference	At least 15 calendar days before deadline of submission of proposals (for JV activity <P500M) At least 30 calendar days (for JV activity >P500M) Government entity <u>may adjust</u> periods as necessary	At least 7 days before deadline of submission of proposals
Submission and Opening of Eligibility/Technical/Financial documents	Shall not exceed 60 calendar days (for JV activity > P500M) and 30 calendar days (for JV activity <P500M) from date of issuance of tender/competitive challenge documents Government entity may adjust period as necessary	At least 15 calendar days from date of issuance of Tender/Competitive Challenge Documents
Simultaneous post-qualification of Eligibility/Technical/Financial documents; approval of eligible proponents by government entity	Within 15 calendar days after deadline for submission of eligibility documents	Within 7 calendar days
Issuance of notices to eligible and ineligible proponents	Within 7 calendar days from approval by government entity	Within 2 calendar days
Appeal period for ineligible proponents	Within 7 calendar days from receipt of notice of ineligibility	Within 7 calendar days
Evaluation of appeal	Within maximum period of 30 calendar days (during which competitive challenge process shall be suspended)	Within 5 calendar days
Notice to original private sector proponent of a superior/more advantageous offer that it may wish to match	No specific period	Immediately after period for evaluation of appeal
Deadline for right to match of original private sector proponent	Within 30 calendar days from notice	Within 7 calendar days
JVSC to submit recommendation of award to government entity	Within 7 calendar days from completion of Competitive Challenge	Within 2 calendar days



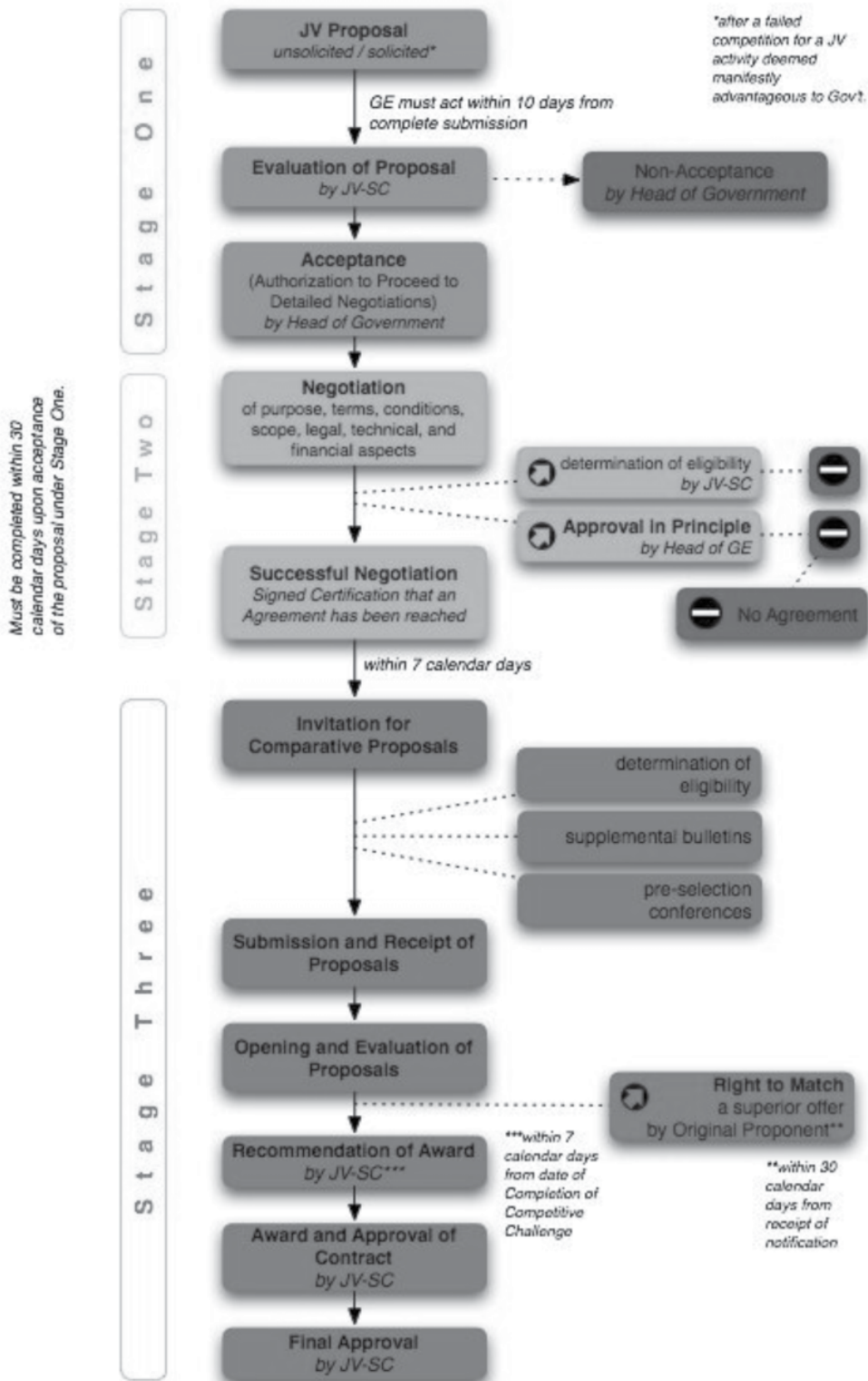
Government entity decision to award/reject	Within 7 calendar days from receipt of JVSC recommendation	Within 2 calendar days
Issuance of Notice of Award and instruction to comply with conditions precedent to execution of JV Agreement	Within 7 calendar days from approval of JVSC recommendation	Within 2 calendar days
Submission of compliance statements and compliance with conditions precedent for execution of JV Agreement	Not later than 15 calendar days from Notice of Award	Within 5 calendar days
Issuance of notice of acceptance of compliance statements submitted	Within 7 calendar days from receipt of compliance statements from winning private sector participant	Within 2 calendar days
Issuance by OGCC of Counsel's Opinion	Prior to execution of JV Agreement	Prior to execution of JV Agreement
Execution/Approval of the JV Agreement	Within 7 calendar days from receipt by winning private sector participant of acceptance by government entity of compliance statements	Within 2 calendar days
TOTAL	APPROXIMATELY 231 DAYS	APPROXIMATELY 75 DAYS



