

**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 (IRR) 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 implementing Infrastructure or Development Projects normally undertaken by the government, which includes the Construction, financing, operations, and maintenance of such projects.

In line with the foregoing, this Revised IRR seeks to facilitate the delivery of high quality services to the public by (a) promoting transparency and accountability in processing Infrastructure or Development Projects to arrive at the real cost of the project to the government, consumers, and taxpayers, (b) avoiding conflicts of interest situations, (c) promoting practices that foster competition, and (d) ensuring that the contracting parties are capable to implement the project and fulfill their respective contractual obligations.

This Revised IRR also seeks to protect the government and the public from excessive payments, undue guarantees, unnecessary fiscal risks, and onerous contractual obligations by (a) creating an enabling environment for Agencies/LGUs, including the Regulators, to perform their mandated tasks, (b) ensuring that Contractual Arrangements reflect appropriate sharing of risks between the government and the Project Proponent, (c) allowing reasonable returns on investments, incentives, support, and undertakings, financial or otherwise, that may be granted to Project Proponents, as part of clearly defined parameters, terms, and conditions of a project, and (d) promoting the interests and welfare of the Filipino who ultimately pay for the costs and returns from the projects to be undertaken under the Act and this Revised IRR.

Section 1.2 – Coverage

This Revised 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 the Act and this Revised IRR and pertinent provisions of R.A. No. 7160 (Local Government Code of 1991) and its implementing rules and regulations. Guidelines/procedures formulated by concerned LGUs relating to the BOT Law including PPP codes and ordinances thereto, and any updates thereof, shall be regularly uploaded to the PPP Center website and the website of the Agency/LGU.

Section 1.3 - Definition of Terms

For purposes of this Revised IRR, the terms and phrases hereunder shall be understood as follows:

- a. **Act** - refers to 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** - refers to 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** - refers to the entity authorized to approve projects proposed under the Act and in accordance with Sections 2.9 and 2.10 of this Revised IRR.
- e. **Contractual Arrangements** - refers to any of the following contractual arrangements or schemes, as well as other variations approved by the President, by which Infrastructure or Development Projects may be undertaken pursuant to the provisions of this Revised IRR:
 - i. **Build-and-transfer (BT)** - refers to 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/LGU concerned, which shall pay the Project Proponent on an agreed schedule its total investment expended on the project, plus a (RROR) 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)** - refers to 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)** - refers to 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 Project 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)** - refers to 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 Project Proponent who owns the assets of the facility may assign its operation and maintenance to a Facility Operator.
- v. **Build-transfer-and-operate (BTO)** - refers to 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)** - refers to 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)** - refers to 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)** - refers to 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)** - refers to 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.
- f. **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.
- g. **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.
- h. **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).
- i. **Economic Model** - refers to an electronic copy of a model which presents the economic benefits and costs of a project. The model must present the assumptions used in calculating economic benefits, conversion of financial costs to economic costs, and calculation of economic viability (i.e., economic internal rate of return; economic net present value; benefits-cost ratio).

- j. **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) or Cooperative Development Authority (CDA) 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.
- k. **Financial Model** - refers to an electronic copy of a model which presents the projected balance sheet, income statement, and cash flows statement of a project for its full life cycle. The model must present the calculations on financial viability (i.e., free cash flows to firm and equity holders; project and equity internal rates of return; project and equity net present value; weighted average cost of capital) and bankability (i.e., debt service coverage ratio) of a project.
- 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 this Revised IRR, which the Government or any of its Agencies/ LGUs may extend to a Project Proponent.
- n. **Head of Agency/LGU** - refers to (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 this Revised IRR.
- q. **IRR** - refers to these Revised Implementing Rules and Regulations.
- r. **Key Performance Indicators (KPI)** – refer to specific milestones in or components of quantifiable performance measures that serve as indications of progress towards the eventual achievement of the desired performance measures.

- s. **List of Priority Projects** - refers to the list of Private Sector Infrastructure or Development Projects in accordance with Section 2.4.
- t. **Local Government Units (LGUs)** - refer to provincial, city, municipal and/or barangay government entities.
- u. **Material Adverse Government Action (MAGA)** - refers to any act of the executive branch, which the Project Proponent had no knowledge of, or could not reasonably be expected to have had knowledge of, prior to the effectivity of the contract; and that occurs after the effectivity of the contract, that:
 - a. specifically discriminates against the Project Proponent; and
 - b. has a material adverse effect on the ability of the Project Proponent to comply with any of its obligations under the contract.

This shall not include acts of the Agency/LGU and Approving Body, as well as acts of the executive branch, made in the exercise of regulatory powers; and acts of the legislative and judicial branches of government.

For purposes of the contract, the provisions on MAGA shall also provide for the rules on materiality or amount threshold, nature and compensation, cap on monetary compensation, conditions for termination and termination payment due to MAGA.

- v. **Negotiated Contracts** - refer to contracts entered into by the Government in cases prescribed under Rule 9.
- w. **Operations and Maintenance (O&M) Costs** – refer to the costs of operations and maintenance of the project in the event that O&M is bundled with the Contractual Arrangement.
- x. **PBAC** - refers to the Pre-qualifications, Bids, and Awards Committee established in accordance with Rule 3 of this Revised IRR.
- y. **PPP Center** - refers to 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).

- z. **Private Sector Infrastructure or Development Projects** - refer to 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 this 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, or if a cooperative, it must be duly registered with the Cooperative Development Authority (CDA): 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.
- aa. **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.
- bb. **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.

- cc. **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.
- dd. **Public Utility Projects** - refer 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.
- ee. **Reasonable Rate of Return (RROR)** - refers to the rate of return accruing to the Project Proponent at the project level, as determined by the ICC. This shall take into account, among others, the prevailing cost of capital (equity and borrowings) in the domestic and international markets and risks being assumed by the Project Proponent, provided, 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.

In addition to the reasonable rate of return, the adjusted rate of return of the Project Proponent shall also be determined. The adjusted rate of return shall be the project internal rate of return or the internal rate of return to equity shareholders after adjusting the project's free cash flows to reflect the value of all Government Undertakings and risks assumed by the government, including but not limited to the following or any combination thereof:

- a. value of all assets and usufruct contributed by the government, including air rights;
- b. any government right of way;
- c. any franchise/license granted to government agencies/GOCCs;
- d. personnel;
- e. intellectual property;
- f. indirect benefits accruing to the proponent, such as exclusivity rights, appreciation in the commercial value of other assets owned by the proponent;
- g. other revenues accruing to the proponent as a consequence of undertaking the project, such as commercial revenues and other revenues from related businesses;
- h. all government guarantees and subsidies, tax credits, incentives; and
- i. any financing cost savings as a result of the foregoing and/or any government undertakings.

The recommended valuation shall be based on the estimates prepared by a government financial institution or a national government agency in accordance with Sections 10.4 and 13.3 of this Revised IRR.

Such adjusted rate of return shall be compared against the RROR for the purpose of ensuring that the proposed project is viable, and that the revenue streams allowed for the project and the amount of Government Undertakings, if any, are reasonable.

The valuation of the Government Undertakings shall be verified and approved by the Approving Body.

- ff. **Regulator** - refers to a department, bureau, office, instrumentality, commission, or authority of the national and local government, including Government-Owned and/or -Controlled Corporations (GOCCs), Government Instrumentalities with Corporate Powers (GICP), Government Corporate Entities (GCE), Government Financial Institutions (GFIs), that exercises a regulatory function over the Infrastructure or Development Project.
- gg. **Solicited Projects** – refer to projects identified by an Agency/LGU as part of the list of priority projects in accordance with Section 2.4.
- hh. **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.
- ii. **Value for Money** – refers to the optimum combination of whole-of-life costs and quality (or fitness for purpose) of the good or service to meet the user's requirement.

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 Projects are authorized to enter into contractual arrangements under the Act and this Revised IRR.

Section 2.2 - Building Competencies to Deliver Infrastructure or Development Projects

In order to successfully identify, develop, evaluate, procure, implement, monitor, and oversee Infrastructure or Development Projects implemented under the Act, the PPP Center, in coordination with relevant offices, shall develop and implement a capacity building program that will build and continuously enhance the competencies of Agencies/LGUs and various public sector stakeholders involved in the delivery of projects under the Act.

To this end, competency assessments, among others, shall be integrated with various capacity building activities and relevant processes, as necessary, to ensure that Agencies/LGUs and public sector stakeholders effectively perform their roles and responsibilities as required under this Revised IRR.

Section 2.3 - 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 or Development Projects as may be authorized by the appropriate agencies, may be proposed under the provisions of the Act and this Revised IRR:

- a. Highways, including expressways, 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, aerial, and space infrastructure, and related service facilities;
- h. Information technology (IT) networks and database infrastructure; 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 and housing projects;
- o. Markets, slaughterhouses, trading posts, and related facilities;
- p. Warehouses and post-harvest facilities;
- q. Public fish ports and fishponds, including storage and processing facilities;
- r. Agri-fishery industrial hubs, agribusiness facilities, agricultural research facilities, agricultural estates, agrilogistics systems, contract farming, and related facilities;
- s. Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others; and
- t. Climate change adaptation and mitigation and disaster risk reduction and management infrastructure projects and related facilities.

Section 2.4 - 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 this Revised IRR and to submit for the approval by the Approving Body, as specified in Section 2.9. The List of Priority Projects shall be consistent with the Agency's/LGU's master plans, Philippine Development Plan (PDP), Regional Development Plans (RDP), Provincial Development and Physical Framework Plans (PDPFP), Comprehensive Development Plans (CDP), and such other plans or programs as may be mandated by the President.

The Public Investment Program (PIP) and the Three-Year Rolling Infrastructure Program (TRIP), and their successor priority lists, as may be necessary, shall be deemed as the lists of National Priority Projects. The Provincial Development Investment Programs (PDIPs)/Local Development Investment Programs (LDIPs), and Local Investment and Incentive Codes (LIIC), shall be deemed as the List of Local Priority Projects. The PIP, TRIP, RDP, CDP, LIIC and PDIP/LDIP shall be updated and endorsed by the regional development councils 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 2.5 - 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 this 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, in print or online media, and where applicable, international newspapers of general circulation in print or online media. Said list should also be posted continuously on the websites of the PPP Center, the concerned Agency/LGU, and any online government portal for the purpose, if available.

Section 2.6 - Allowable Modes of Implementation

Projects may be implemented through public bidding or direct negotiation. The direct negotiation mode is subject to conditions specified in Rules 9 and 10 hereof.

