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POLICY BRIEF

UNSOLICITED PROPOSALS

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CONTENTS

ACRONYMS

BOT	Build-Operate-and-Transfer
DOF	Department of Finance
DOTC	Department of Transportation and Communication
IA	implementing Agency
ICC	Investment Coordination Committee
IRR	Implementing Rules and Regulations
GOCCs	Government Owned and Controlled Corporations
GPH	Government of the Philippines
LGU	Local Government Unit
LGUGC	LGU Guarantee Corporation
NEDA	National Economic and Development Authority
NGA	National Government Agency
OGCC	Office of the Government Corporate Counsel
OSG	Office of the Solicitor General
PDMF	Project Development and Monitoring Facility
PIP	Public Investment Program
PPP	Public Private Partnerships
VfM	Value-for-Money

1.0 INTRODUCTION AND OBJECTIVE

1. This paper will examine issues related to unsolicited PPPs in the Philippines, with a view to learn vicariously from the experience of other countries. In particular it will look at ensuring value and improving the competition element of the process. The discussion will follow the outline below:

   a. Review of the legal framework and operating guidelines for unsolicited proposals;

   b. Overview of International experiences;

   c. Review of Philippine experience: issues and recommendations.

2. Stakeholder Consultation on this document was held on 5th September 2012 at Discovery Suites, Ortigas. The Consultation was attended by participants from government, private sector and academia who were invited to provide feedback on the recommendations included in the Report. A Summary of the consultation is provided in Appendix 4 and a list of attendees is provided in Appendix 5. The outcomes of this consultation have been considered and, where relevant are addressed in this Final version of the report.

2.0 DESCRIPTION OF CURRENT POLICY

3. When the Philippine BOT Law was crafted, the intention was to implement projects through competitive bidding; with an option for negotiated contracts as an exception and done under prescribed conditions. However, contrary to expectations, unsolicited proposals became the predominant mode mainly because they took out the burden on implementing agencies to prepare projects for bidding. Until the PPPC was recently assigned this role under the revised BOT Law IRR[1], there has been no central repository of unsolicited proposals in the Philippines; hence it is difficult to tell how many were actually submitted. However, there is data on a good number of proposals that have been processed and implemented; and these show that the success rate is mixed. Appendix1shows the list of some of the unsolicited projects processed from 1994 to the present.Still there were those that languished for years, such as the LRT 4 which never reached financial closing, and a number of high profile deals, such as the Casecnan Multi-purpose Project and NAIA Terminal 3that became problematic to say the least.

4. Several countries have adopted the unsolicited mode of procuring PPPs[2]. Like a two-edged sword, it can facilitate investments and, on the other hand, can mire transactions in controversy if not done properly. The main issue with unsolicited proposals is not that the project concept originated from the private sector, rather that governments' award to the original private sector proponent may be perceived to lack sufficient transparency or competition, thus associated with corruption. On the other hand, international experience shows that if the approval process is transparent and fair, the outcomes can be highly beneficial to the government and ultimately to the consumers.

5. The unsolicited mode was included in the amending law, Republic Act No. 7718. An unsolicited proposal may be accepted for evaluation by the implementing agency if it involves a new concept or technology and/or is not part of the list of the priority projects, and does not include a direct government guarantee, equity or subsidy. A"new" technology must possess at least one of the following attributes[3]:

[1] This refers to the revised BOT Law IRR published on July 20, 2012.

[2] A quick scan of international procurement practices show several countries allowing unsolicited proposals; and so far only one, the US Federal Government, was found not allowing it.

[3] Section 10.2 of the BOT Law IRR

a. 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;

b. 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

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

6. The implementing agency (IA)[4]determines if indeed the proponent offers a new concept or technology.

7. On direct government guarantee, equity or subsidy, the implementing rules and regulations of the BOT Law, defined each of these terms, as follows:

a. A direct government guarantee refers to an agreement whereby the Philippine Government guarantees repayment of debt directly incurred by the Project Proponent in implementing the project in case of a loan default[5];

b. A direct government subsidy refers to an agreement whereby the government 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 (right-of-way included); (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[6].

c. Direct government equity refers to the subscription by the government of shares of stock or other securities convertible to shares of stock of the project company, whether such subscription will be paid by money or assets[7].

8. Entitlement to investment incentives is ambiguous. Section 10 of the BOT Law provides that PPP projects (no distinction between solicited and unsolicited projects) in excess of PhP1 billion shall be entitled to incentives provided under the Omnibus Investment Code upon registration with Board of Investments. Furthermore, the BOT Law IRR provides that projects undertaken through the authorized contractual arrangements, costing PhP1 billion or less may also avail of OIC incentives upon registration with BOI subject to the inclusion of the project activity in the Investment Priorities Plan[8]. It is noted that the IRR qualifies registration as not merely an administrative procedure rather is subject to compliance with criteria as may be set by BOI, such as consumer benefit, technical and financial soundness of the PPP project.

[4]Throughout this document, the Implementing Agency or IA will refer to both national government implementing agency and local government units.
[5]Section 1.3j of the BOT Law IRR
[6]Section 13.3c of the BOT Law IRR
[7]Section 13.3d of the BOT Law IRR
[8]Section 13.2b of the BOT Law IRR

Notwithstanding Section 10 of the BOT Law, BOI apparently has discretion in the provision of incentives to PPPs, since they are not in the mandatory list[9]. Moreover, the Implementing Guidelines of the Investment Priorities Plan 2011 state that generally unsolicited proposals are not entitled to incentives[10]. It is also worth noting that approval process wise, BOI requires endorsement from PPPC, and DOF and NEDA approval[11].