COMPETITIVE SELECTION and LIMITED NEGOTIATIONS **Annex A & B**



COMPETITIVE CHALLENGE Annex C



ABOUT FORENSIC LAW AND POLICY STRATEGIES, INC. (FORENSIC SOLUTIONS)

Forensic Solutions is a private think tank offering services in the fields of policy, law reform, advocacy and governance. The group provides forensic study and viable policy options, giving our clients a crucial advantage in navigating executive, administrative, legislative and judicial inquiries.

As of 31 December 2010, Forensic Solutions has published one book on Case Law on Local Autonomy and Local Governments (Survey of Supreme Court Decisions from 1901 to June 2010) and 15 policy papers, all found in www.forensicsolutions.com:

Public-Private Partnerships

1. Swiss Challenge is Public Bidding
2. The 2008 NEDA JV Guidelines Remains to be a Sound Legal Framework for PPP
3. The Country Needs a Stable PPP Policy

Water

4. Tightening Water Regulation

Energy

5. Viability of Capture and Storage of Philippine Carbon Dioxide
6. The road to electric power industry reform: Will it lead anywhere?

Taxation

7. Curbing Abuses in BIR Lifestyle Check for Individuals
8. Taxing the Real Estate Investment Trust

Public Corporations

9. Saving MRT 3
10. A Grain of Hope for National Food Authority

Mining

11. CSR in Mining

Governance

12. Above All, Restraint, Reliance And Respect for the Courts
13. Appointive Barangay and SK Officials and SK Abolition, Possible

Regulation

14. Competition Laws in the Face of the Merger Wave

Consumer Protection

15. Road Safety





ABOUT THE AUTHORS

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