Section 2.7 – Completeness and Quality of Proposed Projects Submitted to the Approving Body

A project shall be deemed complete for purposes of evaluation by the Approving Body when it has submitted a complete set of requirements, which shall be published by the ICC of the NEDA Board. These shall include, but are not limited to, a complete feasibility study, economic and financial models that are traceable and that contain data not older than three (3) years, and the proposed parameters, terms, and conditions as described in Section 2.8 of this Revised IRR. In the case of unsolicited proposals, a complete submission shall contain additional requirements described in Section 10.5 of this Revised IRR.

Once the complete set of requirements is submitted, the Approving Body shall evaluate the project pursuant to Section 2.10.

For projects not requiring ICC recommendation and/or approval, the set of requirements to be published by the ICC shall serve as the minimum requirements for a proposed project.

The ICC and/or the Approving Body, as the case may be, shall prescribe or revise requirements to be submitted in support of the proposed project, including their respective timelines, provided that the same are consistent with the act and this Revised IRR.

Section 2.8 – Parameters, Terms, and Conditions (PTCs)

- a. The Agency/LGU shall submit to the Approving Body as part of the proposed project for approval, the following minimum PTCs:
 - i. Scope of the project;
 - ii. Contractual Arrangement;
 - iii. Contract term;

- iv. Obligations, undertakings, and applicable liquidated damages of the Project Proponent;
- v. Requirement to submit performance reports by the Project Proponent to the Agency/LGU and to the PPP Center;
- vi. Key performance indicators, targets, and measurement;
- vii. Government Undertakings;
- viii. Bid parameter that does not deter competition;
- ix. Requirement to disclose to the Agency/LGU and the appropriate Approving Body by the Project Proponent of its loan agreement as referred to in Section 14.6;
- x. Ceiling for debt-to-equity ratio;
- xi. Revenue share for the government, if any;
- xii. RROR pursuant to Section 12.18;
- xiii. Proposed structure of tolls/fees/rentals/charges pursuant to Section 12.18;
- xiv. Grounds for termination, pursuant to Section 12.21.a of this Revised IRR;
- xv. Firm and contingent liabilities, risk allocation, materiality threshold amount and/or compensation cap pursuant to Rule 15;
- xvi. Acceptable conditions for lenders' step-in rights;
- xvii. Conditions for acceptable permitted security interest;
- xviii. A condition prohibiting the incorporation of onerous and one-sided provisions in the contracts. A contract is onerous if the cost of the project outweighs the advantages the government and the public will receive from the project.

For this purpose, the Agency/LGU shall comply with the requirements set forth by the Technical Working Group of the ICC.

The ICC and/or the Approving Body, as the case may be, shall set forth the required PTCs which shall be the basis for the drafting and approval of tender documents and contract, provided that the same are consistent with the Act and this Revised IRR.

- b. In no case shall the Head of the Agency/LGU set additional PTCs in the draft contract or during negotiations that will result in any or a combination of the following:

- i. Altering the approved risk allocation;
- ii. Conflict or supersede the PTCs approved by the Approving Body;
- iii. The incremental fiscal impact being disadvantageous to the government;
- iv. Altering the definition of contingent liabilities or expanding the types of contingent liabilities set by this Revised IRR; or
- v. Worsening the approved viability indicators from the government's perspective.

If the executed contract contains provision/s which results in any of the items under (b) above, as validated by the Approving Body, the contract shall be null and void.

Section 2.9 - Approval of Projects

The approval of projects proposed under the Act shall be in accordance with the following:

- a. National Projects - All national projects 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 – Prior to approval, 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.

Such confirmation shall be for the purpose of validating the consistency of the proposed project with existing master plans and development plans. The said

confirmation shall be given within sixty (60) calendar days from the submission of a written request for confirmation and a complete set of requirements as prescribed by the appropriate development council or the ICC for those costing above PhP 200 million. Non-confirmation of the appropriate development council or the ICC within the 60-calendar day period shall not be deemed an automatic confirmation.

After confirmation is secured, final approval of local projects is vested on the Local Sanggunians per provisions of the Local Government Code.

Projects to be implemented by LGUs and national government agencies (NGAs) as co-grantors shall undergo the abovementioned approval process required for both national and local projects.

Section 2.10 - Detailed Guidelines for the Approval of Projects

In the evaluation of projects, the Approving Body shall be guided by the following criteria in approving projects, among others:

- a. value-for-money analysis shows that PPP modality is the most viable procurement option;
- b. the proposed project is technically feasible and is optimal based on a value engineering/value analysis study;
- c. the outputs of the project are clearly specified and do not restrict competition. This means by which the technical solution proposed by different bids shall be evaluated are likewise specified;
- d. the project is economically viable, based on the guidelines set by the Approving Body;
- e. the Agency's/LGU's plans for mitigating social and environmental impacts will enable the project to comply with existing legal requirements;
- f. the Project Cost is sufficient to achieve the technical requirements including key performance indicators and targets to meet social and environmental standards;
- g. the operating costs are sufficient to achieve the operational requirements;
- h. the project is financially viable for investors at the project level, provided that the factors that would make the project financially viable are disclosed in the submission;
- i. the project's cash flows are healthy and sufficient to service debt obligations, in accordance with the guidelines set by the ICC;
- j. the risk allocation complies with the Generic Preferred Risk Allocation Matrix as determined by the ICC. Any deviation must be justified by the Agency/LGU and shall be up for approval of the concerned Approving Body;

- k. the firm payments are justified by the Agency/LGU, if included in the proposed project structure;
- l. the proposed bid parameter generates the most value-for money for the public and shall not deter competition;
- m. the Agency/LGU has the capability to deliver its assumed obligations for the project; and
- n. the proposed PTCs are consistent with the Act and this Revised IRR.

For projects requiring the approval of the ICC and/or NEDA Board, such shall be evaluated by a technical working group composed of NEDA, DOF, and the Agency/LGU prior to their elevation to the ICC - Technical Board. The PPP Center shall serve as the secretariat of such technical working group.

The Approving Body shall prescribe or revise detailed guidelines on the process and procedures for the approval of projects provided that the same are consistent with the Act and this Revised IRR.

Section 2.11 - Deadline for Approval of Solicited Projects

The Approving Body shall approve or disapprove the project within thirty (30) working days from the receipt of the Approving Body of a complete set of requirements for evaluation.

In the event of 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.

In the event of disapproval, the Approving Body shall inform, in writing, the Agency/LGU of the reason for disapproval. The Agency/LGU shall be allowed to re-submit the disapproved solicited project for approval provided that the reasons for disapproval of the project are addressed accordingly. Upon resubmission, the Approving Body shall treat it as a new project and act on the project pursuant to this provision.

Section 2.12 - Approval of Contracts

The Head of the Agency/LGU shall review and approve the draft contract, which shall be based on the PTCs set forth by the Approving Body pursuant to Section 2.8 of this Revised IRR.

Prior to approval of the Head of Agency/LGU, the draft contract shall undergo review by the Department of Finance (DOF) and 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 in accordance with their respective mandates and areas of expertise.

The OSG, OGCC, or any prescribed statutory counsel as the case may be, shall issue an opinion on the draft contract within twenty (20) working days upon receipt thereof. The DOF shall issue an opinion on the draft contract for projects of national government agencies, local projects which will involve funds of the national government, and local projects requiring ICC review or approval, within twenty (20) working days upon receipt thereof. The DOF opinion on the draft contract shall contain an explicit approval of the proposed Government Undertakings.

Any Government Undertaking stated in the draft contract not approved by the Approving Body and not enumerated in the DOF opinion shall not be binding against the Republic.

Changes in the PTCs of the draft contract may be allowed prior to submission of bids for solicited projects, or prior to submission of comparative proposals for unsolicited projects, provided that the prior approval of the appropriate Approving Body and the Head of Agency/LGU shall be secured.

The concerned Agency/LGU shall likewise inform in writing the DOF and the concerned statutory counsel of such changes as provided in this Section.

Changes to the PTCs 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.

Section 2.13 - 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.

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

Section 3.1 – Composition

The Head of the Agency/LGU shall create a PPP 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 – Chairperson
- 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 Regulator, 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 (COA) - Observer (non-voting)
- i. One (1) representative from the PPP Center for national projects, in accordance with Section 2.9 (a) - Observer (non-voting)
- j. One (1) representative from the local Department of the Interior and Local Government (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 Chairperson 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. "Draft Contract" (as approved in accordance with Section 2.12) reflecting the PTCs as approved by the Approving Body and using the model contracts provided by NEDA/PPP Center as reference;
- c. "Bid Form" reflecting the required information to properly evaluate the bid proposal;
- d. forms of bid and performance securities;
- e. requirements and timelines/milestones of concerned Agencies in granting of franchise, if applicable; and
- f. other documents as may be deemed necessary by the Agency/LGU concerned.

Section 4.2 – Instruction to Bidders

The instruction 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 this 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 tariff adjustment formula approved by the Regulator pursuant to Sections 12.16 and 12.18 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, as approved by the Regulator pursuant to Sections 12.16 and 12.18. Said formula shall take into account the reasonableness of the same to users of the project/facility under bidding;
- k. Requirements of concerned Regulators, 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 - Draft Contract

The Head of the Agency/LGU shall be responsible in ensuring the consistency of the draft contract with the PTCs as approved by the Approving Body, pursuant to Section 2.8 of this Revised IRR.

The draft contract should clearly define the basic and legal relationship between the parties and their rights and responsibilities including the specific Government Undertakings, and obligations and undertakings of the Project Proponent 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. key performance indicators, targets, and procedures for measuring and reporting results;
- 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. obligation of the Project Proponent to disclose loan agreements, as required under Section 14.6;
- f. liquidated damages as contemplated under Section 12.14;
- g. performance security requirements, including their validity and top-up mechanism procedures, contemplated under Sections 12.8 and 12.9;
- h. minimum insurance coverage as may be required for the project, such as Contractors' all risk, motor vehicle, workmen's compensation, third party liability, force majeure, or comprehensive general liability insurance, as may be applicable;
- i. acceptance tests and procedures;
- j. warranty period and procedures (after transfer) and warranty security;
- k. grounds for and effects of contract termination;
- l. procedures for resolving disputes as detailed in Section 12.22 of this Revised IRR;
- m. the manner and procedures for the resolution of warranty against corruption; and
- n. compliance with all other applicable laws, rules, and regulations.

In accordance with Section 2.12, 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 the Department of Finance (DOF), for projects of national government agencies, local projects which will involve funds of the national government, and local projects requiring ICC review/approval, shall each issue an opinion on the draft contract, in accordance with their respective mandates and areas of expertise, within twenty (20) working days upon receipt thereof.

