



THE PHILIPPINE
AMENDED BOT LAW

R.A. 7718

AND ITS

REVISED IMPLEMENTING RULES
& REGULATIONS (IRR)

2012 REVISION OF THE IRR



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REPUBLIC ACT NO. 7718
THE PHILIPPINE BOT LAW

5TH MAY 1994

REPUBLIC OF THE PHILIPPINES
Congress of the Philippines
Metro Manila

Second Regular Session

Begun and held in Metro Manila, on Monday, the twenty-sixth
day of July, nineteen hundred and ninety-three

[REPUBLIC ACT NO. 7718]

**AN ACT AMENDING CERTAIN SECTIONS OF REPUBLIC ACT NO. 6957, ENTITLED
“AN ACT AUTHORIZING THE FINANCING, CONSTRUCTION, OPERATION AND MAINTENANCE
OF INFRASTRUCTURE PROJECTS BY THE PRIVATE SECTOR, AND FOR OTHER PURPOSES”**

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

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

“SEC. 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 incentives as provided by law, shall include providing a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector.”

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.

- “(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 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.

“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.
- “(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.
- “(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%).
- “(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. 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.”

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.

SEC. 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 unit 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.”

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.”

SEC. 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 here under:

- “(a) If, after advertisement, only one contractor 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/local government unit (LGU) to be complying.
- “(b) If, after advertisement, more than one contractor applied for pre-qualification but only one meets the pre-qualification requirements, after which it submits bid/proposal which is found by the agency/LGU to be complying.
- “(c) If, after pre-qualification of more than one contractor, only one submits a bid which is found by the agency/LGU to be complying.
- “(d) If, after pre-qualification, 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’s/LGU’s Pre-qualification Bids and Awards Committee within fifteen (15) working days to the head of the agency, in case of national projects; to the Department of the Interior and Local Government (DILG), in case of local projects from the date the disqualification was made known to the disqualified bidder: Provided, furthermore, That the implementing agency concerned or DILG should act on the appeal within forty-five (45) working days from receipt thereof.”

SEC. 8. Section 6 of the same Act is hereby amended to read as follows:

“SEC. 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.”

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.”

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.”

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.”

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 (P1,000,000,000) shall be entitled to incentives as provided by the Omnibus Investment Code, upon registration with the Board of Investments.”

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 from the Department of Public Works and Highways (DPWH), the Department of Transportation and Communications (DOTC), the Department of Energy (DOE), the Department of Environment and National Resources (DENR), the Department of Agriculture (DA), the Department of Trade and Industry (DTI), the Department of Finance (DOF), the Department of Interior and Local Government (DILG), the National Economic and Development Authority (NEDA), the Coordinating Council of the Philippine Assistance Program (CCPAP), 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.”

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.”


SEC. 15. Sections 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.


Approved,



EDGARDO J. ANGARA
President of the Senate


JOSE DE VENECIA JR.
Speaker of the House of Representative

This Act which is a consolidation of House Bill No. 10943 and Senate Bill No. 1586 was finally passed by the House of Representatives and the Senate on April 12, 1994 and April 27, 1994, respectively.


EDGARDO E. TUMANGAN
Secretary of the Senate


ROBERTO P. NAZARENO
Acting Secretary General
House of Representative


FIDEL V. RAMOS
President of the Philippines

Approved: 5 MAY 1994

IMPLEMENTING RULES & REGULATIONS (IRR)

2012 REVISION

**REVISED IMPLEMENTING RULES AND REGULATIONS OF R.A. NO. 6957,
“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**

INTRODUCTION

Pursuant to Section 11 of R.A. No. 6957, as amended by R.A. No. 7718, the following Revised Implementing Rules and Regulations are hereby prescribed to carry out the provisions of said Act.

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.

Section 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.

Section 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 and/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 2.6 and 2.7 of these Revised IRR.
- e. **PPP Center** - The successor of the BOT Center and 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. 105 (s. 1989), as amended by Administrative Order No. 67 (s. 1999), as amended by Administrative Order No. 103 (s. 2000), and Executive Order No. 144 (s. 2002), as amended by Executive Order No. 8 (s. 2010).
- 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 (ROR) 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: Provided, that in the 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 (SEC) and owned up to at least sixty percent (60%) by Filipinos. 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 Philippine Development Plan (PDP), and the Provincial Development and Physical Framework Plan (PDPFP).
- 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 the entity 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 the facility operator must be registered with the Securities and Exchange Commission (SEC) before commencement of operation and maintenance of the infrastructure or development facility; provided further, 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 in accordance with Section 2.3.
- s. **Local Government Units (LGUs)** - Refer to provincial, city, municipal and/or barangay government entities.
- t. **Negotiated Contracts** - Refer to contracts entered into by the Government 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.

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 (SEC) 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.

- w. **Project Cost** - Refers to the total cost to be expended 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 Commonwealth Act No. 146 (Public Service Law), as amended, and for which a Franchise is required.
- a.a. **Reasonable Rate of Return** - Refers to the rate of return that a Project Proponent shall be entitled to, as determined by the ICC 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 ICC prior to negotiation and/or 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.

- b.b. **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 (Public Service Law), as amended, and for which a Franchise is required to operate the same.
- c.c. **Solicited Projects** – Refer to projects identified by an Agency/LGU as part of the list of priority projects in accordance with Section 2.3.
- d.d. **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 and not part of the list of priority projects as identified by 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.

RULE 2 - GENERAL PROVISIONS

Section 2.1 - Authorized Contracting Government Agencies/Units

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 project are authorized to enter into contractual arrangements under this Act and these Revised IRR.

Section 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:

- a. Highways, including expressway, roads, bridges, interchanges, tunnels, and related facilities;
- b. Railways or rail-based projects that may or may not be 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 ecotourism projects such as terrestrial and coastal/marine nature parks, among others and 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;
- r. Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others; and
- s. Climate change mitigation and adaptation infrastructure projects and related facilities.