9. The BOT Law and its IRR prescribes further, the submission and approval process for unsolicited proposals. Critical points to note are the following:

   a. To even be considered the unsolicited proponent is required to submit a feasibility study, company profile, draft contract (with mandatory terms as defined under Section 4.4 of the BOT Law IRR) and other documents that may be proprietary in nature.

   b. The IA has 150 calendar days to reject or accept the proposal. Acceptance confers the "original proponent status" to the proponent. At this point the IA will no longer entertain other similar proposals unless the parties are unable to agree during the period for negotiations or the original proponent is unable to comply with the parameters set by the Approving Body[12].

   c. Upon acceptance, the IA then submits it to the Approving Body for approval and the ICC for the determination of the reasonable rate of return and the negotiation parameters (presumably based on appropriate risk allocation). ICC approval is valid for 18 months.

   d. Upon approval the IA and the proponent have 80 calendar days to negotiate the project scope and contract based on ICC parameters. The head of agency shall approve the draft contract after it is reviewed by the Office of the Solicitor General or Office of Government Corporate Counsel, and DOF if necessary[13].

   e. If negotiations are successful, a certificate of negotiation is signed, and agreements will then be the basis for the Swiss challenge's or the bid terms of reference. Challengers are given 60 working days to submit a comparative or competitive proposal.Proposals are comparative if they meet the minimum technical requirements, and compliant with the prescribed terms and condition of the bid terms or reference; and are competitive if the financial proposal offer a better value, as defined in the bid terms of reference.

   f. If a challenger submits a better proposal, the original proponent is given 30 working days to match it. Otherwise the contract is automatically awarded to the original proponent.

[9] Investment Priorities Plan 2011 and 2012

[10] N.B.The General Policies and Specific Guidelines for the IPP 2012 is not available yet as of this writing.

[11] General Policies and Specific Guidelines of the Investment Priorities Plan 2011

[12] According to the BOT Law IRR Section 10.5 and 10.7, the IA has 30 and 120 calendar days to review completeness of the proposal and merits of the proposal respectively.

[13] Section 10.9 of the BOT Law IRR

3.0 OVERVIEW OF INTERNATIONAL PRACTICE[14]

10. There is no international standard for managing unsolicited PPP proposals. However, generally a two-stage process is used. The first stage consisting of four steps as described in the table below, involves evaluation; and the second stage involves the competitive tender. The Philippines like the governments of Argentina, Chile, South Korea, South Africa, and Taiwan, among others, has a formal system for processing and competing unsolicited proposals.

Table 1: Stage 1 – Evaluation of Unsolicited Proposals

Step 1	The private proponent first submits a preliminary description of the project to the appropriate agency or ministry, which in some countries only contains general concepts (e.g. Argentina, Chile, Costa Rica) and in others has detailed information (e.g. Korea, South Africa).
Step 2	After a brief stipulated review period, the agency gives a preliminary response, usually assessing whether the project serves the public interest and is part of the strategic infrastructure plan of the national or local government. If the preliminary project description is accepted, then the proponent usually receives formal recognition for the project concept. The government will then ask for more detailed information.
Step 3	Then the project proponent will be given a designated period of time to submit to the appropriate agency or ministry a well-developed proposal containing (a) the applicant's role in the concessionaire company and proof it can construct and/or operate the project, (b) a technical feasibility study, (c) an estimated total project cost and financing plan, (d) an income and expenditure plan for operation such as user fees and expected revenues, (e) the justification of project need, and (f) environmental or other social impact studies. During this review period, the concerned government agency may also request additional legal, financial, and environmental studies that the proponent will conduct at its own cost.
Step 4	After reviewing the full proposal, the government will be in a position to decide if the project is acceptable. Sometimes this process involves modified negotiations between the proponent and the appropriate agency or ministry to solidify project characteristics (e.g. South Africa, Taiwan). Some agencies or ministries may require additional approval from another government agency as well (e.g. Korea). At the end of the stipulated period, the project will be officially approved for a competitive process or rejected. If the project is rejected, then the project proponent may resubmit a modified version in some countries or the government may use the concept in a public bid after a stipulated period (e.g. three years in Chile, two years in Argentina).

11. If the unsolicited proposal is accepted by the government, the project moves on to Stage 2 where a competitive process will be carried out, where the original proponent has some form of an advantage. The most common systems for offering an advantage can be grouped into one of three types: Bonus, Swiss Challenge, or Best and Final Offer system.

[14] Source: John Hodges and Georgina Dellacha, Unsolicited Infrastructure Proposals: How Some Countries Introduce Transparency and Competition, PPIAF Publication, 2006.

Table 2: Stage 2 – Evaluation of Unsolicited Proposals

Bonus	For bidding purposes, a bonus is an additional value applied to the original proponent's technical or financial offer. For example, a proponent is given a 10% bonus; if the challenger offers a tariff of 19 cents/km, the original proponent will win if its offer is 20 cents/km, as this will be within 10% of the lowest bid. Under a bonus system, once accepted the original proponent is given a bonus point, Step 5 is the assignment of the bonus by the agency (China and Korea uses 10 points) Step 6 is the issuance of the bid with the bonus disclosed and the estimated reimbursable cost for the proposal development Step 7 is the bidding process, where the proponent can use his bonus points. In Chile the bonus can be sold to another bidder.
Swiss Challenge	This system gives the original proponent the right to match the lowest bid. In the Philippines, the challenger has 60 working days to submit a comparative proposal and the original proponent is given 30 working days to match the better bid. In other countries the challenge period is decided on a case to case basis, depending on the complexity of the project.
Best and Final Offer	The key element of this system is multiple rounds of tendering, in which original proponent has the vested right to participate. Countries have variations. For example in South Africa, the best two bids are invited to give a best and final offer (BAFO); if original proponent is not any of the two, it will be automatically included in the BAFO. In Argentina, if the original proponent's offer is within 5% of the best offer, the original proponent immediately wins. In Argentina, if the original proponent's offer is not selected in this final round, the selected bidder will then reimburse proposal development costs equivalent to 1 percent of the estimated project cost, according to the bidding documents. In South Africa, the winning bidder is also required to compensate the proponent for project development costs, which are stipulated in the public bid documents.