RULE 5 - QUALIFICATION OF BIDDERS

Section 5.1 - Who May Participate

Any individual, partnership, corporation, firm, whether local or foreign, including consortia of local, foreign or local and foreign firms, or cooperative 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 this 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 PTCs for the project which shall serve as basis for the draft contract as provided in Section 4.3.

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, print and online, and in at least one (1) local newspaper, print and online, 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 on the websites of the Agency/LGU concerned, if available, and the PPP Center, and any online government portal for the purpose, 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) newspaper, print and online, of 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, or, if cooperatives, must be duly registered with the Cooperative Development Authority (CDA).
- 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, or, if cooperatives, must be duly registered with the Cooperative Development Authority (CDA).
- 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 or 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, even if the Contractor is not a member of the consortium. The experience of the Contractor(s) which the prospective Project Proponent will engage for the project shall be evaluated if it is necessary for the determination of the capacity of the consortium to undertake the project. In such case, the Contractor(s) must have successfully undertaken a project(s) similar or related to the project to be bid.

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**
 - 1. a minimum amount of equity to the project measured in terms of the latest net worth less equity commitments to other projects.

Net worth shall be measured by deducting total liabilities from the total assets based on the latest audited financial statements of the company or each member of the consortia. In case of consortia, the net worth computed shall be prorated net worth of each member based on the proposed ownership structure.

Equity committed to other projects are (1) the equity requirements for the value of all outstanding or uncompleted portions of project construction under ongoing or awarded projects (exclusive of the total assets and total liabilities provided under the latest AFS); and (2) the sum of required equity contributions to unsolicited proposals where original proponent status has been granted to the Project Proponent.

For this capability, the Project Proponent shall submit:

- (a) latest audited financial statement;
- (b) a sworn affidavit disclosing the Project Proponent's, or, in the case of consortia, each member's other projects that are ongoing and new projects requiring equity, with the corresponding value and schedule of outstanding equity requirements for each project. for purposes of this Revised IRR, the term "new projects" shall refer to unsolicited projects where the original proponent is granted with an original proponent status (OPS) in accordance with Section 10.7 of this Revised IRR;

- (c) a sworn affidavit disclosing the Project Proponent's, or, in the case of consortia, each member's other projects that are ongoing and new projects requiring debt financing;
- (d) debt to be incurred in all projects; and
- (e) equity required by all projects.

The prospective Project Proponent shall be deemed to have the capability to fund equity requirements for the project if the latest net worth, or in case of consortia, the sum of the latest net worth of each member, based on the proposed ownership structure, is at least equal to the sum of the minimum amount of equity required for the project and the outstanding equity requirements for the other projects that are under approval, awarded, and under implementation disclosed in the sworn affidavit; or

- 2. a set-aside deposit equivalent to the minimum equity required, committed solely for the project.

For avoidance of doubt, joint and several liability agreements, accession agreements, guarantee letters from parent companies, or other documents not explicitly stated above shall not be considered by the Agency/LGU in determining the Project Proponent's financial capability to provide equity.

ii. Debt

The Project Proponent shall demonstrate its capability to finance the project with debt by submitting a letter testimonial from a bank attesting that:

- 1. the prospective Project Proponent and/or members of the consortium are banking with them;
- 2. The Project Proponent and/or members of the consortium are in good financial standing and/or are qualified to obtain credit accommodations from such banks to finance the project equivalent to the value of the debt requirement in the proposal.

The testimonial must come from a domestic universal/commercial bank or an international bank that is authorized by the BSP to transact in the Philippines.

For the avoidance of doubt, the sworn affidavit contemplated in Section 5.4 (c) (i) is a separate and different requirement from the letter testimonial as proof of capability to raise debt financing.

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 from receipt of the complete submission of the prospective Project Proponent's pre-qualification documents.

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 this 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.

Changes in the PTCs, approved by the Approving Body, may be allowed prior to the issuance of the bid bulletin for any documents obtained by prospective bidders for single-stage and two-stage bidding process; provided that, the prior approval of the appropriate Approving Body and the Head of Agency/LGU shall be secured.

The concerned Agency/LGU shall inform in writing the DOF and the concerned statutory counsel as provided in Section 2.12 of this 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 (as estimated by the Agency/LGU or proposed by the Project Proponent)	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 prequalification 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 submits 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 Contracts

In instances where negotiated contracts are allowed, the ICC shall determine the RROR prior to the negotiation in the case of solicited proposals as referred to under Section 9.1 of this Revised IRR or call for proposals in the case of unsolicited proposals. The scope of negotiation,

in the case of solicited proposals referred to under Section 9.1 of this Revised IRR, shall be limited to the financial proposal of the lone complying bidder and in compliance with the RROR prescribed by the ICC.

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 this 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 contract shall immediately be awarded to the original proponent.

Section 10.2 – New Concept or Technology

The Project Proponent proposing a project involving a new concept or a technology that is new and untried in the Philippines shall incorporate in its proposal information which it, or through any of its consortium members, has directly and 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. This shall include, among others, the details

of the new concept or technology, and the cost-benefit analysis comparing the new concept or technology with traditional ones.

New concept or technology means green, smart, emerging, or state-of-the-art technology, or any other similar or related concepts/technologies.

In addition, it should have a positive impact on the implementation and operations of the project such as, but not limited to:

- a. reduction of Construction costs;
- b. acceleration of project execution;
- c. improvement of safety;
- d. enhancement of project performance;
- e. improvement in productivity or quality of produce;
- f. extension of economic life;
- g. reduction of O&M costs;
- h. reduction of negative environmental impact;
- i. reduction of social/economic disturbances either during construction or operation phase; or
- j. increase in use of materials with a high domestic content.

The Agency/LGU shall issue a certification that based on its assessment, considering available and relevant government and international standards, the new concept or technology possesses any of the above features and other features that would have a positive impact on the implementation and operations of the project. Such certification may also be sought from relevant government agencies/bodies/institutions/etc., with knowledge of the proposed new concept or technology.

Section 10.3 - Projects Ineligible for Unsolicited Proposals

Projects included in the “List of Priority Projects”, as defined under Section 2.4, 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 a Project Proponent shall be considered as a direct government subsidy or equity unless the government receives appropriate compensation pursuant to existing laws, rules and regulations, and guidelines. Such grant of usufruct shall be made in accordance with the following guidelines:

- a. Use of Government Financial Institutions – To determine the value of the usufruct of government assets, the original proponent shall procure, at its own cost, the services of a government financial institution.
- b. Conduct of Valuation – The valuation of the usufruct shall be conducted on a date/s, which is mutually agreed upon by both parties, provided that it shall be done during the negotiation stage but not later than the publication of the invitation for comparative proposals. The valuation determined by the government financial institution shall be valid and binding upon both parties.
- c. Compensation Amount – the amount of compensation for the usufruct of assets shall be based on the appraised value of the asset as determined by the government financial institution. Such amount, including interests, if any, shall be paid in Philippine pesos on a date set forth under the contract.
- d. Interest Rate – Non-payment of compensation on or before the agreed date shall incur interest at a rate stated in the contract, taking into consideration relevant rules and regulations on interest. In case the parties fail to agree on the applicable interest rate, or in default thereof, the prevailing risk-free rate shall apply.

The standards for valuation of government assets, including among others, right-of-way, and of relocation and resettlement for national projects shall be pursuant to Republic Act No. 10752 and other existing laws, rules and regulations, and guidelines. LGUs may use the same standards for their local projects.

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

Section 10.5 - Submission of a Complete Unsolicited Proposal to the Agency/LGU

Once the Agency/LGU receives an unsolicited proposal, it shall acknowledge the receipt of the proposal within seven (7) calendar days from its receipt thereof, and inform the PPP Center of its receipt of the unsolicited proposal.

Within thirty-five (35) calendar days from the Agency/LGU's receipt of the unsolicited proposal, it shall:

- a. Assess whether the proposal is complete or not, taking into consideration the first in time approach described in the subsequent section.

For an unsolicited proposal to be considered complete for purposes of assessment by the Agency/LGU, it shall contain the following:

- i. cover letter, indicating the basic information on the unsolicited proposal such as a description of the project, its expected output and outcome, implementation period, and general description of the new concept or technology pursuant to Section 10.2 of this Revised IRR. The company profile of the Project Proponent or the business plan of the proponent consortium shall also be included;
- ii. feasibility study prepared in accordance with the guidelines of the ICC referred to in Section 2.7;
- iii. draft contract, consistent with Section 4.3;
- iv. financial and economic model used by the Project Proponent, prepared in accordance with Section 2.7 and the guidelines of the ICC referred to therein;
- v. pre-qualification requirements under Section 5.4;
- vi. proposed PTCs as described in Section 2.8; and
- vii. documentary evidence of compliance with items (1) and (2) of Section 4-a of the Act and items a and b of Section 10.1 of this Revised IRR.

The Project Proponent shall likewise submit all of the abovementioned document/s including those that are proprietary in nature in a sealed envelope to the Agency/LGU.

- b. Send a written notice to the Project Proponent and the PPP Center of its assessment on the completeness of the submitted proposal.

If a proposal is determined to be complete by the Agency/LGU, it shall send a written notice to the Project Proponent confirming the completeness of the submitted proposal, and informing the Project Proponent that the Agency/LGU shall proceed to prequalify the Project Proponent and evaluate the merits of the proposal pursuant to Section 10.7 of this Revised IRR. A copy of such notice shall be sent by the Agency/LGU to the PPP Center.

If a proposal is determined to be incomplete by the Agency/LGU, it shall send a written notice to the Project Proponent listing down the lacking information or requirement, and returning all the documents submitted by the Project Proponent. A copy of such

notice shall be sent by the Agency/LGU to the PPP Center. The Agency/LGU may entertain thereafter other same or similar project proposal. The Project Proponent whose submission is deemed incomplete shall not be precluded from re-submitting a revised proposal. The resubmission shall be considered a new submission, and be subject to the first in time approach in Section 10.6.

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 pursuant to the requirements in Section 10.5. The second proposal will only be entertained if the first one is determined to be incomplete pursuant to Section 10.5, or not accepted pursuant to Section 10.7. 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 10.13.

Under the first in time approach, the Head of Agency/LGU shall send a written notice to the other proponents acknowledging the submission of the same or similar project concept, and advise the said proponents on existence of similar project concept and its rank/position based on the date of submission of unsolicited proposals. The Agency/LGU shall furnish the PPP Center with a copy of such notice to other proponents.