Section 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 2.6. The List of Priority Projects shall be consistent with the Philippine Development Plan (PDP), and Provincial Development and Physical Framework Plan (PDPFP).

The Public Investment Program (PIP) and the Comprehensive and Integrated Infrastructure Program (CIIP) shall be deemed as the list of National Priority Projects. The Provincial Development Investment Programs (PDIPs)/Local Development Investment Programs (LDIPs) shall be deemed as the List of Local Priority Projects. The PIP, CIIP and PDIP/LDIP shall be updated periodically.

Any updates to the lists of Priority Projects, local and national, shall be submitted to the PPP Center within five (5) days from approval of the Approving Body for information and for posting in the PPP Center website.

Section 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 websites of the PPP Center and the concerned Agency/LGU, if available.

Section 2.5 - 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.

Section 2.6 - Approval of 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 provisions of the Local Government Code.

Section 2.7 - Detailed Guidelines for the Approval of Projects

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

Section 2.8 - Approval of Contracts

The Head of the Agency/LGU shall review and approve the Draft Contract which shall be based on the parameters, terms and conditions set forth by the Approving Body.

Prior to approval of the Head of Agency/LGU, the draft contract shall undergo review by the office of the Government Corporate Counsel (OGCC), the office of the Solicitor-General (OSG) or any other entity prescribed by law/issuances as the statutory counsel of GOCCs and LGUs as provided in Section 4.4 of these Revised IRR. For projects of national government agencies, local projects which will involve funds of the national government, and local projects requiring ICC review/approval, the draft contract must also be reviewed by the Department of Finance (DOF) before the Head of Agency/LGU approves the same.

The prescribed statutory counsel, and if necessary, the DOF, shall issue an opinion on the draft contract within ten (10) days upon receipt thereof.

For solicited projects, changes in the terms and conditions of the draft contract after its approval by the Head of Agency/LGU may be allowed prior to submission of bids provided that the Head of Agency/LGU shall secure approval of the appropriate Approving Body for any of the following changes:

- a. Changes which reduce the service levels to the public;
- b. Changes which reduce the economic internal rate of return below the hurdle rate used in the original analysis of the project;
- c. Changes which increase the total government subsidy to a project by at least five percent (5%) of the total project cost; and
- d. Changes in the risk profile which are detrimental to the best interest of the government.

The concerned Agency/LGU shall inform in writing the concerned statutory counsel as provided in this section of such changes.

Changes to the terms and conditions of the draft contract after bid submission and prior to contract execution shall not be allowed except for changes to contract terms affected or decided by the winning bidder's bid.

For unsolicited projects, in accordance with Section 10.9 of these Revised IRR, changes to the draft contract as agreed upon by Agency/LGU and the original proponent and as approved by the Head of Agency/LGU shall not be allowed, except for changes to contract terms affected or decided by the winning bidder's bid during the solicitation of comparative proposals and matching by the original proponent.

The Head of the Agency/LGU shall be responsible for compliance with this policy.

Section 2.9 - Presidential Approval, When Required

Projects undertaken through the Build-Own-and-Operate (BOO) scheme or through Contractual Arrangements or schemes other than those defined under Section 2 of the Act 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.

Section 2.10 - Deadline for Approval of Solicited Projects

The Approving Body shall act on the project within thirty (30) working 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 within the specified period shall be deemed an approval thereof and the concerned Agency/LGU may proceed with the solicitation of proposals. Upon approval, the Agency/LGU must publish the invitation to pre-qualify and to bid within six (6) months unless otherwise provided or extended by the Approving Body.

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). The Head of Agency/LGU shall determine the appropriate composition of the PBAC, provided it includes the following among its members:

- 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 PPP Center for national projects, in accordance with Section 2.6 (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.

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, and using the model contracts provided by NEDA/PPP Center as reference;
- d. “Bid Form” reflecting the required information to properly evaluate the bid proposal;
- e. forms of bid and performance securities;
- f. requirements and timelines/milestones of concerned Agencies in granting of franchise, if applicable; 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 government subsidy to be provided for the period covered by the contract;
 - iii. 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
 - iv. Any other appropriate financial bid parameter as may be approved by the Approving Body.
- i. Minimum amount of equity as prescribed by the Approving Body;

- j. 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;
- k. 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;
- l. Requirements and timelines/milestones of concerned Agencies in granting of franchise, if applicable;
- m. Current rules and regulations of the BSP;
- n. Revenue sharing arrangements, if any;
- o. Expected commissioning date; and
- p. 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, if applicable;
- 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 under the schemes contemplated in Section 12.16, if applicable;

- f. Revenue Share of the Implementing Agency/LGU, if applicable; and
- g. Minimum amount of equity as prescribed by the Approving Body.

Section 4.4 - Draft Contract

The Head of the Agency/LGU shall be responsible in ensuring the consistency of the draft contract with the parameters, terms and conditions as approved by the Approving Body.

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 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 may be required for the project, such as Contractors' all risk, motor vehicle, workmen's compensation, third party liability, or 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.

In accordance with Section 2.8, prior to approval of the draft contract by the Head of Agency/LGU, the office of the Government Corporate Counsel (OGCC), the office of the Solicitor-General (OSG) or any other entity prescribed by law/issuances as the statutory counsel of GOCCs and LGUs, and if necessary, the Department of Finance (DOF) shall issue an opinion on the draft contract within ten (10) days upon receipt by the corresponding counsel of the draft contract as submitted by the Agency/LGU.

RULE 5 - QUALIFICATION OF BIDDERS

Section 5.1 - Who May Participate

Any individual, partnership, corporation or firm, whether local or foreign, including 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 publication of Invitation to Pre-qualify and Bid for a particular project shall not be made unless the Approving Body has approved the parameters, terms and conditions for the project which shall serve as basis for the draft contract as provided in Section 4.4.