12. It is evident that some countries also have measures to protect the rights of the original proponent. Apart from proprietary rights to techniques or engineering technologies, the intellectual property rights on the project idea itself are recognized in the tendering process. Tender documents will not disclose the technology of the original proponent and the winning bidder, if it is not the original proponent,will be required to reimburse project development cost; or should government decide to use the proposal in a competitive bidding, it also reimburses the cost. Table 3 summarizes the proposal system by country or state.

Table 3: Proposal System by Country or State

Country/State	Type of System	Reimbursement of development cost?	Bid bond required?	Intellectual Property Rights
Andra Pradesh, India	Swiss Challenge	Yes, by government	No	After reimbursement proposal become property of the government
Argentina	Bonus and best and final offer	Yes, by the winning bidder, 1% of the estimated project cost	Yes, 0.05% of the estimated project cost	After 2 years proposal becomes property of the government
Chile	Bonus	Yes, by winning bidder Reimbursement costs approved at initial stage	Yes, according to project value	
Costa Rica	None	Yes, by winning bidder Reimbursement costs approved at initial stage	Yes, not higher than 1% of estimated project cost	After reimbursement proposal become property of the government
Guam	Swiss Challenge	No	No	
Gujarat, India	Swiss Challenge	Yes, by government	No	After reimbursement proposal become property of the government
Indonesia	Bonus of purchase of proposal	Yes when bonus is not granted. Paid for government or winning bidder		
Korea	Bonus	No	No	
Philippines	Swiss Challenge	No	Yes	
South Africa	Best and final offer	Yes, by winning bidder; reimbursement costs approved at initial stage		
Sri Lanka	Same as solicited projects	No		No
Taiwan	Combined Bonus and Swiss Challenge	No		
Virginia, USA	Same as solicited proposal	No	No	Public entity shall take appropriate action to protect confidential and proprietary information
Nigeria	No policy	No	No	

13. In many countries the policy issues that confront governments, including the Philippines are:

    a. To what extent should unsolicited proposals be used in PPP project implementation?
    b. How is reimbursement cost for project development best determined?
    c. What are the appropriate time allocations for the process? (See Table 4 on the timelines).

Table 4: Timelines in Unsolicited Proposals

Country	Preliminary Approval (mos.)	Final Approval(mos.)	Tendering (mos.)	Challenge (mos.)	Additional Time (mos.)	Total(mos.)
Argentina	3	12	2	undetermined	n.a.	n.a.
Chile	1.5	4	12	2-4	n.a.	30-35
Cost Rica	1.5	2	12	Not applicable	n.a.	17+
Guam	undetermined	undetermined	undetermined	2	n.a.	n.a.
Italy	4	2	3	n.a.	n.a.	n.a.
Korea	15 days	4	undetermined	2-4	n.a.	6.5-8.5
Philippines	5	1	3(including negotiation)	3.5	1	14-15
South Africa	1	9	3	2	2 to evaluate	17

14. There are no right answers to these questions. Each country does its best assessment. However, the conclusions of the international practices review is that in practice, all the main systems have demonstrated to be effective in providing more transparency and competition to private infrastructure projects, and are much better than having no policy at all. However, they are only as successful as the overall PPP systems and institutions of the country where they operate. **Unsolicited proposal systems are not a substitute for overall PPP governance and planning, and should indeed be the exception rather than the norm. There is still no substitute to competitive bidding.**

4.0 ASSESSMENT OF THE PHILIPPINE EXPERIENCE: ISSUES AND RECOMMENDATIONS

15. The experience of the Philippines on unsolicited proposals, given supposed benefits, particularly: access to intellectual property rights, cost efficiency and speedy project development; show some apparent benefit only onspeedy project development. Unsolicited proponents took out the burden of preparing projects from the IAs, however even with that,the agencies had to scrounge for resources to do quick technical and financial analyses to have meaningful negotiations with the private proponents. Most proposals did not really offer new technology and cost efficiency was either elicited in the competitive challenge or was not established since the government agencies did not use value analysis.The Swiss Challenge has in most cases not encouraged challengers, as contracts were awarded to the original proponents

(as shown in Appendix1). Although IRR timelines are mandatory[15], they were generally not observed, and in most cases went longer than the ideal.Box 1 cites illustrative cases that brought to fore critical implementation issues on unsolicited proposals[16].

Box 1: Illustrative Issues on Unsolicited Proposals

Despite achieving its objectives for the most part, the **Casecnan Multi-purpose Project** resulted in significant negative outcomes for the National Irrigation Authority and the Government. These are:

- Major construction delays.
- High levels of water fees for NIA which are not recoverable from the off-takers.
- Increased amounts of contingent liabilities for the National Government.

The construction delays were due to the proponent, CE Casecnan's failure to anticipate the conditions at the project site because of inadequate geophysical studies, and consequently the need to re-design major equipment and partially modify its construction approach. Since the Swiss challenge did not generate competitive proposals there was no way of knowing if the original proponent's equipment or methodology offered the best value.

The payment of fixed water fees based on pre-determined volumes of water means that demand risk is borne by NIA. The problem is that NIA cannot recover the water fees paid to CE Casecnan from the fees received from the irrigation beneficiaries. This is because irrigation fees are set far below cost-recovery levels. As a result, the Government is almost totally subsidizing the water fees paid to CE Casecnan.

The Project also resulted in PHP46.3 billion of contingent liabilities for the Government because NIA's obligations under the BOT Agreement are backed by a full performance undertaking from the National Government.