If a contract is awarded to the winning bidder, the Agency/LGU shall send a written notice returning the unopened submissions to the respective proponents. The Agency/LGU shall furnish the PPP Center with a copy of such notice.

Section 10.7 - Evaluation and Acceptance of Unsolicited Proposals

Within one hundred and twenty (120) calendar days upon informing the Project Proponent of the completeness of its proposal pursuant to Section 10.5, the Agency/LGU shall assess the qualifications of the Project Proponent, evaluate the proposal, and send a written notice to the Project Proponent informing whether the Agency/LGU accepts or rejects the proposal, pursuant to the following rules:

- a. The Agency/LGU shall qualify the project proponent based on the provisions of rule 5 hereof;
- b. In evaluating the proposal, the Agency/LGU must perform the following tasks:
 - i. Confirm the existence of the new concept or technology in accordance with Section 10.2 hereof;
 - ii. Validate the absence of any direct government guarantee, subsidy, or equity;

- iii. Assess the appropriateness of the contractual arrangement and reasonableness of the proposed risk allocation pursuant to the Generic Preferred Risk Allocation Matrix published by the ICC;
 - iv. Review the proposed PTCs for the project, as described in Section 2.8;
 - v. Ensure the technical, financial, and economic viability of the project, pursuant to the criteria set in Section 2.10 and any additional guidelines set by the Approving Body; and
 - vi. Evaluate the proposed RROR submitted by the Project Proponent. The Agency/LGU may confirm the proposed RROR, or recommend another RROR for the project.
- c. After assessing the qualifications of the Project Proponent and evaluating the proposal, the Agency/LGU shall accept or reject the proposal:
- i. If the Agency/LGU accepts the proposal, it shall send a written notice to the project proponent stating its intention to accept the proposal, and granting a conditional OPS to the Project Proponent.

In cases of local projects, the LGU shall also request the confirmation of the appropriate body pursuant to Section 2.9 of this Revised IRR.

Within thirty (30) calendar days upon issuance of such notice, the Head of Agency/LGU shall endorse to the Approving Body the proposed unsolicited proposal together with the documents listed in Section 10.5 and other documents required pursuant to Section 2.7. A copy of such notice shall be sent by the Agency/LGU to the PPP Center.

The Head of Agency/LGU shall also certify and provide documentation, as prescribed by the Approving Body, that it has done the mandated evaluation pursuant to Section 10.7 of this Revised IRR. Thereafter, the Approving Body shall assess the qualifications of the proponent for the grant of OPS pursuant to 10.8.a.

- ii. If the Agency/LGU rejects the proposal, the Agency/LGU shall send a written notice informing the Project Proponent of the reasons for the rejection of its unsolicited proposal, and returning all documents submitted by the proponent. A copy of such notice shall be sent by the Agency/LGU to the PPP Center. Thereafter, the Agency/LGU may entertain other same or similar project proposals.

Section 10.8 - Approval of the Unsolicited Proposal Prior to Negotiation with the Original Proponent

- a. Confirmation by the ICC/Sanggunian of the Conditional OPS Granted by the Agency/LGU to the Proponent**

i. National Projects

Within sixty (60) calendar days upon receipt by the Approving Body of the endorsement and documents referred to in Section 10.7.b:

1. The Approving Body shall endorse all documents to the Technical Working Group (TWG) of the ICC.
2. Thereafter, the TWG of the ICC shall validate the completeness and compliance of the submitted proposal pursuant to Sections 2.7 and 10.5 of this Revised IRR; validate the qualifications of the Project Proponent pursuant to Rule 5; and submit its findings to the ICC for its decision.
3. The ICC shall either:
 - (a) Confirm the grant of conditional OPS through a written notice to the Agency/LGU. Such notice shall also state the total amount that the Project Proponent is qualified to raise for the proposed project.
 - (b) Thereafter, the Approving Body shall proceed with the evaluation of the merits of the proposal pursuant to Section 10.8.b; or
 - (c) Reject the grant of conditional OPS through a written notice to the Agency/LGU. Such notice shall state the reasons for the rejection of the grant of OPS.

ii. Local Projects

Within sixty (60) calendar days upon receipt by the local Sanggunian of the endorsement and documents referred to in Section 10.7.b, and the confirmation of the appropriate body referred to in Section 2.9.b of this Revised IRR, the local Sanggunian shall:

1. Assess the completeness and compliance of the submitted proposal pursuant to Sections 2.7 and 10.5 of this Revised IRR;
2. Validate the qualifications of the Project Proponent pursuant to Rule 5;
3. Confirm or reject the grant of conditional OPS to the Project Proponent; and
4. Notify the LGU of its action on the grant of OPS.

The local Sanggunian may also create a technical working group to provide assistance for items ii.1. and ii.2.

Within five (5) calendar days from receipt by the Agency/LGU of the notice from the ICC/Sanggunian, the Agency/LGU shall perform either of the following actions, depending on the decision of the ICC/Sanggunian:

- i. If the ICC/Sanggunian confirms the grant of OPS, the Agency/LGU shall issue a written notice to the Project Proponent informing the Project Proponent that the ICC/Sanggunian confirmed the conditional grant of OPS. Thereafter, the Project Proponent shall be considered as the “original proponent”; or
- ii. If the ICC/Sanggunian rejects the grant of OPS, the Agency/LGU shall issue a written notice to the Project Proponent stating the reasons for the rejection of the Project Proponent’s unsolicited proposal, and returning all documents submitted by the Project Proponent. Thereafter, the conditional OPS granted by the Agency/LGU is automatically revoked, and the Agency/LGU may entertain other same or similar project proposals.

The Agency/LGU shall furnish the PPP Center with a copy of the above notice.

b. Evaluation of the Proposal by the Approving Body

Within ninety (90) calendar days from the confirmation by the ICC/Sanggunian of the grant of OPS, the Approving Body shall evaluate the proposal according to the criteria set forth in Section 2.10 of this Revised IRR, and any additional guidelines as prescribed by the Approving Body.

If the proposal is accepted, the Approving Body shall issue a written notice to the Agency/LGU containing the approved PTCs for negotiation, and a formal advice for the Agency/LGU to commence negotiation.

If the proposal is rejected, the Approving Body shall either:

- i. issue a written notice to the Agency/LGU containing the conditions and timelines that the Agency/LGU must comply with for the approval of the proposal; or
- ii. issue a written notice to the Agency/LGU stating the reasons for the rejection of the proposal, and returning the proposal to the Agency/LGU.

If the Approving Body determines that the Agency/LGU complied with the conditions and timelines set by the Approving Body in item b.i. of this Section, the Approving Body shall issue a written notice to the Agency/LGU containing the approved PTCs for negotiations and a formal advice for the Agency/LGU to commence negotiation.

If the Approving Body determines that the Agency/LGU failed to comply with the conditions and timelines set by the Approving Body in item b.i. of this Section, the Approving Body shall either reject the proposal or extend the timeline for compliance by the Agency/LGU.

The return of the project proposal by the Approving Body to the Agency/LGU shall serve as the automatic revocation of OPS granted to the Project Proponent.

Section 10.9 – Revocation of Original Proponent Status (OPS)

a. Revocation

The OPS granted to a Project Proponent may, upon review, be revoked based on the following grounds:

- i. It is found that the facts disclosed are incomplete, incorrect, misleading, untrue, inaccurate, or different from what was represented; or
- ii. Any non-compliance or violation of the BOT Law and this Revised IRR.

Upon revocation, the Agency/LGU may accept new unsolicited proposals involving the same or similar project, provided that this shall not preclude the original proponent from resubmitting a new or revised proposal.

b. Unsolicited Proposal that may Conflict with Projects of the Government

The grant of OPS does not preclude the government from implementing a project that may conflict with the unsolicited proposal or any of its components. No temporary restraining order, mandatory injunction, mandatory preliminary injunction shall be filed by the original proponent against the government in case of such conflict.

Section 10.10 - Negotiation

a. Notice to Commence Negotiation

Within seven (7) calendar days upon receipt of the Agency/LGU of the formal advice of the 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 cover only the PTCs that have been approved by the Approving Body to be negotiable with the original proponent.

b. Negotiation Stage

The Agency/LGU and the original proponent shall negotiate in good faith and shall complete and conclude the negotiations within a period of eighty (80) calendar days from the commencement date of negotiation, as stipulated in the formal advice of the Agency/LGU. In the event that there are irreconcilable differences during the period of negotiation, or the Agency/LGU and the original proponent fail to conclude negotiations within the 80-day period, such events shall be considered as a failure of negotiation.

c. Failure of Negotiation

In case of failure of negotiation, the Agency/LGU shall, within seven (7) calendar days from the lapse of the 80-day negotiation period, reject the proposal and revoke the OPS in writing stating the grounds for rejecting the proposal and revoking the OPS. Thereafter, the Agency/LGU shall have the option to:

- i. accept a new Unsolicited Proposal, if there be any;
- ii. bid out the project as a solicited proposal, or
- iii. undertake the project on its own.

The Agency/LGU shall submit a report to the Approving Body informing it of the failure of negotiation, the reasons therefor, and which among the above options the Agency/LGU intends to undertake.

d. Successful Negotiation

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 negotiated terms comply with the PTCs approved by the Approving Body.

The Agency/LGU shall, within seven (7) calendar days after the conclusion of negotiation or the end of the eighty (80)-calendar day negotiation period, whichever comes first, submit a report to the Approving Body of the result of negotiation.

e. Action of the Approving Body on the Negotiated PTCs following Successful Negotiation

The Approving Body shall, within twenty (20) working days from the receipt of the report submitted by the Agency/LGU, validate whether the negotiated terms are in accordance with the approved PTCs.

If the negotiated terms do not conform with the approved PTCs, the Approving Body shall declare a failure of negotiation. Thereafter, the Agency/LGU shall reject the proposal by advising the original proponent in writing stating the grounds for rejection and shall have the options provided in Section 10.10.c.

Otherwise, the Approving Body shall notify the Agency/LGU that it may proceed with the publication of the invitation for comparative proposals in accordance with Section 10.13.

Section 10.11 - Approval of Unsolicited Contracts by the Head of Agency/LGU

The Head of the Agency/LGU shall review and approve the draft contract which shall be based on the PTCs set forth by the Approving Body, pursuant to Section 2.8 of this Revised IRR.

Prior to approval of the Head of Agency/LGU, the draft contract shall undergo review by the DOF, 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, in accordance with their respective mandates and areas of expertise.