The Head of the Agency/LGU concerned shall, after obtaining approval for the project, 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, and the PPP Center during the period stated above. If the total project cost amounts to at least PhP 500 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.

For changes in the information contained in the published invitation to Pre-qualify and to Bid, the Agency/LGU may cause the invitation reflecting said changes to be published anew in accordance with this section.

Section 5.3 - Period to Prepare Pre-qualification Documents

The Agency/LGU concerned shall allow prospective bidders at least fifteen (15) calendar days from the last date of publication of the Invitation to Pre-qualify and Bid to prepare their respective pre-qualification documents. 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 a contractual arrangement which requires a public utility Franchise for its operation, and where the project proponent and Facility Operator are one and the same entity, the prospective Project Proponent 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, or, if a consortium of local, foreign, or local and foreign firms, Filipinos must have at least sixty percent (60%) interest in said consortium.
- ii. For projects to be implemented through a contractual arrangement requiring a public utility Franchise for its operation but where the Project Proponent and Facility Operator may be two separate and independent entities, 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.
- iii. For projects that do not require a public utility Franchise for its operation, the prospective Project Proponent or the Facility Operator may be Filipino or foreign-owned.
- iv. In case the prospective Project Proponent is a consortium, the members or participants thereof shall 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 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 consortium.

- 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 consortium or through a Contractor(s) which the prospective Project Proponent may engage 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 consortium proponent shall be evaluated based on the individual or collective experience of the member-firms of the consortium and of the Contractor(s) that it has engaged for the project.

For purposes of the above, consortia shall submit as part of their pre-qualification statement a business plan which shall, among others, identify their members, the equity interest/contribution of each member to the consortium, their prospective Contractor(s), if the experience of their Contractor(s) are necessary for the determination of the capacity of the 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, including as to which member(s) is(are) the prospective facility operator(s), if applicable. 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.
 - 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.

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 consortia, the net worth of the lead member or 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 twenty (20) calendar days.

Section 5.5 - Pre-qualified and Disqualified Proponents

The Agency/LGU, through its PBAC, shall, within a period of twenty (20) 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 five (5) 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 upon completion of pre-qualification evaluation and issuance of notice of pre-qualification/disqualification 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 or Single-stage Qualification and Bidding

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 - Changes to Pre-qualification and Tender Documents

If changes to pre-qualification and tender documents are made prior to pre-qualification of prospective bidders, the Agency/LGU shall issue a bid bulletin to all bidders who had purchased the tender/bid documents informing them of such changes, and afford them reasonable time within which to consider the same in the preparation of their submission/bids. Such issuance shall be duly acknowledged by each bidder prior to the submission of his pre-qualification documents/bid and shall be so indicated in his submission/bid. This shall be observed under the single-stage bidding process (simultaneous qualification) as well as in the two-stage bidding process.

Further, if changes to pre-qualification and tender documents are made after the pre-qualification stage, the bid bulletin shall be issued only to all pre-qualified bidders.

Provided that, consistent with Section 2.8 of these Revised IRR, the Head of Agency/LGU shall secure approval by the appropriate Approving Body prior to the issuance of the bid bulletin for any of the following material changes in the information contained in the documents obtained by prospective bidders for single-stage and two-stage bidding process:

- a. Changes which reduce the service levels to the public;
- b. Changes which reduce the economic internal rate of return below the hurdle rate used in the original analysis of the project;

- c. Changes which increase the total government subsidy to a project by at least five percent (5%) of the total project cost; and
- d. Changes in the risk profile which are detrimental to the best interest of the government.

The concerned Agency/LGU shall inform in writing the concerned statutory counsel as provided in Section 2.8 of these Revised IRR of such changes.

Section 5.9 - 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.

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 no later than sixty (60) 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 at least two (2) separate sealed envelopes, the first being the technical proposal and the second the financial proposal. In case of simultaneous qualification, at least 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 requirements, as may be deemed necessary by the concerned Agency/LGU:
 - i. Acceptance/Compliance statements with regard to all terms and conditions in the tender documents including those with regard to financial parameters and any changes which were made thereto by the Agency/LGU prior to bid submission.

- 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. The Agency/LGU shall determine which form of Bid Security it will require which may be in 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 <i>(as estimated by the Agency/LGU or proposed by the Project Proponent)</i>	REQUIRED BID SECURITY
less than PhP 5.0 billion	2.0% of the Project Cost
less than PhP 5.0 billion to less than PhP 10.0 billion	1.5% of the Project Cost or PhP 100 million, whichever is higher
PhP 10.0 billion and more	1.0% of the Project Cost or PhP 150 million, whichever is higher

The Agency/LGU shall determine whether the Bid Security shall be issued by a local bank, an international bank, or both. 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 therefore.

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 11.7. 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. Proposed Project Cost, operation and maintenance cost, and all other related costs;
 - ii. Project financing scheme, which may include the amount of equity to be infused, debt to be obtained for the project, and sources of financing; 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 ten (10) 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 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.

The PBAC of the Agency/LGU concerned shall complete the evaluation of the technical proposal within twenty (20) 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.

RULE 9 - NEGOTIATED CONTRACT

Section 9.1 - Direct Negotiation

Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder:

- a. 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;
- b. 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;
- c. 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;
- d. 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 the instances where negotiated projects are allowed, the ICC shall determine 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 ICC-determined Reasonable Rate of Return. Direct negotiation should not result in a higher subsidy, or higher user fee, or lower amount of government revenue, or longer concession period.

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.

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 as determined by the Agency/LGU 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.

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. 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 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.

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 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 to Unsolicited Proposals as enumerated under Rule 13.

In accordance with Section 4-A of the Act, there shall be no direct government guarantee, subsidy or equity for unsolicited proposals.