Given that the irrigation component of the Project required a Government subsidy, a BOT contractual arrangement procured through the unsolicited proposal route may not have been the most optimal structure for this Project. Rather than using private funds for the Project's irrigation component, the Government could have used upfront defined subsidy or direct financing of the irrigation component. This would have decreased the Project's costs since the cost of public funds is considerably lower than that of private funds.

The IA did not have the capability to evaluate the new technology and gauge the reasonableness of the cost. For complex projects involving new technology and requiring large amounts of capital investment, it is a good policy to subject the project to a competitive tender to obtain the best possible arrangement for the Government, both financially and technically.

Source: Castaglia Report under the PEGR Project (2009)

The contract for **NAIA Terminal 3**[17] was awarded to the challenger, which offered a much higher lease payments to the government. The contract was however declared null and void by the Supreme Court because of the following reasons:

- Challenger is deemed not a qualified bidder because it did not satisfy the minimum financial requirement. Proof of required net worth included the entire net worth of a private bank, which was one of the consortium members. The SC ruled that it cannot do so because banks are prohibited to invest more than 15% of their net worth in a single enterprise.
- The concession agreement offered from public bidding differed from the one signed and executed, on critical provisions—a) modification on the public utility revenues and non-public utility revenues that may be collected by the challenger; and b) assumption by the Government of the liabilities of the challenger in the event of the latter's default. These changes violated the ICC condition on regulation of public utilities and violated the provision of the BOT law against direct government guarantees for unsolicited proposals.

[15] The operative term in the IRR as regards the setting of timelines is "shall" which in legal construct means mandatory (GHD legal consultant).

[16] In view of undocumented experiences, GHD interviewed some of the persons who were directly involved in the development, evaluation or processing of unsolicited proposals cited in Box 1.

[17] Updates on arbitration proceedings still to be included here.

Although DOTC did not adhere to the timelines prescribed in the BOT Law IRR, the project followed the approval and competition process. The bid TOR was prepared well enough and the process transparent enough to attract a challenge. However, there was no oversight review of the final concession agreement that would have surfaced the significant change in the risk allocation.

Source: Supreme Court Ruling

Following the ruling from the Supreme Court that PIATCO's concession contract is null and void under Philippine Law, Fraport commenced arbitration with the International Center for Settlement of Investment Disputes (ICSID). ICSID jurisdiction is premised on the bilateral investment treaty (BIT) of the Governments of Germany and the Philippines. ICSID ruled that "Fraport knowingly and intentionally circumvented the Anti-Dummy Law of the Philippines, by means of secret shareholders agreement and that it cannot claim to have made an investment in accordance with law. As such the agreement is not covered by the BIT, which provides that investment shall mean any kind of asset accepted in accordance with respective laws and regulations of either Contracting State. Therefore ICSID held that it lacked jurisdiction *rationaemateriae* and dismissed the case accordingly.

Source:Mealy's International Arbitration Report, volume 26#4, April 2011. Article on The Scope of Legality Requirement in Relation to Investments: Recent Case Law by Michael Polkinghorne, Kristen Young and Eugenia Levine of White and Case LLP.

16. In principle the Philippine system and guidelines for approving and competing for unsolicited proposals appear adequate, but governance and capacity constraints raise several issues. Table 5 discusses these issues and the corresponding recommendations to address them, underpinned by value analysis, efficiency and transparency.

17. Thetransparency measures, given below,are culled from the recommendationsin Table 5:

Project Life Cycle	Transparency measures
1. Project submission	a. Concurrent submission to IA and PPPC b. PPPC to serve as repository information on unsolicited proposals
2. Ensuring consistency of quality of proposal and evaluation	a. ICC requirement to use value for money analysis b. Use of standard template of the unsolicited proposal submission and its feasibility study c. Application by the IA of value for money analysis d. Technical assistance from PPPC
3. Process of accepting unsolicited proposal	a. Defining timelines, process, documentation and eligibility requirements
4. Negotiation	a. ICC to set reasonable rate of return and negotiating parameters[18] b. IA head approval of the contract that will form part of the bid TOR will be subject to appropriate government counsel opinion[19]
5. Competition	a. Ensuring clarity of bid terms of reference and unbiased bid evaluation criteria b. PPPC to serve as probity auditor to ensure integrity of the competition process (see recommendation in Table 5, No.3) c. ICC to set challenge period within the band of 120 to 365 days. Until this amendment is made in the BOT Law, adopt a system for pre-solicitation notices to give the challengers advance

[18] Provided for in Section 9.3 of the BOT Law IRR
[19] Provided for in Section 10.9 of the BOT Law IRR

	information on the project and qualification requirements.
6. Conversion of unsolicited to solicited proposal	a. Reimbursement of the project preparation cost up to 3% of the project cost, and subject to independent validation b. Winning bidder to be required to reimburse project preparation cost. This requirement will be explicitly stated in the bid terms of reference and in the contract.