The OSG, OGCC, or any prescribed statutory counsel, as the case may be, shall issue an opinion on the draft contract within twenty (20) working days upon receipt thereof. The DOF shall issue an opinion on the draft contract for projects of national government agencies, local projects which will involve funds of the national government, and local projects requiring ICC review or approval, within twenty (20) working days upon receipt thereof. The DOF opinion on the draft contract shall contain an explicit approval of the proposed Government Undertakings.

Any Government Undertaking stated in the draft contract not approved by the Approving Body and not enumerated in the DOF opinion shall not be binding against the Republic.

Changes in the PTCs of the draft contract may be allowed pursuant to Section 2.12 of this Revised IRR.

Section 10.12 - 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 10.13 - Invitation for Comparative Proposals

Within seven (7) calendar days from the receipt of the notice by the Approving Body allowing the Agency/LGU to publish the invitation for comparative proposals, the Agency/LGU PBAC shall publish the invitation for comparative proposals. The invitation for comparative or competitive proposals should be published at least once every week for three (3) consecutive weeks, in online media and in at least one (1) newspaper of general circulation. Said invitation should also be posted continuously in the websites of the Agency/LGU concerned, if available, and of the PPP Center, and any online government portal for the purpose, 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) online media and newspaper of 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 10.14 - 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 10.15 - Qualification of Comparative Proponents

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

Section 10.16 - 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 10.17 - 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 10.18 - 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 10.19 - 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 contract 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 of completion of the financial evaluation, the Agency/LGU PBAC shall submit to the Head of Agency/LGU a recommendation of award. The PBAC shall 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 bidder 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 contract 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 bidder 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 winning bidder is a corporation - e.g., treasurer's affidavit attesting to actual paid-up capital, subscription agreement(s) between a shareholder(s) of the winning bidder and the winning bidder itself covering said equity contribution, or shareholders agreement between and amongst two (2) or more shareholders of the winning bidder 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 Project Costs to be shouldered by the winning bidder;

- d. in the case of a consortium, the agreement indicating that the members are jointly and severally liable for the obligations of the winning bidder under the contract;
- e. in case a special purpose company (SPC) is formed for purposes of undertaking the project, proof of registration in accordance with Philippine laws; and
- 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 the 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 SPC 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 SPC, 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 SPC 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 SPC; 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 SPC and the Project Proponent in favor of the Agency/LGU making the SPC principally liable for the performance of the winning Project Proponent's obligations under the Notice of Award and/or the contract.

The SPC shall be prohibited from engaging in other concessions, businesses, or undertakings not approved by the Approving Body which may conflict with the approved project or otherwise lead to anti-competitive behavior or abuse of dominant position.

Section 11.6 - Withdrawal/Substitution of a Member

The Project Proponent or member-firms of a consortium granted with the OPS, may not be changed, withdrawn, or substituted by another member or participant prior to approval of the project by the appropriate Approving Body. Any withdrawal, substitution, or addition of such shall lead to revocation of OPS pursuant to Section 10.9 of this Revised IRR. Changes in, withdrawals, or substitution of Project Proponents or member-firms of a consortium after the approval of the project shall be subject to the approval of the Approving Body.

Further, in case of withdrawals, the remaining members or shareholders are still legally, technically, and financially capable of successfully carrying out the implementation/operation of the project.

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 Project Proponent's bid or performance security.

The Agency/LGU shall inform in writing the PPP Center of such changes within five (5) working days 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 signatories 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 2.12, 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.

The Project Proponent, that was pre-qualified and awarded with the project, shall be the signatory to the contract.

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 permits and 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 upon application by the Project Proponent and compliance with applicable laws, rules and regulations, the Regulator shall 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.

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 Project 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 key performance indicators and targets and shall submit the same to the Agency/LGU concerned pursuant to the timeline stipulated in the contract.

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. 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 regulators 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. Preference shall be given to the hiring of Filipino construction workforce. Hiring of labor shall be subject to existing labor laws, rules and regulations.

Section 12.8 - Performance Security for Pre-Construction and Construction Works

To guarantee the faithful performance by the Project Proponent of its obligations after the signing of the contract until the acceptance of the facility under the contract, including the prosecution of the Construction works related to the project, the Project Proponent shall post a performance security in favor of the Agency/LGU concerned, within the period and in the form and amount stipulated in the Notice of Award.

The form of performance security shall be in accordance with the PTCs approved by the Approving Body 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. The amount of security to be set by the Agency/LGU shall be 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.

Should the performance security fall below the amount as required in the contract, the Project Proponent shall provide for an additional performance security to meet such required amount within fifteen (15) days from the occurrence thereof.

The performance security shall be proportionately increased in the case of government-approved variations causing an increase in the Project Cost. The Project Proponent shall provide for the necessary additional performance security within fifteen (15) days from the approval of the variation.

The Agency/LGU shall strictly monitor compliance by the Project Proponent of the requirements for performance security and the sufficiency thereof.

Section 12.9 - Performance Security for Operations

For projects where the Project Proponent or other third parties shall operate the facility, the Agency/LGU shall require the Project Proponent to 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 facility 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 during the entire operations period.

Should the performance security fall below the amount as required in the contract, the Project Proponent shall provide for an additional performance security to meet such required amount within fifteen (15) days from the occurrence thereof.

The performance security shall be proportionately increased in the case of government-approved variations causing an increase in the Project Cost. The Project Proponent shall provide for the necessary additional performance security within fifteen (15) days from the approval of the variation.

The Agency/LGU shall strictly monitor compliance by the Project Proponent of the requirements for performance security and the sufficiency thereof.

Section 12.10 - Review of Project Construction, Operation and Maintenance

The Agency/LGU, PPP Center, COA, and a panel of government offices designated by the Approving Body, if any, may individually or jointly inspect and check, at any 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, PPP Center, COA, or a panel of government offices designated by the Approving Body, if any, shall find any deviation from or non-compliance with the approved plans, specifications and standards, the Agency/LGU 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 of this 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 approved by the Head of the Agency/LGU, Provided, that:

- a. There is no impact on the PTCs 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's/LGU's revenue or profit share derived from the project, except as may be allowed under a formula as approved by the relevant Regulator, or the Approving Body, as the case may be; 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; 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 of 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.

The Approving Body shall set, as part of the approval of the project, a cap on the allowable variation during the entire contract, which cap shall not exceed ten percent (10%) of the original Project Cost.

In case of contract variation, any extension of the contract term shall not serve as a substitute to compensate the Project Proponent, in any manner whatsoever, without the written approval of the Approving Body. Further, for variations allowed under this Revised IRR, the performance security shall be proportionately increased in the case of any government-approved variation.

Failure to secure clearance/approval of the Head of Agency/LGU or Approving Body, as provided in this section, prior to the implementation of the variation, shall render the contract variation void. No variation shall be implemented before the variation is approved.

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 or delay on the part of the Project Proponent to comply with these milestones may result to imposition of liquidated damages, contract rescission, and/or forfeiture of the performance security of the Project Proponent, as the case may be, in accordance with Section 12.14 and/or Section 12.21 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, or fail to perform any of its obligations and undertakings as stipulated 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.

Persistent breach of obligations by the Project Proponent and a limit to the amount of consequent liquidated damages shall be defined in the contract. Should the limit be reached, such shall be considered a Project Proponent event of default pursuant to Section 12.21.a. Persistent breach of obligations by the Project Proponent shall be defined in the contract by using the following parameters:

- a. an accumulation of a significant number of breaches over a stated period of time; and/or
- b. an accumulation of payment deductions from the performance security or of payment of liquidated damages above a certain threshold.

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

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 Schemes

12.16.1 General Classification

The repayment schemes for the projects shall depend on the contractual arrangement as follows or as may be approved by the Approving Body:

- a. For projects undertaken through BOT, CAO, DOT, ROT, BOO and ROO arrangements, the Project Proponents may be repaid by authorizing it to collect reasonable tolls, fees, and charges for a fixed term, subject to Section 12.18 of this Revised IRR. In the case of BOT, CAO, DOT, ROT arrangements, such term shall in no case exceed fifty (50) years. However, for 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 Project 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. Any extension or

expansion of the concession should not serve as a form of non-monetary compensation without a separate approval from the approving body.

- e. For projects undertaken through arrangements not enumerated under the Act and this Revised 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/charges

The proposed tolls/ fees/ 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.

All projects shall include in its contract a fixed initial/base tolls/fees/rentals/charges, as applicable, and as approved by the appropriate Regulator according to the policies of the relevant Regulator. In the absence of an appropriate Regulator, the fixed initial/base tolls/fees/rentals/charges and the formula/adjustment schedules, as the case may be, shall be approved by the Approving Body.

Adjustments of such tolls/fees/rentals/charges shall be pursuant to Section 12.18 of this Revised IRR.

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 Project Proponent under the contract shall be in accordance with pertinent laws, rules and regulations especially those issued by the BSP.

12.16.4 All contracts shall adhere to the terminologies for payments used in this Section.

Section 12.17 - Revenue Sharing

The Agency/LGU concerned may share in the revenue from the operation of the Project Proponent and can only be in the form of either a set fee or a percentage of the gross revenue or a combination of both, which may be increased during the term of the contract subject to agreed parameters, provided that the same is indicated in the bidding documents and included in the contract. The payment of the revenue share shall not be dependent on the project ROR.

Section 12.18 - Adjustments of Tolls/Fees/Rentals/Charges

The concerned Regulator for the project shall retain the power to approve or disapprove adjustments to tolls/fees/rentals/charges, and other tariffs based on prevailing economic conditions, other factors consistent with the regulatory framework for the project, and the actual financial performance of the project.

In no case shall the contract contain provisions automatically entitling the Project Proponent to its proposed tolls/fees/rentals/charges to be imposed upon the users of the project. While the tolls/fees/rentals/charges and adjustment may be stipulated in the contract, the Project Proponent shall not be automatically entitled to an increase in the tolls/fees/rentals/charges, unless duly authorized and approved by the concerned Regulator. The Agency/LGU shall not be liable for the non-approval by the concerned Regulator of any application of increase or adjustment of the tolls/fees/rentals/charges.

If the Agency/LGU fails to implement the adjustment of tolls/fees/rentals/charges approved by the appropriate Regulator, then the Agency/LGU and the Project Proponent shall agree on ways for the Project Proponent to recover such adjusted tolls/fees/rentals/charges, but in no case shall the Agency/LGU be liable for any monetary compensation.

Price indices shall be based on the official issuances by the Philippine Statistics Authority (PSA), BSP, Department of Labor and Employment (DOLE) and other sources authorized by the Agency/LGU concerned prior to bidding.