The grant of usufruct of government assets, including among others, right-of-way, to Project Proponents shall be considered as direct subsidy or equity unless government receives appropriate compensation pursuant to existing laws, rules and regulations, and guidelines.

All costs related to relocation and resettlement in connection with the project shall be shouldered by the Project Proponent.

The standards for valuation of government assets, including among others, right-of-way, and of relocation and resettlement shall be pursuant to Republic Act No.8974 and other existing laws, rules and regulations, and guidelines. The appraisal or valuation shall be undertaken by a third-party or an independent institution or individuals duly accredited to conduct the appraisal of the property/asset.

Section 10.5 - Submission of a Complete Unsolicited Proposal

For an unsolicited proposal to be considered by the Agency/LGU, the proponent has to submit a complete proposal, which shall include a cover letter, feasibility study which should indicate relevant assumptions, company profile, the draft contract adverted to in Section 4.4 above, and other documents that are needed even if proprietary in nature. The cover letter shall indicate the basic information on the Unsolicited Proposal such as its expected output and outcome, implementation period, and general description of the new concept or technology, among others, and shall include the company profile of the unsolicited proponent. The feasibility study, draft contract, and other documents that are needed even if proprietary in nature shall be submitted in a sealed envelope. The Agency/LGU shall acknowledge receipt of the proposal within seven (7) calendar days and advise the proponent whether the proposal is complete or incomplete within thirty (30) calendar days from submission thereof. If incomplete, the Agency/LGU shall return to the proponent its submission indicating what information is lacking or necessary and the Agency/LGU may entertain thereafter other same or similar project proposal.

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 prior to acceptance of the proposal as the “original proponent”, the Agency/LGU may reject all such proposals or 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.

Under the first in time approach, the Head of Agency/LGU shall acknowledge the submission of other unsolicited proponent for the same or similar project concept, and advise the unsolicited proponent on existence of similar project concept and its rank/position based on date of submission of unsolicited proposals. If a contract is awarded to a proponent, the unopened envelope/s shall be returned to the respective proponents.

Section 10.7 - Evaluation and Acceptance of Unsolicited Proposals

The Agency/LGU is tasked with the 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; 4)

recommend a reasonable Rate of Return (ROR); and, 5) inform the ICC and the PPP Center of its receipt of an Unsolicited Proposal. The Agency/LGU shall evaluate the proposal, qualify the proponent, and advise whether it accepts or rejects the proposal within one hundred and twenty (120) calendar days upon receipt of the complete proposal. The Agency/LGU shall indicate in its letter of acceptance the confirmation of the proponent as “original proponent”. In case of acceptance, the Agency/LGU shall endorse the unsolicited proposal and submit all pertinent documentation to the ICC/Approving Body. 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.

Section 10.8 - ICC Determination of Reasonable Rate of Return (ROR) and Parameters and Approval of the Unsolicited Project Prior to Negotiation With the Original Proponent

Within five (5) calendar days upon issuance of the letter of acceptance by the Agency/LGU to the proponent, the Head of Agency/LGU shall endorse to the ICC the proposed unsolicited project. Pursuant to Section 2(o) of the Act, the ICC shall determine the reasonable ROR on investments and operating and maintenance cost based on the reasonable ROR recommended by the Agency/LGU.

Within thirty (30) working days upon receipt of endorsement, results of due diligence evaluation conducted and submission of complete documentation from the Head of Agency/LGU, the Approving Body shall act on the unsolicited project upon recommendation by the ICC of the project including the determination of the reasonable ROR and other parameters for negotiation. The Approving Body shall formally advise the Agency/LGU, thereafter, that such determination is final and executory.

Within seven (7) calendar days upon receipt of the Agency/LGU of the formal advise of the ICC/ Approving Body, the Agency/LGU shall inform in writing the original proponent of 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, reasonable ROR and other parameters determined by ICC/Approving Body, and the terms and conditions of the draft contract for the Unsolicited Proposal, among others. The Agency/LGU and the original proponent shall conclude negotiations within a period of eighty (80) 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 eighty (80)-calendar 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. If negotiation is successful, the Head of Agency/LGU and the authorized signatory of the original proponent shall issue a signed certification that an agreement has been reached by both parties. Said certification shall also state that the Agency/LGU shall commence the activities for the solicitation of comparative proposals. The Agency/LGU shall, within seven (7) calendar days after the eighty (80)-calendar day negotiation period, submit a report to the ICC and the Approving Body of the result of its negotiation with the original proponent for approval/validation.

The approval by the Approving Body of the unsolicited project 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.

Section 10.9 - Approval of Unsolicited Contracts by the Head of Agency/LGU

The Head of Agency/LGU shall review and approve the draft contract which shall be based on the parameters, terms and conditions set forth by the Approving Body.

Prior to approval of the Head of Agency/LGU, the draft contract shall undergo review by the office of the Government Corporate Counsel (OGCC), the office of the Solicitor-General (OSG) or any other entity prescribed by law/issuances as the statutory counsel of GOCCs and LGUs. The prescribed statutory counsel, and if necessary, the DOF, shall issue an opinion on the draft contract within ten (10) days upon their receipt of the draft contract as submitted by the Agency/LGU.

Changes to the draft contract as agreed upon by Agency/LGU and the original proponent and as approved by the Head of Agency/LGU shall not be allowed, except for changes to contract terms affected or decided by the winning bidder's bid during the solicitation of comparative proposals and matching by the original proponent.

Section 10.10 - Tender Documents

The qualification and tender documents shall be prepared along the lines specified under Rules 4 and 5 hereof. The draft contract as agreed upon by the Agency/LGU and the original proponent and as approved by the Head of Agency/LGU, 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

Within seven (7) calendar days upon issuance of the certification of a successful negotiation referred to in Section 10.8, 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. 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 PhP 500 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 thirty (30) 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, following the requirements of Section 7.1(b)(vi).

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.