Table 5: Issues and Recommendations

Issues	Recommendations
1. *Eligible projects*- the new IRR explicitly state that the projects listed in the PIP, CIIP, and Local Development Investment Programs are ineligible for unsolicited proposals, unless they involve a new concept or technology[20]. These are all the priority projects identified by the government to achieve Philippine Development Plan objectives. In its strict sense, projects not in the priority list of the government mean they are not critical to achieving the development goals. In the case of Chile, Costa Rica and Italy, they require unsolicited proposals to be part of their strategic infrastructure investment plan.	Unsolicited project proposals should come from the priority programs of the Philippine Development Plan. Although they will not result to any direct upfront financial exposure for the Philippine government, still they will consume economic resources; theywill be mutually exclusive with priority alternative interventions;and they will require recovery of investments either from government (off take payments for availability PPPs) or directly from consumers.Redundancy of infrastructure facilities is often not economically efficient;thus,once the project is built it will be difficult to justify a related project in case it is not effective.Tariffs will have to be set to recover costs and equity returns hence may impinge on affordability. As such the projects should address the priority needs in the most effective and cost efficient way.In this regard, unsolicited proposals should come from priority projects that have been identified for PPP implementation (using the VfM approach) and listed in thePublic Investment Program or the Comprehensive and Integrated Infrastructure Program. The inclusion of the project in the latter sends a signal to the potential proponent that the project is desired by government and therefore worth the risk of development as an unsolicited proposal. After evaluating such proposal, the Implementing Agency can decide whether it is likely to receive more value for money from the project as an unsolicited proposal, rather than going through a public solicitation. Although government clearly wants to minimize unsolicited proposals, its ability to do so clearly remains within its power. The key objective of the government's PPP program is to derive VfM from its decisions, not necessarily to limit unsolicited proposals, per se. *Enabling Instrument: amendment of the BOT Law to take out provision making list of priority projects ineligible for unsolicited proposals.*
2. *Inconsistent scope and depth of evaluation of unsolicited proposals*- The responsibility of evaluating proposals before	For consistency on the scope and quality of unsolicited proposals, ICC should prescribe the use of value for money (VfM) analysis by the IA and an unsolicited

[20] Section 10.1of the BOT Law IRR

Issues	Recommendations
they are presented to the ICC rest with implementing agencies; and agencies' capability of doing a complete and robust evaluation vary. It is uncertain if the agencies validate that indeed the proponent is offering a new technology that has a comparative advantage over others. More critically only a handful of the implementing agencies apply value for money analysis.	proposal form and scope of feasibility studies. An example of such a template for proposals and an outline of a feasibility study are given in Appendices 2and 3. Value for money analysis will be a useful tool for gauging the benefits of a PPP arrangement for the project. VfM analysis will demonstrate if PPP is likely to deliver better valuethan the traditional method using government's resources, particularly how the project is managed with due regard for economy, efficiency and effectiveness. Value for money assessment should encompass all stages of the project proposal including both quantitative and qualitative elements. The VfM analysis will be covered in the policy brief on VfM, NGA Manual and ICC PPP Guidelines. PPPC should be capacitated to provide training and mentoring to IAs on VfM analysis. Moreover, VfM analysis should be a standard component of the PDMF terms of reference for the preparation of feasibility studies and advisory assistance to implementing agencies. *Enabling Instruments: ICC guidelines prescribing the proposal template and scope of the feasibility study, and use of VfM analysis as a pre-requisite for evaluating unsolicited proposals; and PDMFguidelines standardizing VfM analysis in the scope of work of the PDMF technical assistance to implementing agencies.*
3. *Unenforced Timelines*- The private sector investors may view the process as protracted and counter-productive if the government takes too long to review and approve a project. In an extreme case, the delays rendered an information technology project outdated (ex. DFA's Machine Readable Passport project), or substantially increased project cost, or lost validity of bids and ICC approvals beyond the previously prescribed 180-day period (ex. Carmen Bulk Water Supply Project). The revised IRR sets timelines for IA evaluation (30+120 calendar days),	Under Section 10.7 of the BOT Law IRR, the IA is required to inform ICC and the PPP Center of its receipt of the unsolicited proposal. Relatedly, PPP Center should be enabled to serve as the monitor for unsolicited proposals, in particular to perform the following functions: i) set-up a registry of unsolicited proposals and a centralized data base; ii) track the progress of the evaluation of the implementing agencies to ensure compliance with prescribed timelines; iii) provide technical assistance to the implementing agency in the evaluation and negotiation of unsolicited proposals, and preparation of the competition terms of reference; iv) monitor the competitive challenge to ensure transparency of the bidding process and clarity of bid documents, especially the bid evaluation parameters.PPPC can initially serve as the probity auditor

Issues	Recommendations
approvalby the appropriate Approval Body (30 working days upon receipt of endorsement by the IA and recommendation by ICC on the reasonable rate of return and negotiation parameters), negotiation (80 calendar days), challenge (60 working days) and bid evaluation (45 calendar days), and matching period (30 working days)[21]. However, there is no compelling driver for implementing agencies to stick to these time lines.	on the integrity of the competition process and the faithfulness of the concession agreement to the ICC approved rate of return and negotiating parameters. Over time PPPC can develop external independent auditors. Upon the recommendation of the PPPC, ICC should issue guidelines to implementing agencies on what constitute a complete and quality evaluation of unsolicited proposals (this will be covered in the NGA and LGU Manuals). First of all the agencies have to ensure completeness of the submission; that is: a feasibility study, proposed PPP modality, risk analysis and allocation, financing plan and implementation plan. The proposal should be subjected to the same rigor as solicited projects. The agency will have to check compliance with de-jure eligibility requirements for unsolicited proposals as described in Section 1 above; followed by thequalifications of the proponent, in accordance with the requirements of the BOT Law and Rule 5 of its IRR and evaluation of project merits. Critical points to consider on the latter are: i) social cost benefit analysis, ii) value for money analysis, especially validating if the new concept, technology or approach indeed offer a comparative advantage over existing alternatives; iii) financial analysis; iv) environment, social and gender impact analysis; and v) an indepth risk analysis and allocation.
4. *Lack of Transparency*-The tender for comparative proposals remains the responsibility of the agency or LGU. The BOT law and the IRR do not specifically require the agency or LGU to submit details of the tender proceedings to any oversight authority. As such, detailed information on the challengers and comparative proposals on a per project basis is not available, nor is it maintained or documented by any government entity. As a result, there is no evidence of effective competition, which limits any possible benefits from third parties submitting more attractive bids.	
5. *No assurance that approved risk allocation is reflected in contract*- Under the existing approval process, there is no way of verifying that the approved risk allocation and risk management strategies are accurately reflected in the final project agreement.	The current IRR does not explicitly state that contracts of unsolicited proposals approval need the review of DOF. It is recommended that DOF review and approval of unsolicited proposal contracts be made a requirement. *Enabling Instruments: The current mandate of the PPPC as defined in the revised BOT Law IRR and EO 8 will be sufficient to perform the above roles. Sections 10.7 and 14.1 of the BOT Law IRR can also provide more explicit guidelines requiring unsolicited proponents to make a parallel submission to the PPPC, and how unsolicited proposals*