Section 12.19 - Audit of Collections

All revenues, share and/or receipts pertaining to or accruing to the Agency/LGU derived from any project proposed under the Act and this Revised IRR, including expenditures or uses 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 may be remitted directly to the Project Proponent, as may be stipulated in the contract.

Pursuant to the provisions of the Government Auditing Code of the Philippines, revenues, shares, and/or receipts from projects shall be subject to the COA accounting and auditing rules and regulations and Section 14.7 of this Revised IRR.

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 Project Proponent or cancellation of the contract, as the case may be, and forfeiture of the Project Proponent's bid or performance security.

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

Section 12.21 – Contract Termination or Rescission

Failure to comply with any obligation prescribed in the contract, and such failure is not remediable or if remediable shall remain unremedied for an unreasonable length of time, will result in contract termination or rescission as provided under the following rules:

a. Grounds for Termination or Rescission

All contracts shall define all events that may lead to its termination, including but not limited to:

- i. Government event of default
- ii. Project Proponent event of default
- iii. Force majeure and other no-fault termination events
- iv. Other termination events, as may be agreed upon by the parties.

For such events that may lead to contract termination, the contract shall provide remedies, curing periods, lender step-in rights, and written notice requirements agreed upon by both parties. The contract shall likewise provide that termination shall take place only upon failure to remedy or cure the default in accordance with the contract.

For avoidance of doubt, the project shall not be terminated for an event of default without exhausting the corresponding remedy or curing period.

Persistent breach of obligations by the Project Proponent, as defined in the contract, shall be considered as a Project Proponent event of default.

In cases of Project Proponent event of default, the government may choose to terminate or rescind the contract.

b. Termination Payment

In cases of termination for failure to remedy an event of default, the amount of termination payment shall be determined by the parties pursuant to the contract.

The determination of the amount of termination payment shall be done in accordance with relevant rules and regulations, including the termination payment guidelines issued by the PPP Governing Board, as well as the following guiding principles:

- i. Debt guarantees shall not be allowed.

- ii. Payment for expected returns of the Project Proponent exceeding the contract term shall not be allowed.
- iii. Payment of profits of commercial business units shall not be allowed.
- iv. In the case of termination from Project Proponent default, the compensation for the usable core assets, if any, shall be up to (a) the amount of outstanding senior debt borrowed to fund such core assets; (b) the appraised value of the assets, or (c) the depreciated book value of the assets, whichever is lower.
- v. In the case of government default, the government shall pay the outstanding senior debt, subject to applicable government-mandated caps, incurred by the Project Proponent and shall allow the latter to realize a reasonable rate of return, to be determined by the Approving Body; provided such return shall not exceed that stated in the contract.
- vi. In the case of termination that is neither the fault of the government nor the Project Proponent, the compensation for the usable core asset shall be (a) the appraised value of the assets at their condition, at the time of termination, or (b) the depreciated value of the assets, whichever is lower.

An independent appraiser shall be required under the contract and chosen by mutual consent of the parties. The cost of hiring the independent appraiser shall be borne by the party at fault, except in cases of termination that is neither the fault of the government nor the Project Proponent, in which case, the cost shall be divided equally.

The amount determined by the independent appraiser shall be binding to both the Project Proponent and the Agency/LGU.

The Project Proponent shall be precluded from using non-delivery of the termination payment as a reason for failure or refusal to handover the asset.

c. Temporary or Permanent Takeover by the Government

In cases of emergency or when public interest so requires, as determined by the President, the Agency/LGU may, by written notice to the Project Proponent, immediately takeover the Infrastructure or Development Facility or any part thereof.

Under a temporary takeover, except for the collection of tolls/fees/charges by the Agency/LGU held in trust for the Project Proponent less the actual operating costs incurred by the Agency/LGU, under no circumstance shall the Project Proponent claim compensation for the duration of such temporary takeover. During such takeover, the concession or cooperation period shall be suspended until the facility or operation thereof is returned to the Project Proponent.

In case of permanent takeover, the Project Proponent shall be entitled to claim compensation computed according to the termination payment stated in item (b) of this Section.

If necessary, the Agency/LGU shall immediately enact the relevant rules, regulations, or ordinance to facilitate the emergency takeover.

Section 12.22 - Resolution of Disputes between the Contracting Parties

Resolution of disputes between the contracting parties, whether through arbitration or litigation, shall be as mutually agreed upon by the parties to the contract, subject to applicable laws, rules, and regulations.

In default thereof, the venue shall be in the Philippines. Acts and decisions of Regulators shall not be subject to arbitration.

Section 12.23 - Expiring 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.

a. Transfer Security

To guarantee the faithful performance by the Project Proponent of its obligations during the transfer of the facility, the Project Proponent shall post an asset transfer security in favor of the Agency/LGU concerned, in the form, amount, and period stipulated in the contract.

The Agency/LGU shall determine the amount but the form shall be in accordance with Section 12.8. The asset transfer security shall be valid until the Agency/LGU determines that the facility complies with the transfer requirements as stipulated in the contract and issues an acceptance certificate.

b. Warranty Security

The Project Proponent shall provide warranty that the facility meets the key performance indicators and targets in connection therewith for a period not less than one (1) year from the transfer of the facility. The Project Proponent shall put up a warranty security in the form in accordance with Section 12.8, and 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 this 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 grant of investment incentives shall be governed by the following rules:

- a. Projects in excess of one billion pesos (P1,000,000,000) shall be entitled to incentives as provided for in Section 10 of the Act. This shall be listed in the Strategic Investment Priority Plan (SIPP).
- b. Projects costing one billion pesos (P1,000,000,000) or less may, upon registration with the Board of Investments, avail of incentives subject to inclusion of the project activity or sector in the SIPP, which shall undergo an evaluation process to determine the suitability and potential of the industry or the sector in promoting long-term growth and sustainable development, and the national interest.

This is without prejudice to other incentives that may be given under existing laws, rules, and regulations.

Such grant shall be pursuant to existing laws, rules and regulations; provided that, all such incentives are disclosed and included in the financial and economic models submitted to the appropriate Approving Body during the project approval stage.

Section 13.3 - Government Undertakings

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

- a. Credit Enhancements - This shall refer to support to an infrastructure or 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.

- b. Direct Government Guarantee – This shall refer 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.
- c. Direct Government Subsidy - This shall refer to an agreement whereby the Government, or any of its Agencies/LGUs will:
 - i. defray, pay for or shoulder a portion of the Project Cost;
 - ii. bear a portion of capital expenses associated with the establishment of an Infrastructure or Development Facility and/or any partial financing of the project, or components thereof;
 - iii. defray, pay for or shoulder a portion of the expenses and costs in operating or maintaining the project;
 - iv. contribute any property or assets to the project 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;
 - v. in the case of LGUs, waive or grant special rates on real property taxes on the project during the term of the Contractual Arrangement; or
 - vi. waive charges or fees relative to business permits or licenses that are to be obtained for the Construction of the project,

All without receiving appropriate compensation from the Project Proponent and/or Facility Operator. All direct government subsidy shall not exceed fifty (50%) of the total Project Cost. In the case of O&M projects with zero Project Costs, it shall not exceed fifty (50%) of the total O&M cost as defined in Section 1.3.

The above undertakings may be financed from direct government appropriations and/or from official development assistance (ODA) of foreign government or institutions. In the case of solicited projects, sunk costs, which are costs incurred prior to the preparation of the feasibility study, shall not be included in the computation of the direct government subsidy and the total Project Cost. In case of contribution of assets or property, the value of the direct government subsidy shall be determined by a government financial institution before the project is submitted to the Approving Body.

In case of contribution of assets or property, compensation shall be considered as appropriate if the value of the compensation is at least equal to the value of the contribution or undertaking as determined by a government financial institution. Payment of the compensation shall be made not later than the start of operations. Non-payment of compensation on the said date shall incur interest on the compensation.

The interest rate to be applied shall be the rate stated in the contract, taking into consideration relevant rules and regulations on interest. In case the parties fail to agree on the applicable interest rate, or in default thereof, the prevailing risk-free rate shall apply.

Subject to Section 12.21, in cases of unsolicited proposals, except in the case of build-and-transfer and build-lease-and transfer arrangements, government payments is a direct government subsidy and shall be prohibited.

- d. Direct Government Equity - This shall refer to the subscription by the Government or any of its agencies or LGUs 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 or the debt of the Project Proponent incurred for the project, whichever is lower.

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

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 the Act and this Revised IRR. Project monitoring will be undertaken to ensure that the project complies with this Revised IRR, including the Project Proponent's required environmental clearances from the DENR. For this purpose, the Agency/LGU shall periodically submit to the PPP Center information on the status of projects they are implementing. The PPP Center shall prescribe the frequency of submissions, format, and contents, among others, based on the requirements of oversight agencies and other stakeholders.

In addition, all concerned Agencies/LGUs shall submit to the PPP Center a copy of all Solicited and Unsolicited executed/signed contracts and all other documents to be required by the PPP Center. Agencies/LGUs shall also submit to the PPP Center all Unsolicited Proposals that they receive and all other documents required for complete submission.

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, the PPP Center shall report to the ICC, President, and the Congress on the progress of all projects implemented under the Act and this 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 this Revised IRR.

Section 14.3 - Agencies/LGUs

The Agency/LGU shall certify that they are capable of undertaking their respective obligations in the contract and impose mitigating measures to minimize the risks involved in the project. The Head of the Agency/LGU shall be responsible for ensuring that the Agency/LGU does not breach its obligations under the contract. The Head of Agency/LGU may assign responsibility and provide a budget to an appropriate unit to identify, plan, and monitor the fulfillment of contractual obligations by due date in each contract. Furthermore, the unit so formed shall report the status of fulfillment of obligations on a regular basis to the Head of the Agency/LGU.

The formed unit may include as members, among others, technical and legal personnel who are knowledgeable on the technical and legal aspects, respectively, of the projects that may be implemented pursuant to the Act and this Revised 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 this Revised IRR, shall be submitted to Congress by the PPP Center, copy the ICC, for its information.

Section 14.5 - The Independent Consultant (IC)

An independent consultant (i.e., a non-aligned or neutral third party/parties), either individuals, partnerships or corporations, shall be procured by the Agency/LGU to provide independent advice to the Agency/LGU and Project Proponent or its Contractor for the design and Construction of the facility, including the monitoring of the performance of the contracting parties. The procurement of the IC shall commence within thirty (30) working days from the signing of the contract and shall be done in accordance with Republic Act No. 9184, or the Government Procurement Reform Act.