RULE 11 - AWARD AND SIGNING OF CONTRACT

Section 11.1 - Recommendation to Award

Within three (3) calendar days from the date the financial evaluation shall have been completed, the Agency/LGU PBAC will submit to the Head of Agency/LGU a recommendation of award. The PBAC will prepare and submit a detailed evaluation/assessment report on its decision regarding the evaluation of the bids and explain in clear terms the basis of its recommendations.

Section 11.2 - Decision to Award

Within three (3) calendar days from the submission by PBAC of the recommendation to award, the Head of Agency/LGU shall decide on the award. The approval shall be manifested by signing and issuing the "Notice of Award" to the winning Project Proponent within five (5) calendar days from approval thereof.

All unsuccessful bidders shall be informed in writing of the decision of the Agency/LGU to award the project to the winning Project Proponent. Such decision shall be made available to the public when requested.

Section 11.3 - Notice of Award

The "Notice of Award", which is issued by the Head of Agency/LGU, shall indicate, among others, that the winning Project Proponent must submit within twenty (20) calendar days from official receipt of the "Notice of Award" the following:

- a. prescribed performance security;
- b. proof of commitment of the required equity contribution, as specified by the Agency/LGU:
 - i. in the case where the Project Proponent is a corporation - e.g., treasurer's affidavit attesting to actual paid-up capital, subscription agreement(s) between a shareholder(s) of the Project Proponent and the Project Proponent itself covering said equity contribution, or shareholders agreement between and amongst 2 or more shareholders of the Project Proponent undertaking to contribute/subscribe the required equity contribution; or
 - ii. in the case of a consortium - an undertaking of the members thereof to infuse the required equity contribution to the consortium.

- c. proof of firm commitments from reputable financial institution to provide sufficient credit lines to cover the total estimated cost of the project;
- d. in the case of a consortium, the agreement indicating that the members are jointly and severally liable for the obligations of the Project Proponent under the contract; or
- e. in case a special purpose company (SPC) is formed for purposes of undertaking the project, proof of registration in accordance with Philippine laws.
- f. such other conditions imposed by the Agency/LGU.

Failure to submit the requirements within the prescribed twenty (20)-calendar day period will result in confiscation of the bid security. Within five (5) calendar days upon receipt of the foregoing requirements for award, the Head of Agency/LGU shall determine and notify the winning bidder of its compliance of all the conditions stated in the said notice.

Section 11.4 - Public Dissemination of Bidding Results

The PBAC shall post the notice of award and/or bidding results in the PHILGEPS, websites of PPP Center and of the Agency/LGU, if any, within seven (7) calendar days from the issuance of Notice of Award.

Section 11.5 - Formation of Special Purpose Company (SPC)

The concerned Agency/LGU may require the winning Project Proponent to incorporate with the Securities and Exchange Commission (SEC) in accordance with applicable Philippine laws. The corporation that will be created shall assume and accede to all the rights and obligations of the winning Project Proponent, Provided, that:

- a. the winning Project Proponent subscribes to and pays for a significant/principal shareholding or controlling interest in the corporation, subject to the nationality and ownership requirements under the Constitution and other applicable laws. The required level of share ownership may be indicated in the tender documents or determined as a condition prior to contract award;
- b. in the case of a consortium, all members thereof shall present proof of contractual or other legally binding ties to or relationships with the corporation for the development and implementation of the project in accordance with their submitted business plan, e.g., for facility owners/developers/equity investors - subscription to and payment for a significant number of shares in the corporation; for Contractors or operators - binding appointment and undertaking to be the Contractor/operator or duly signed engineering, procurement and Construction (EPC) contract/operation and maintenance agreement; for financial institutions - letter of firm commitment to raise or provide financing to the project;

- c. an accession undertaking is executed by the corporation and the winning proponent in favor of the Agency/LGU making the corporation principally liable for the performance of the winning Project Proponent's obligations under the Notice of Award and/or the contract.

Section 11.6 - Withdrawal/Substitution of a Member

Subject to the approval of the Agency/LGU, any member of the consortium, or a shareholder of the SPC created (who was a member of such consortium), or its pre-qualified Contractors may withdraw as such prior to award of the project or any time during the contract term, provided that, the remaining members or shareholders are still legally, technically, and financially capable of successfully carrying out the implementation/operation of the project. The Agency/LGU shall have the discretion to allow substitution of members or shareholders after pre-qualification; provided that, the substitute has equal or better qualifications than the withdrawing member or shareholder; provided further, that the Agency/LGU shall undertake necessary procedure to determine the qualification of the substitute.

A withdrawal made in violation of this section shall be a ground for disqualification or cancellation of the contract, as the case may be, and forfeiture of the proponent's bid or performance security.

The Agency/LGU shall inform in writing the PPP Center of such changes for monitoring purposes.

Section 11.7 - Validity of Bids/Return of Bid Security

The execution of the contract shall be made within the period of the validity of the bid security. The required bid security shall be valid for a reasonable period but in no case beyond one hundred eighty (180) calendar days following the opening of the bids. Bid securities shall be returned to the unsuccessful bidders as soon as the contract is signed by the winning bidder.

Section 11.8 - Extension of Validity of Bids

When an extension of validity of bids is considered necessary, those who submitted bids shall be requested in writing to extend the validity of their bids before the expiration date. However, bidders shall not be allowed to modify or revise the price or other substance of their bids.

Bidders shall have the right to refuse to grant such an extension without forfeiting their bid security, but those who are willing to extend the validity of their bids should be required to provide a suitable extension of bid security.

Section 11.9 - Failure of Bidding

In the case of solicited bids, when no complying bids are received or in case of failure to execute the contract with a qualified and contracting bidder due to the refusal of the latter, the bidding shall be declared a failure. In such cases, the project shall be subjected to a re-bidding.