[21] Timelines lifted from BOT Law IRR Sections: 10.5, 10.7, 10.8, 10.11, 7.4, 8.1, 8.2 and 10.1 respectively

Issues	Recommendations
	will be monitored, documented and guided by PPPC. *Amend Section 10.9 of the BOT IRR for the second sentence of the first paragraph to read as follows: The prescribed statutory counsel shall issue an opinion on the draft contract and for DOF to review and approve within ten (10) days upon their receipt of the draft contract as submitted by the Agency/LGU.*
6. *Right-to-Match Advantage*-The current IRR gives challengers 60 working days only to prepare a comparative proposal. The proposed amendments to the BOT swung the other way and changed the 60 day period to a minimum of 4 months to one year. While the 60-day period may be short for projects that require complex technical studies, but one year is way too long for simple project proposals. A short period will discourage challengers and a long period will discourage original proponents. 7. NEDA directed PPPC to think through changing matching of the comparative bid with offering an improved proposal.	Extend the 60- working day right to match for complex infrastructure projects. The proposed BOT Law amendment recommends 120 to 365 days; this band can be adopted but ICC shouldspecify on a case to case basis the number of days for the challenge, as part of itsproject evaluation. In which case, the ICC will prescribe in addition to the reasonable rate of return and negotiating parameters, the number of days for the challenge. Until the law is amended, allow issuance of pre-solicitation notices for the upcoming Swiss Challenges that give a broad description of the project and expected outcomes and qualification requirements of challengers. This will give more time for the challengers to prepare qualification documents and get a head start on the due diligence required for mounting a competitive bid. The PPPC can act as the third party to review the pre-solicitation notice to ensure that no proprietary information is divulged. The best time to issue the pre-solicitation notice is after the ICC approval of the project. From ICC approval the IA has 80 days to negotiate the contract with the proponent. The RFP for the challenge is supposed to be issued within seven (7) days upon issuance of the certification of successful negotiation. The pre-solicitation notices can be published in the IA and PPPC websites. On the proposal for an improved instead of just a matched proposal;requiring so will be a disincentive to the original proponent. The competition is already supposed to elicit the best value proposal, which ultimately benefits the government or users. Note that in some countries original proponents are even given bonus points to reward innovation.

Issues	Recommendations
	The Enabling Instrument for increasing the 60-day period is an amendment of the BOT Law and its IRR. Meanwhile the current IRR may be amended to include a provision for pre-solicitation notices for Swiss Challenges.
8. *No requirement for risk management*- Although the simple risk allocation matrix required for BOT projects under the ICC Guidelines would presumably require implementing agencies to identify and allocate project risks, there is still no requirement for the agencies to formulate cost-justified strategies to manage those risks. Neither are there any standards that may be used by NEDA staff to be able to determine whether a particular risk analysis is reasonable.	The revised IRR set guidelines on the allowable government support for unsolicited proposals. While sovereign guarantees for market risk or revenue streams are not allowed, it appears that guarantees can be given for pre-agreed tariffs and the parametric rate adjustment formula therefor. Sub-sovereign entities such as GOCCs and LGUs can enter into off-take agreements but guarantees, if required, should come from commercial sources (such as LGUGC or PhilExim or private insurance companies); or alternatively commit to security packages with recourse within the sub-sovereign's balance sheet (for example IRA pledge by the LGU, revenue assignment from other services or product lines of a GOCC). *Enabling Instruments: ICC PPP guidelines, NGA and LGU PPP Manual*
9. *Lack of or inadequate guidelines on the following:* a. *Conversion of unsolicited to competitive bid, i.e.,* reimbursement of project development cost, and conditions when the unsolicited proposal can be used for competitive bids. b. *Protection of unsolicited proponents, i.e., dealing with moral hazard.*	Formulate guidelines on when to reimburse the project development cost, and how to determine the reasonable cost if government uses the idea for bidding a project. Reimbursement of the feasibility study will be required of the winning bidder; this condition will be explicitly stated in the bid terms of reference and reflected in the contract. In case of failure of bid government will pay the FS cost. The government will ensure payment by signing a Reimbursement Agreement with the unsolicited proponent. It is recommended further to cap the reimbursement cost to 3% of the project cost (in most IAs, 3% is the rule of thumb for estimating cost of feasibility studies), and to institute a vetting system of the cost using independent appraisers. The guidelines for reimbursement will address the issue on moral hazard, as there will be a cost for IAs whichdecide to reject an unsolicited proposal so it can use it for its own purpose. *Enabling Instrument: amendment of the BOT Law IRR*

Issues	Recommendations
10. *Ambiguity in the entitlement to incentives under the Omnibus Investment Code*	Follow the intent of the BOT Law to provide investment incentives to both solicited and unsolicited proponents. Such incentives will redound to more competitive financial proposals. Streamline the approval process by replacing requirement for PPPC endorsement and approvals by NEDA and DOF with ICC approval of the PPP project. *Enabling Instrument: already covered in the BOT Law and its IRR.* *General Policies and Specific Guidelines of the Investment Priorities Plan for 2012 to include unsolicited projects among eligible projects for incentives and revision of the approval process.*