The prospective IC shall submit a complete disclosure statement specifying all past, present, and anticipated or planned future relationships of the prospective independent consultant to the project and with every person who has or is likely to have a connection with it, confirming that there is or is not likely to be any conflict of interest. The IC shall provide a copy of such disclosure statement to the Project Proponent and the Agency/LGU.

Upon selection of the IC, the Agency/LGU shall notify the Project Proponent of its proposed award of the IC contract with scope of duties as agreed upon, and the Project Proponent shall send a written acknowledgment thereof to the Agency/LGU.

All costs of the IC services shall be shared in half (50:50) between the Agency/LGU and the Project Proponent. Such costs to be shared by the Agency/LGU shall not be considered as a direct government subsidy.

The parties shall provide all the assistance necessary to enable the IC to carry out its functions and duties under the contract. The parties shall not deceive, intimidate, influence, or otherwise exert undue pressure, upon the IC, or commit similar acts that would adversely impact the integrity and the independence of the IC.

The terms and conditions provided in the IC contract shall be consistent with the project contract. In addition to the responsibilities of the IC set forth in the IC contract, the IC shall provide the Agency/LGU, Project Proponent, COA, a panel of government offices designated by the Approving Body, if any, and the PPP Center with copies of all documents procured by the IC during its period of appointment.

The terms of reference for the procurement of the IC shall include, but shall not be limited to, the scope of reports and the frequency of their submissions to the Agency/LGU, and the process for their evaluation. The Agency/LGU shall allow the Project Proponent to comment on the terms of reference prior to approval within fourteen (14) calendar days from receipt thereof.

The IC report shall, at the minimum, contain the following: project progress plan and schedule, project status in terms of accomplishments and backlogs, project issues and concerns, materials report, IC activities, and other documents as may be required.

Section 14.6 - Disclosure and Consent on Loan Agreement

Prior to signing a loan agreement to finance a project, the Project Proponent shall obtain the consent of the Agency/LGU on the following stipulations in the loan agreement:

- a. Proposed conditions precedent and the events of default that will be included therein;
- b. Any proposed termination, amendment, waiver of rights or any action regarding the loan agreement that may reasonably be expected to have a materially adverse effect on the ability of the Project Proponent to perform its obligations under the contract or the loan agreement;
- c. Any proposed cure agreed with the lender/creditor/bank that may increase the Agency's/LGU's liabilities or impede the operations of the project; and
- d. Any agreement to refinance the loan entered into for the project.

The Agency/LGU may seek the assistance of the DOF in evaluating the abovementioned conditions in the loan agreement.

If any of the foregoing stipulation will result to an increase in Government Undertakings or a change in the approved risk allocation, the Agency/LGU shall obtain the consent or clearance of the Approving Body prior to giving its consent to the Project Proponent.

In the event the Project Proponent enters into a loan agreement without obtaining the necessary consent required above, such will be considered a Project Proponent event of default, and the Project Proponent shall be prohibited from holding the Agency/LGU liable for any obligations arising from the loan agreement.

Under no circumstance shall the Agency/LGU withhold its consent on the above enumerated conditions, unless such conditions are grossly disadvantageous to the government.

During the implementation of the loan agreement, the Project Proponent shall periodically report and submit to the PPP Center and the Agency/LGU the necessary documents on the following:

- a. status of the fulfillment of its obligations under the loan agreement; and
- b. status of an agreed cure for a default committed by the Project Proponent under the loan agreement.

The PPP Center shall determine the frequency of submission of such reports by the Agency/LGU.

Section 14.7 – Accounting and Auditing of Projects

To further promote accountability, after a project has been awarded under the Act and this Revised IRR, the Commission on Audit (COA) shall have audit jurisdiction over compliance with the contract, and the requirements and processes set forth under the Act and this Revised

IRR. The COA, in the exercise of its audit and examination functions, shall also have visitorial power over non-government entities such as the Project Proponent pursuant to the Government Auditing Code of the Philippines and the 2009 Revised Rules of Procedure of the COA and any amendments thereto for the purpose of ensuring that revenues, share and/or receipts pertaining to or accruing to the Agency/LGU derived from any project proposed under the Act are fully and properly accounted for and remitted to the Agency/LGU.

To this end, the COA, in consultation and coordination with the PPP Center, shall promulgate accounting guidelines that will set the rules and guidelines in the booking and accounting of projects, and auditing guidelines that will guide the COA auditors who shall be assigned to audit projects.

The COA shall have the authority to access all project-related documents, including the documents referred to in Rules 4 to 12 of this Revised IRR. The Agency/LGU and the Project Proponent shall cooperate with the COA and provide the latter the necessary documents to conduct the audit of the project.

Section 14.8 – Conflict of Interest

All relevant parties shall, at all times, avoid conflicts of interest, as defined in Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees. To ensure avoidance of conflict of interest, regulatory agencies or bodies implementing a project shall prepare a conflict mitigation plan.

In case a conflict of interest arises, the concerned parties shall inhibit themselves from the performance of their duties in connection to the project. In the case of a PBAC member with a conflict of interest, the concerned member shall resign from their position as PBAC member within thirty (30) days from the time such conflict arises.

Section 14.9 - Disclosure of Contracts

Copies of all contracts executed under the BOT Law shall be considered as public documents. The Agency/LGU shall submit a copy of the contracts, including their schedules and annexes, to the PPP Center. The Agency/LGU and the PPP Center shall publicly make available copies of the contracts, together with their schedule and annexes, through their respective websites.

RULE 15 – GOVERNMENT LIABILITIES IN CONTRACTS

Section 15.1 – Firm and Contingent Liabilities

Government liabilities in contracts consist of firm liabilities and contingent liabilities. For purposes of this Revised IRR, firm liabilities are foreseeable and definite liabilities, as described in the provisions of a contract. These include, but are not limited to, milestone payments, amortization payments, availability payments, viability gap funding, variation payments, and payment for settlement of undisputed claims.

Contingent liabilities are liabilities that may be incurred from events specified in a contract, the occurrence, timing, or amount of which are uncertain. These include, but are not limited to MAGA, force majeure, breach of government warranties, and failure to deliver contractual obligations.

Section 15.2 – Rules for Government Firm Liabilities in Contracts

- a. Projects that would result in a government firm liability shall meet the following additional criteria for approval:
 - i. The project passes the criteria for technical viability, economic feasibility, social acceptability, and climate change resiliency set by the Approving Body.
 - ii. The project offers value for money and that the proposed firm liabilities are supported by a financial model showing that the project is not financially viable unless the firm payments are included.
 - iii. The fiscal impact of the firm liabilities is sustainable based on the assessment of the DOF.
 - iv. The Agency proposing a project under the Act and this Revised IRR must commit to bidding the project competitively and with the goal to keep firm payments to a minimum.
 - v. Payments are in local currency.
 - vi. Payments are conditional, subject to the Project Proponent achieving availability targets or other applicable performance targets.
- b. The amounts to be paid and schedule of payments shall be reflected in the approved financial model.
- c. The PTCs related to firm liabilities, which must be approved by the Approving Body, shall consist of:
 - i. the amounts to be paid; and
 - ii. the schedule of payments.
- d. The Agency/LGU shall ensure that sources of funds necessary for the payment of firm liabilities are identified and secured pursuant to existing laws, rules, and regulations.

Section 15.3 - Rules on Contingent Liabilities

- a. Contingent liabilities shall be set only for risks that the national or local government, whichever is applicable, is best able to control.

- b. Pursuant to Section 2.8, the Agency/LGU shall submit a risk mitigation plan for approval by the Approving Body in accordance with Section 2.10 of this Revised IRR. Such plan shall include a list of all risks assumed by the government under the contract, risks assumed by the Agency/LGU, risk mitigating measures, estimated costs to be incurred, target dates to have each measure in place, and the appropriate action plan by the Agency/LGU to manage each type of risk.
- c. The Approving Body shall validate that the proposed risk allocation is consistent with the GPRAM approved by the ICC and published by the PPP Center. Deviations could be proposed but must have the approval of the Approving Body pursuant to Section 2.10 of this Revised IRR.
- d. Both the draft and the final contract shall be consistent with the approved PTCs related to contingent liabilities, in accordance with Section 2.8 of this Revised IRR.
- e. All contingent liabilities to be assumed by the government shall be transparent in terms of specific risk events that would trigger such liabilities; the probability or likelihood that such risks will occur; the manner of compensation for the economic impact on the Project Proponent, if compensation is financial; the method or principle of calculation of financial compensation; the materiality threshold; and the cap on compensation.
- f. For force majeure risks, contingent liabilities above the insurance proceeds shall be shared equally between parties to the contract.
- g. The PTCs related to contingent liabilities, which must be approved by the Approving Body pursuant to Section 2.10 of this Revised IRR, shall consist of:
 - i. A condition to negotiate a remedy or cure for a risk event
 - ii. A term for curing period
 - iii. The parameters for compensation for damages or losses, including caps on compensation from the national or local government, as may be applicable
 - iv. A condition to include step-in rights
 - v. Parameters for payments if terminated
- h. The Agency/LGU shall conduct monitoring of contingent liabilities in accordance with Section 15.7 of this Revised IRR.

Section 15.4 - Accounting for Liabilities

The identification and reporting of firm and contingent liabilities in contracts shall be based on the applicable accounting rules and regulations whether adopted or to be issued by the COA pursuant to Section 14.7 of this Revised IRR.

Section 15.5 - Executing Plans for Delivery of Obligations and Risk Mitigation

All Heads of Agencies/LGUs with Infrastructure or Development Projects shall ensure execution of all plans to deliver obligations on their due dates and report to the PPP Center, COA, and the panel of government offices designated by the Approving Body, if any, the status of execution including any issues being faced and their proposed actions to address the same. They shall also keep up-to-date all risk mitigation plans and ensure the timely execution of such plans and report to the PPP Center the status of execution including any issues being faced. The Project Proponent shall cooperate and provide the abovementioned agencies all necessary documents within a reasonable time for the said agencies to comply with their obligation under this provision.

Section 15.6 – Role of DBCC and TWG-CL in Managing Contingent Liabilities

- a. The Technical Working Group for Contingent Liabilities (TWG-CL) that was formed under Development Budget Coordination Committee (DBCC) Resolution No. 2015-2 shall continue to recommend the amount to be appropriated for the Risk Management Program (RMP) to be included in every national expenditure program based on its analysis of the potential fiscal burden of CLs.
- b. The use of the RMP by national government agencies for obligations covered in the contract, or GOCCs for obligations in the contract that are guaranteed by a performance undertaking or a similar instrument issued by the national government, is subject to the rules set by the DBCC, which shall include the procedure for payment of contingent liabilities that have materialized.