RULE 12 - CONTRACT APPROVAL AND IMPLEMENTATION

Section 12.1 - Execution/Approval of the Contract

The authorized signatory(ies) of the winning bidder and the Head of Agency/LGU shall execute and sign the contract for the project as approved in accordance with Section 2.8, within five (5) calendar days from receipt by the winning bidder of the notice from the Agency/LGU that all conditions stated in the Notice of Award have been complied with.

Consistent with Article 1159 of the New Civil Code, the contract is the law between the parties and the parties shall perform their respective prestations, obligations, and undertakings thereunder with utmost good faith with the end in view of attaining the objective hereof. An original signed copy of the contract shall be submitted to the Approving Body and the PPP Center within five (5) calendar days after signing thereof by the Agency/LGU.

In the event of refusal, inability or failure of the winning bidder to enter into contract with the Government within the time provided therefor, the Agency/LGU concerned shall forfeit its bid security. In such an event, the Agency/LGU concerned shall consider the bidder with the next ranked complying bid. If the same shall likewise refuse or fail to enter into contract with the Government, its bid security shall likewise be forfeited and the Agency/LGU concerned shall consider the next ranked complying bid, and so on until a contract shall have been entered into. In the event that the concerned Agency/LGU is unable to execute the contract with any of the complying bidders, a failure of bidding will be declared and the project may be subjected to a re-bidding.

Section 12.2 - Other Approvals for Contract

The Project Proponent shall, as may be required under the 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 Construction. The DENR shall act on the environmental clearance of the project within the time frame prescribed IN and following the guidelines of DENR Administrative Order No. 96 -37 and subsequent guidelines as may be issued from time to time. The Agency/LGU may provide the necessary assistance to the Project Proponent in securing all the required clearances. The contract shall provide milestones in securing such other approvals required for the implementation of the contract.

Section 12.3 - Grant of Franchise

Subject to the provisions of the Constitution and other existing laws, rules and regulations, once a contract is executed by the Project Proponent and the Agency/LGU, a presumption arises that the public interest will be served by the implementation of the project covered thereby, and immediately upon application by the Project Proponent, the Regulator shall automatically grant in favor of the Project Proponent a Franchise to operate the facility and collect the tolls, fees, rentals, and other charges stipulated under the contract.

Provided that, if the final approval of the franchise by the regulator shall result in a decrease in the amount of tolls, fees, rentals, and other charges stipulated under the contract, the government shall ensure that the Project Proponent recovers the difference between the amount stipulated under the contract/parametric formulae and the amount approved by the regulator or appropriate regulatory body through measures consistent with the Constitution and other applicable laws.

Section 12.4 - Contract Effectivity

The contract shall be effective upon signing thereof by the Head of Agency/LGU, unless another date is stipulated therein.

Section 12.5 - Notice to Commence

The concerned Agency/LGU, when deemed necessary, shall issue the “Notice to Commence Implementation” of the project to the proponent within a reasonable period to be determined by the Agency/LGUs and stated in the contract.

Section 12.6 - Preparation and Approval of Detailed Engineering Design

Where the project involves design, the Project Proponent shall be responsible for the preparation of the detailed engineering designs and plans based on the prescribed minimum design and performance standards and specifications and shall submit the same to the Agency/LGU concerned.

The Agency/LGU concerned shall review the detailed engineering designs and plans prepared by the Project Proponent in terms of its compliance with the prescribed standards and specifications, and if found acceptable, shall approve the same for incorporation in the contract to be signed by the Project Proponent and the Agency/LGU. This approval by the Agency/LGU concerned notwithstanding, the Project Proponent shall be solely responsible for the integrity of its detailed engineering designs and plans. The approval thereof by the Agency/LGU concerned does not diminish this responsibility, nor does it transfer any part of such responsibility to the Agency/LGU concerned.

In the case of local projects, the LGU concerned shall ensure that the technical designs, plans, specifications, and related aspects necessary for the project’s Construction, operation and maintenance shall be based on relevant local and national policies, standards and guidelines. Moreover, the LGU shall consult with appropriate national regulatory bodies regarding national policies, standards, and guidelines in granting the necessary Franchise.

Section 12.7 - Project Construction

The Project Proponent shall build the facility in accordance with the design and performance standards and specifications prescribed in the approved detailed engineering design. For this Construction stage, the Project Proponent may engage the services of foreign and/or Filipino Contractors that comply with the requirements as prescribed under Section 5.4 (a) and (b). In the case of foreign Contractors,

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

Section 12.8 - Performance Security for Construction Works

to guarantee the faithful performance by the Project Proponent of its obligations under the contract, including the prosecution of the Construction works related to the project, the Project Proponent shall post a performance guarantee in favor of the Agency/LGU concerned, within the period and in the form and amount stipulated in the Notice of Award. The Agency/LGU shall determine which form of performance security it will require which may be in cash, bank draft or guarantee confirmed by a local bank (in the case of foreign bidders bonded by a foreign bank), letter of credit issued by a reputable bank, surety bond callable on demand issued by the GSIS or by surety or insurance companies duly accredited by the office of the Insurance Commissioner, or a combination thereof, in accordance with the following schedules:

- a. Cash, irrevocable letter of credit, bank draft - a minimum of two percent (2%) of the total Project Cost.
- b. Bank Guarantee - a minimum of five percent (5%) of the total Project Cost.
- c. Surety Bond - a minimum of ten percent (10%) of the total Project Cost. The performance guarantee shall be valid up to acceptance by the Agency/LGU of the facility.

Section 12.9 - Performance Security for Operations

For projects where the proponent or other third parties shall operate the project, the Agency/LGU shall determine whether the Project Proponent will post a performance security for operations, simultaneously with the acceptance of the facility. The performance security for operations will be issued to guarantee the proper operation of the project in accordance with the operating parameters and specifications under the contract. The Agency/LGU shall determine the amount but the form shall be in accordance with the preceding section. This performance security for operations shall be valid ninety (90) calendar days after the turn-over of the facility, as contemplated in Section 12.23, or as may be provided in the contract whichever is longer.