APPENDIX1 – LIST OF UNSOLICITED PROPOSALS (1994-2012)

PROJECT	IA	SECTOR	VARIANT	COST ($M)	YEAR	WINNER	REMARKS
Alien Certificate of Registration	BI	IT	BOT	2.8	2003	OP	Operational
Caliaya-Botocan-Kalayaan Power Plan	NPC	Power	BROT	450		OP	Operational
Casecnan Multi-purpose Project	NPC	Power/ water	BOT	650	1994	OP	Operational
Computerization of civil registry	NSO	IT	BTO	65	1996	OP	Operational
San Roque Multipurpose Project	NPC, NIA, DENR, DPWH	Power/ Water	BOT	1,141	1996	OP	Operational
Land Titling Computerization	LRA	IT	BOO	82	1998	OP	Operational
Machine Readable Passport	DFA	IT	BOT	50.3	1995	OP	Operational
San Pascual Cogeneration Power Plant	NPC	Power	BOO	400	1995	OP	Operational
Pampanga GIS Center	Pampanga Province LGU	IT	BTO	0.96		OP	Concluded
Talisay City Hall Building Project	Talisay Municipality	Property Development	BT	4.00			Concluded
Malabon Digital Infrastructure Project	Malabon City	IT	BTO	0.46			Concluded
Bohol Provincial Electric System	Bohol Province	Power	JV	5.00			Operational
Dapitan Public Market	Quezon City	Property Development	BOT	1.30			Operational
Redevelopment of the Port of Irene	CEZA	Transport	BOT	84.00		OP	Operational
South Luzon Tollway Extension	DPWH/ PNCC	Transport	JV	478.00		OP	Operational
NAIA Terminal 3	DOTC	Transport	BOT	369.15	1995	Challenger	Terminated. Supreme Court ruled contact with challenger null

PROJECT	IA	SECTOR	VARIANT	COST ($M)	YEAR	WINNER	REMARKS
							and void because proof of financial capacity of the bidder was not established and there was material change in the contract approved and signed
Tarlac Public Market	Tarlac City LGU	Property Development	BOT	3.88			Terminated
PhilPost ICT/ E-Commerce	PPC	IT	BLT	64.00			Terminated
Thermal Coating and Printing Plan	PCSO	Property Development	BOT	9.00			Terminated

Source: PPP Center

APPENDIX2– DRAFT UNSOLICITED PROPOSAL SUBMISSION FORM

Preliminary Application for an Unsolicited Proposal for a Public-Private Partnership in Infrastructure		
Submission Date		
APPLICANT INFORMATION		
Project Name:		
Applicant Contact:		
Company/Organization:		
Address:		
City	**State**	**Country**
Telephone	**Fax**	**Email Address**
THRESHOLD CRITERIA		
Project Type:		
Project Sector:		
Government Support Requested:		

PROJECT INFORMATION
Description of Project:
Project Location and Land Ownership (attach legal proof):
Total Project Cost (attach preliminary detailed cost budget):
Total Project Income (attach preliminary detailed revenue and user fee budget):
Any Proprietary Technologies:

Project Start Date:	**Project End Date (Concession Period):**

Benefits of Project:

QUALIFICATIONS OF PROPOSER
Experience and Credentials of the Applicant Company (attach Company Information, such as Annual Report):
Experience and Credentials of Key Proposed Staff (attach CVs):
Financial Resources of the Applicant Company (attach Annual Audited Financial Statement:
ATTACHMENTS
a) Proof of Land Ownership **b) Preliminary Detailed Cost Budget** **c) Preliminary Detailed Revenue and User Fee Budget** **d) Company Background Information** **e) Key Staff CVs.** **f) Company Annual Audited Financial Statement** **g) Any Other Relevant Information**

APPENDIX3– MODEL OUTLINE FOR FEASIBILITY STUDY (AS USED IN EUROPEAN UNION)

Executive Summary

10.4. Project Promoters and Authorities

1.2. Object of Analysis

1.2.1. Project Name

1.2.2. Brief Description of the Project

1.2.2.1. Sector

1.2.2.2. Location

1.2.2.3. Area Impacted by the Project (regional, national, international)

1.3. Promoter's Objectives

1.4. Previous Experiences with Similar Projects

1.5. Brief Description of the Appraisal Report

1.5.1. Authors of this Report

1.5.2. Scope of the Report

1.5.3. Methodology of the Project Analysis

1.6. Main Results of the Analysis

1.6.1. Financial Returns

1.6.2. Economic Returns

1.6.3. Impact on Employment

1.6.4. Environmental Impact

1.6.5. Other Results

C2. Socio-economic context

2.1. Main Elements of the Socio-economic Context

2.1.1. Territorial and Environmental Aspects

2.1.2. Demographics, including gender impact analysis

2.1.3. Other Economic Aspects, including willingness and ability to pay

2.2. Institutional and Political Aspects

2.2.1. General Political Outlook.

2.2.2. Sources of Financing; national (central government, regions, others); private individuals

2.2.3. Government Support

2.2.4. Administrative and Procedural Obligations; Decision-making Authorities for the Project; Territorial Planning Obligations; licences/permits; requirements for licences and incentives.