Section 12.10 - Review of Project Construction, Operation and Maintenance

The Agency/LGU may inspect and check, from time to time, the project to determine whether the project is constructed, operated and maintained in accordance with the approved plans, specifications, standards and costs under the contract.

In the event that the Agency/LGU concerned shall find any deviation from or non-compliance with the approved plans, specifications and standards, it shall bring the same to the attention of the Project Proponent for the necessary corrective actions. Failure of the Project Proponent to correct the deviation

within the time prescribed by the Agency/LGU may be a ground for the rescission/ termination of the contract, in accordance with Section 12.21 (b) of these Revised IRR. Such technical supervision by the Agency/LGU concerned shall not diminish the singular responsibility of the Project Proponent for the proper Construction, operation, and maintenance of the facility, nor does it transfer any part of that responsibility to the Agency/LGU.

Section 12.11 - Contract Variation

A contract variation may be allowed by the Head of the Agency/LGU, Provided, that:

- a. There is no impact on the basic parameters, terms and conditions as approved by the Approving Body; or
- b. There is no increase in the agreed fees, tolls and charges or a decrease in the Agency/LGU's revenue or profit share derived from the project, except as may be allowed under a parametric formula in the contract itself; or
- c. There is no reduction in the scope of works or performance standards, or fundamental change in the contractual arrangement nor extension in the contract term, except in cases of breach on the part of the Agency/LGU of its obligations under the contract; or
- d. There is no additional Government Undertaking, or increase in the financial exposure of the Government under the project.

Upon due diligence and recommendation of the Head or Agency/LGU, contract variations not covered by above shall undergo approval by the Approving Body in terms of the impacts on government undertakings/exposure, performance standards and service charges. Failure to secure clearance/ approval of the Head of Agency/LGU or Approving Body as provided in this section shall render the contract variation void.

The Agency/LGU shall report to the Approving Body and the PPP Center on any contract variations including those approved by the Head of Agency/LGU.

Section 12.12 - Milestones

The Project Proponent shall execute the project in accordance with pre-determined milestones. Failure by the Project Proponent to comply with these milestones may result to contract rescission and forfeiture of the performance security of the proponent, in accordance with Section 12.21 (b) hereof.

Section 12.13 - Release of Performance Security

a. Performance Security for Construction Works

Upon completion of construction works, the Agency/LGU shall issue a "Certificate of Completion." Within a period of no more than one (1) year after its issuance, the Agency/LGU shall issue a "Certificate of Acceptance" upon final acceptance that the project had been completed in accordance with the agreed standards and specifications.

The Performance Security for Construction Works shall be released by the Agency/LGU concerned after the issuance of the "Certificate of Acceptance" of the Construction works provided that there are no claims filed against the Project Proponent or its Contractor.

As may be agreed upon in the contract, a portion of the Performance security shall be released upon compliance with corresponding milestones.

b. Performance Security for Operations

The Performance Security for Operations shall be released by the Agency/LGU concerned on the transfer date of the facility, provided that there are no claims filed against the Project Proponent and its Contractor.

Section 12.14 - Liquidated Damages

Where the Project Proponent fails to satisfactorily complete the work on or before completion date, including any extension or grace period duly granted, or meet the operating performance standard as prescribed in the contract, the Project Proponent shall pay the Agency/LGU concerned liquidated damages, as specified in the contract as an indemnity and not by way of penalty. The performance security for construction works or for operations, as the case may be, may be applied to answer for any liquidated damages due to the Agency/LGU.

During the Construction period, the amount of liquidated damages due for every calendar day of delay beyond the completion date will be determined by the Agency/LGU based on the formula in the contract. During the operation period, the amount of liquidated damages, which will be determined by the Agency/LGU, shall be based on the principle of fair compensation for damages which the Agency/LGU will sustain as a result of the Project Proponent's failure to meet its obligations.

The imposition and collection of liquidated damages shall be without prejudice to the right of the Agency/LGU concerned to rescind the contract and proceed with the procedures prescribed under Section 12.21 (b).

Section 12.15 - Repair and Maintenance Costs

The Project Proponent shall, within the contract term and the warranty period prescribed under Section 12.23, undertake the necessary and appropriate repair and maintenance of the project, in accordance with the design and performance standards, and other terms prescribed in the approved contract, in order to ensure that the facility operates at the desired level of service. For this purpose, and where applicable, a portion of the project's revenues equivalent to the cost of the project's repair and maintenance, as indicated in the Project Proponent's bid proposal shall be set aside and reserved exclusively for repair and maintenance costs of the project. For facility, an escrow account may be established for the purpose.

Section 12.16 - Repayment Schemes12.16.1 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 and IRR 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, resulting from the bidding, and incorporated in the contract, which, shall be upheld, adopted, accorded utmost weight, or 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 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.

The government shall ensure that the project proponent recovers the difference between the amount of tolls, fees, rentals and other charges as stipulated or computed based on the contract and/or approved parametric formulae and the amount approved by the Regulator or appropriate regulatory body through measures consistent with applicable laws and the constitution.

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 negotiated contracts and Public Utility Projects which are natural monopolies.

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 may be stipulated in the contract.

Section 12.20 - Accession/Divestiture

Subject to the approval of the Approving Body upon due diligence and recommendation by the Head of Agency/LGU, a project proponent may divest or accede its ownership and/or rights to a project provided that, the divestiture or accession shall be after the holding or lock-in period which shall be determined by the Agency/LGU and indicated in the contract, and provided that, the new project proponent has equal or better qualifications as with the previous project proponent.

A divestment/accession made in violation of this section shall be a ground for disqualification of the proponent or cancellation of the contract, as the case may be, and forfeiture of the proponent's bid or performance security.

The Agency/LGU shall inform in writing the PPP Center the change in ownership for monitoring purposes.

Section 12.21 - 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 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; 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 take-over 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 12.22 - 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 12.23 - Expiring BOT/PPP Contracts and 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, all documents, property rights, source codes, equipment, among others, which are related to the project in favor of the Agency/LGU, subject to any existing liens as may be agreed upon in the contract. The facility, upon transfer to Agency/LGU, shall be operable and in good condition. The performance indicators for the project/facility and frequency of monitoring the indicators shall be stipulated in the contract. A third-party shall be commissioned to assess the residual value of the facility upon transfer or turnover of the facility to the Agency/LGU. 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 a form to be specified by the concerned Agency/LGU which may be in 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.

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 Executive Order (EO) No. 226, otherwise known as the Omnibus Investment Code of 1987, subject to the compliance of the project with the criteria, as may be set by the BOI in its review thereof under EO 226 such as, but not limited to economic and consumer benefit, technical and financial soundness.

- 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 and compliance of the project with the criteria, as may be set by the BOI in its review thereof under EO 226, such as, but not limited to economic and consumer benefit, technical and financial soundness.
- 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 R.A. 9513, otherwise known as the “Renewable Energy Act of 2008”, R.A. 9593, otherwise known as “The tourism Act of 2009”, 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.

Section 13.3 - Government Undertakings

Subject to existing laws, policies, rules and regulations, the Government may provide any form of support or contribution to solicited projects, such as, but not limited, to the following:

- 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 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, or the obligation of the Agency/LGU under its contract with the Project Proponent.

- 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) contribute any property or assets to the project; (c) 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 (d) 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 pre-cleared in principle, in writing, by the department, bureau, office, commission, authority, agency, GOCC, or LGU or any other government entity that will grant the same as mandated by law; provided that the total government undertakings shall not exceed fifty percent (50%) of the total project cost.

The government undertakings shall be based on the approved risk allocation matrix which shall be issued by the Approving Body/ICC.

RULE 14 - COORDINATION AND MONITORING OF PROJECTS

Section 14.1 - The PPP Center

The PPP 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 PPP Center information on the status of projects implemented by them. In addition, all concerned Agencies/LGUs shall submit to the PPP Center a copy of all Unsolicited Proposals that they receive and all other related documents. The PPP 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, PPP 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 PPP Center shall monitor the compliance of the Agencies/LGUs with the timelines prescribed in these Revised IRR.

Section 14.3 - PPP Units

Each concerned Agency/LGU may create a PPP Unit headed by a senior official of the Agency/LGU and shall designate a senior official as PPP 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 PPP Unit may also include as members, among others, technical and legal personnel who are knowledgeable on the technical and legal aspects, respectively, of the PPP projects that may be implemented pursuant to the Act and this IRR.

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 by the PPP Center, copy the ICC, for its information.

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, after due public hearing, become effective fifteen (15) days after its complete publication in at least one (1) newspaper of general circulation.

Section 15.3 - Transitory Provision

Upon effectivity of these revised IRR, all PPP projects, including those presently being processed and/or reviewed but not yet approved by the Approving Body shall hereafter be processed and/or reviewed in accordance with these revised IRR.

Projects under implementation shall be governed by the contract provisions entered into by the concerned parties.

Section 15.4 - Repealing Clause

Any issuance, executive order, administrative order, proclamation, charter, rule or regulation and/or parts thereof contrary to or inconsistent with the provisions of this IRR is hereby repealed, modified or amended accordingly.

Section 15.5 - Separability Clause

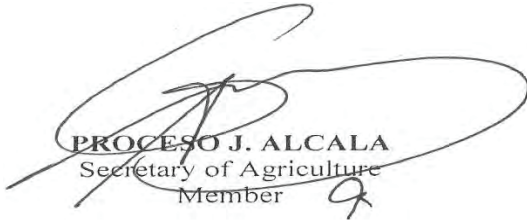
In the event any of the provisions of these Revised IRR is declared void or unenforceable by final judgment of a court of competent jurisdiction, the other provisions unaffected thereby shall remain in full force and effect.



CAYETANO W. PADERANGA, JR.
Secretary of Socio-Economic Planning
Chairman, BOT-IRR Committee



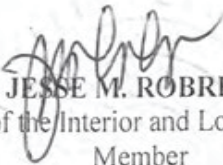
COSETTE V. CANILAO
Executive Director of PPP Center
Member



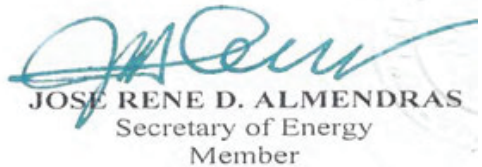
PROCESO J. ALCALA
Secretary of Agriculture
Member



RAMON J.P. PAJE
Secretary of Environment and Natural Resources
Member



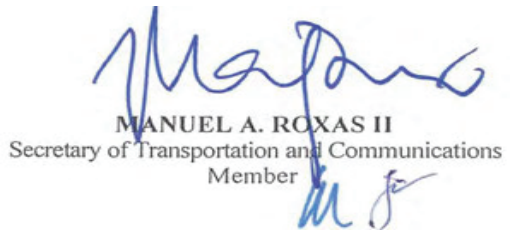
JESSE M. ROBREDO
Secretary of the Interior and Local Government
Member



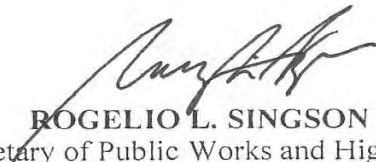
JOSE RENE D. ALMENDRAS
Secretary of Energy
Member




CESAR V. PURISIMA
Secretary of Finance
Member



MANUEL A. ROXAS II
Secretary of Transportation and Communications
Member



ROGELIO L. SINGSON
Secretary of Public Works and Highways
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GREGORY L. DOMINGO
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