2.2.5. Expected times for: licences/permits; licences/

C3. Supply of and Demand for the Project's Outputs

3.1. Potential Demand Expectations

3.1.1. Needs the Project Meets within a Set Period of Time
3.1.2. Current and Future Trends in Demand
3.1.3. Demand Breakdown by Consumer Type
3.1.4. Means of Purchase or Distribution
3.1.5. Specific Market Research: Results

3.2. Competition
3.2.1. Supply Features of Similar Outputs
3.2.2. Competitive Structure, if existing or can be forecasted
3.2.3. Success Factors

3.3. Proposed Strategy
3.3.1. Outputs
3.3.2. Prices
3.3.3. Promotion
3.3.4. Distribution
3.3.5. Marketing

3.4. Estimate on the Percentage of Potential Use
3.4.1. Sales Forecasts for the Project
3.4.2. Market shares, coverage of the shares of various needs
3.4.3. Forecasting hypothesis and techniques

C.4. Technological Alternatives and Production Plan
4.1. Description of Significant Technological Alternatives

4.2. Selection of Appropriate Technology

4.3. Buildings and Plants

4.4. Physical Inputs for Production

4.5. Personnel Requirements

4.6. Energy Requirements

4.7. Technology Providers

4.8. Investment Costs
4.8.1. Planning and Know-how
4.8.2. Buildings
4.8.3. Machinery

4.9. Production Plan over the Project Time Horizon

4.10. Combined Output Supply

4.11. Production Organisation

C.5. Human Resources
5.1. Organisational Diagram

5.2. List of Personnel and Salary Parameters
5.2.1. Managers
5.2.2. Office Workers
5.2.3. Technicians
5.2.4. Manual Workers

5.3. External Services
5.3.1. Administrative Staff
5.3.2. Technicians
5.3.3. Other

5.4. Hiring Procedures

5.5. Training Procedures

5.6. Annual Costs (before and after project start-up)

C6. Location
10.4. Ideal Requirements for the Location

10.4. Alternative Options

6.3. Choice of Site and its Characteristics
6.3.1. Climatic Conditions, Environmental Aspects (if relevant)
6.3.2. Site or Territory
6.3.3. Transport and Communications
6.3.4. Water and Electricity Provisioning
6.3.5. Waste Disposal
6.3.6. Government Regulations
6.3.7. Policies of the Local Authorities
6.3.8. Description of the Pre-chosen Site (details in the Appendix)

10.4. Cost of Land and Site Preparation

10.4. Site Availability

10.4. Infrastructure Requirements

C7. Implementation

7.1. Analysis of Construction/Start-up Times (project cycle)

7.1.1. Selection of Management Group for the Project

7.1.2. Definition of Information System

7.1.3. Building Planning and Contract Scheduling

7.1.4. Financing Negotiations

7.1.5. Acquisition of Land and Licences

7.2. Bar Graph (or PERT chart) of the main phases

7.3. Main Information on Execution Times to consider in the Financial Analysis

C8. Financial Analysis

8.1. Basic Assumptions of the Financial Analysis

8.1.1. Time Horizon

8.1.2. Prices of Productive Factors and Project Outputs

8.1.3. Real Financial Discount Rate

8.2. Fixed Investments

8.3. Expenses before Production (Goodwill)

8.4. Working Capital

8.5. Total Investment

8.6. Operating Revenue and Costs

8.7. Sources of Financing

8.8. Financial Plan (a table showing cash flow for each year)

8.9. Balance Sheet (assets and liabilities)

8.10. Profit and Loss Account

8.11. Determining the Net Cash Flow

8.11.1. Net Flow to Calculate the Total Return on the Investment (investments in the total project)

8.11.2. Net Flow to Calculate the Return on Shareholders' Equity

8.12. Ratio Analysis

8.13 Sensitivity Analysis

C9. Socio-economic Cost-Benefit Analysis

9.1. Accounting and Discount Unit for the Cost-Benefit Analysis

9.2. Social Cost Analysis

9.2.1. Output Price Distortions

9.2.2. Salary Distortions

9.2.3. Fiscal Aspects

9.2.4. External Costs

9.2.5. Non-monetary Costs, including Environmental Aspects

9.3. Analysis of social benefits

9.3.1. Output Price Distortions

9.3.2. Social Benefits from Increased Employment

9.3.3. Fiscal Aspects

9.3.4. External Benefits

9.3.5. Non-monetary Benefits, including Environmental Aspects

9.4. Economic Rate of Return or Net Present Value of the Project in Monetary Terms

C10. Risk Analysis

10.1. Defining the Critical Variables with the help of the Sensitivity Analysis

10.1.1. Supply/Demand Variables

10.1.2. Financial Variables

10.1.3. Economic Variables

10.2. Best and Worst Case Scenario Simulation

10.3. Risk Assessment

10.4. Risk Mitigation and Management

SOURCES OF INFORMATION:

Argentina:http://infoleg.mecon.gov.ar/infolegInternet/anexos/105000-109999/108805/norma.htm

Australia, New South Wales: http://www.treasury.nsw.gov.au/wwg/pdf/wwgguidelines.pdf

Australia, Queensland: http://www.coordinatorgeneral.qld.gov.au/pp_partnerships/policy_guidance.shtm

Australia, Victoria:
http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/PVGuidanceMaterial_PracGuide/$File/PVGuidanceMaterial_PracGuide.pdf
Canada, British Columbia: http://www.fin.gov.bc.ca/pt/dmb/cpf.shtml

Canada, Ontario: http://www.pir.gov.on.ca/userfiles/HTML/cma_4_35661_1.html

Chile:http://www.mop.cl/documentos/ley_cgc.pdf

Costa Rica:http://www.mopt.go.cr/cnc/decreto.html

India, Andhra Pradesh:http://www.apidc.org/Infraact.pdf

India, Gujarat: http://www.gidb.org

Indonesia:http://www.kkppi.go.id/laws/PerPres67.pdf

Republic of Korea:http://www.mpb.go.kr/29nglish.html

South Africa: http://www.nra.co.za/usb_policy.pdf

Sri Lanka : http://www.boi.lk

Taiwan (China) : http://www.pcc.gov.tw/eng/indexE.htm

United States, Guam (Territory):http://www.guamlegislature.com/24th_Guam_Legislature/Public_Laws_24th/PL240294.htm

United States, Virginia (State of) :http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC560000000220000000000000