Section 15.7 - Monitoring and Reporting Liabilities

The PPP Center shall establish a system, consisting of processes, procedures, and forms, to be used by the Agency/LGU for monitoring and reporting firm and contingent liabilities in contracts. The system shall be consistent with the applicable accounting rules and regulations to be issued by COA under Section 15.4 of this Revised IRR.

The Agency/LGU shall submit to the PPP Center information on the firm and contingent liabilities in their contracts following the monitoring and reporting processes, procedures, and forms established by the PPP Center. The Project Proponent shall cooperate and provide the Agency/LGU all necessary documents within a reasonable time for the latter to comply with their obligation under this provision.

RULE 16 - FINAL PROVISIONS

Section 16.1 - IRR Committee

The Committee constituted pursuant to Section 11 of R.A. 6957, as amended by R.A. 7718, may be reconvened by its Chairperson at their instance, or upon the recommendation of any members of the Committee, formulate and prescribe amendments to this Revised IRR,

consistent with the letter and spirit of the Act. No amendments to this Revised IRR may be adopted and prescribed by the Committee without due public consultation/hearing and publication.

Section 16.2 - Effectivity of This Revised IRR or Amendments Thereto

Amendments to this Revised IRR or amendments thereto shall, after due public hearing, become effective fifteen (15) days after its complete publication in the Official Gazette and/or at least one (1) newspaper of general circulation.

Section 16.3 - Transitory Provision

Upon effectivity of this Revised IRR, all 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 this Revised IRR.

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

Section 16.4 - 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 Revised IRR is hereby repealed, modified or amended accordingly.

Section 16.5 - Separability Clause

In the event any of the provisions of this 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.

Section 16.6 - Rules of Interpretation

Unless expressly provided to the contrary, references to any statute, law, decree, regulation, document, or agreement made in this Revised IRR shall be deemed to include references to such statute, law, decree, regulation, document, or agreement, as amended, supplemented, novated, varied or replaced from time to time. Provided, that there is no impairment of the obligation of contract.

Approved. March 31, 2022


KARL KENDRICK T. CHUA




**BOT Law IRR Committee Chairman
and Socioeconomic Planning Secretary,
National Economic and Development Authority**


ALFONSO C. CUSI
Secretary
Department of Energy


CARLOS G. DOMINGUEZ
Secretary
Department of Finance




EDUARDO M. AÑO
Secretary

*Department of the Interior and
Local Government*


RAMON M. LOPEZ
Secretary

Department of Trade and Industry




WILLIAM D. DAR
Secretary
Department of Agriculture

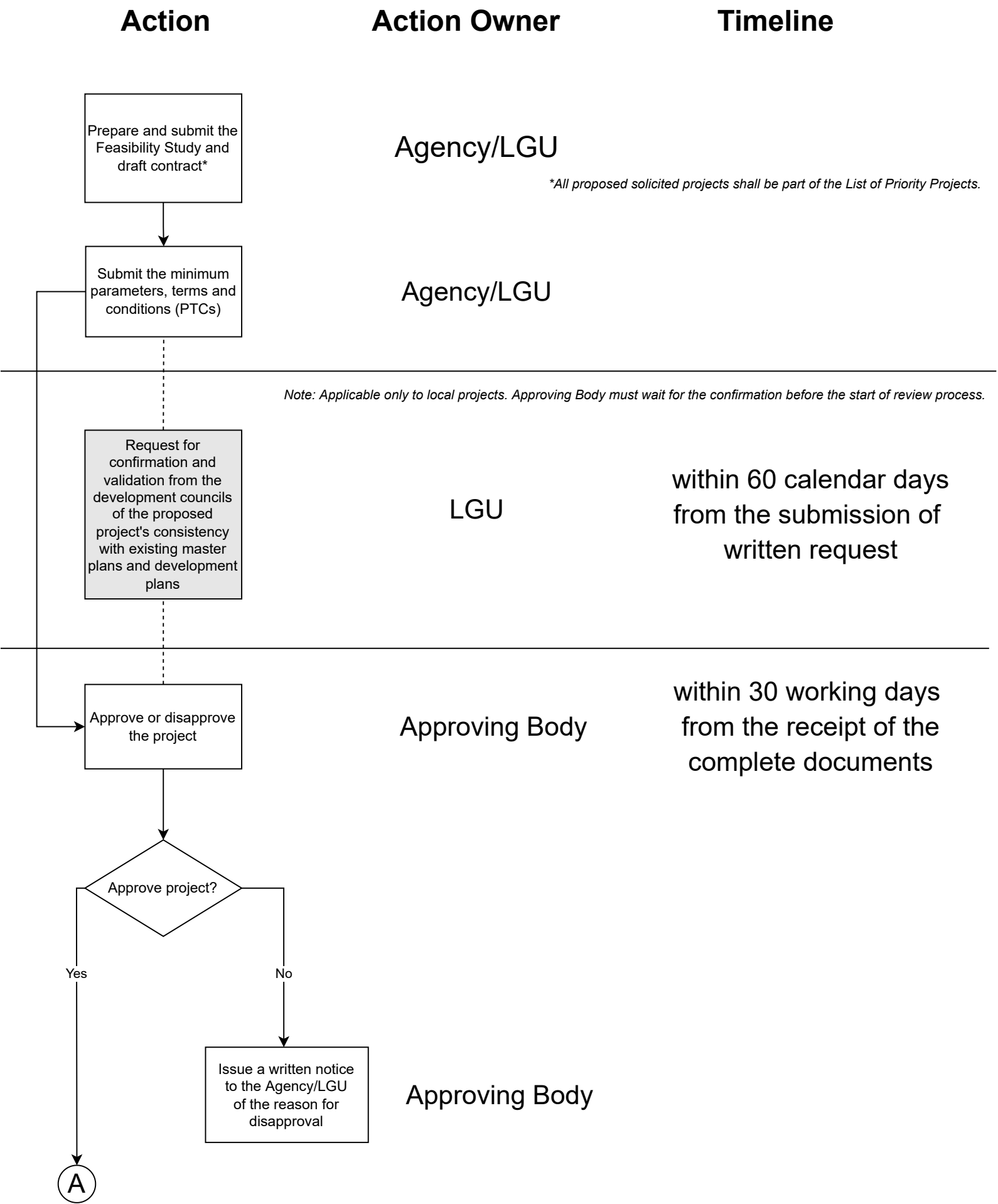

FERDINAND A. PECSON
Undersecretary and
Executive Director
Public-Private Partnership Center

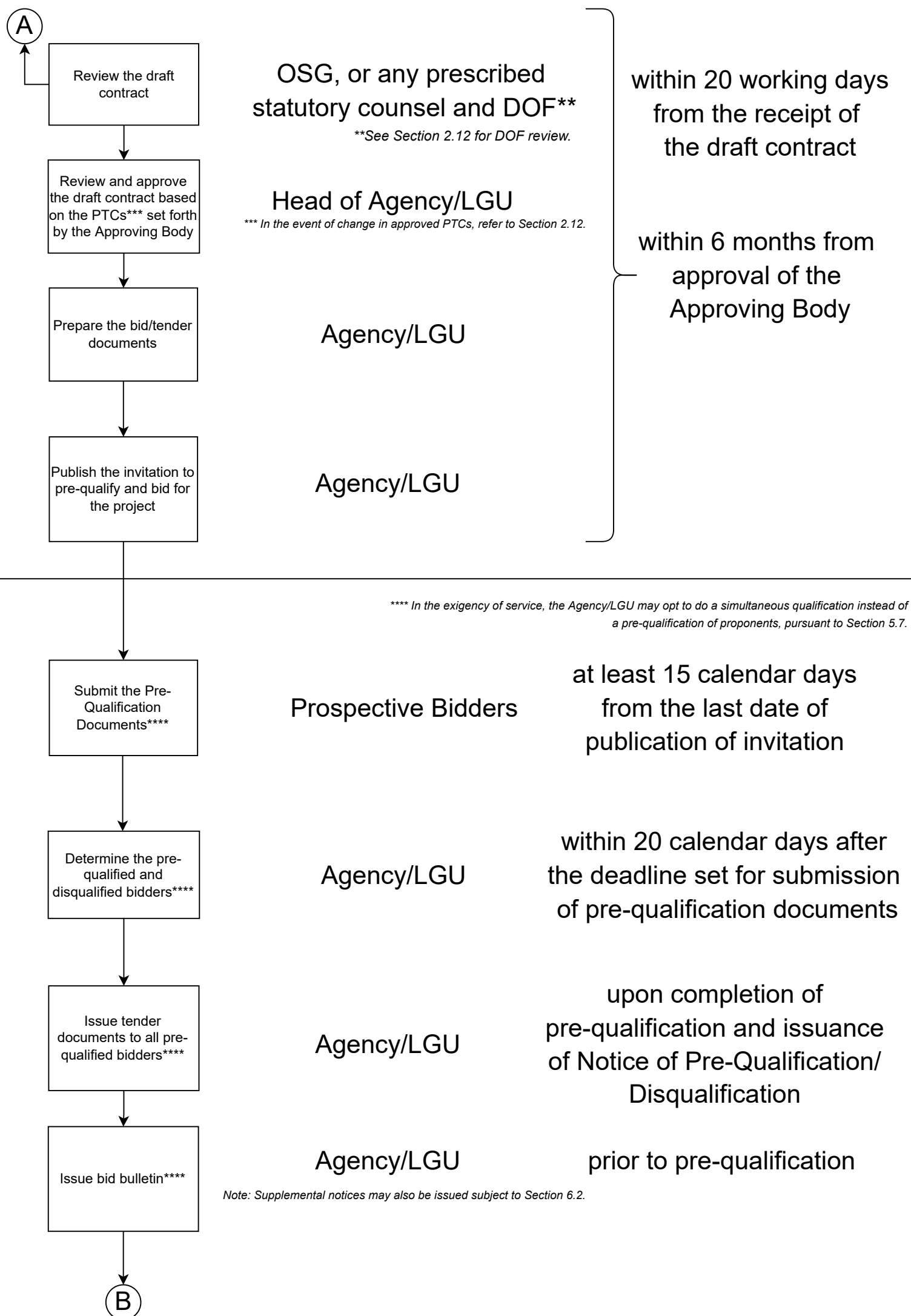

EMMANUEL R. CAINTIC
Acting Secretary
*Department of Information and
Communications Technology*

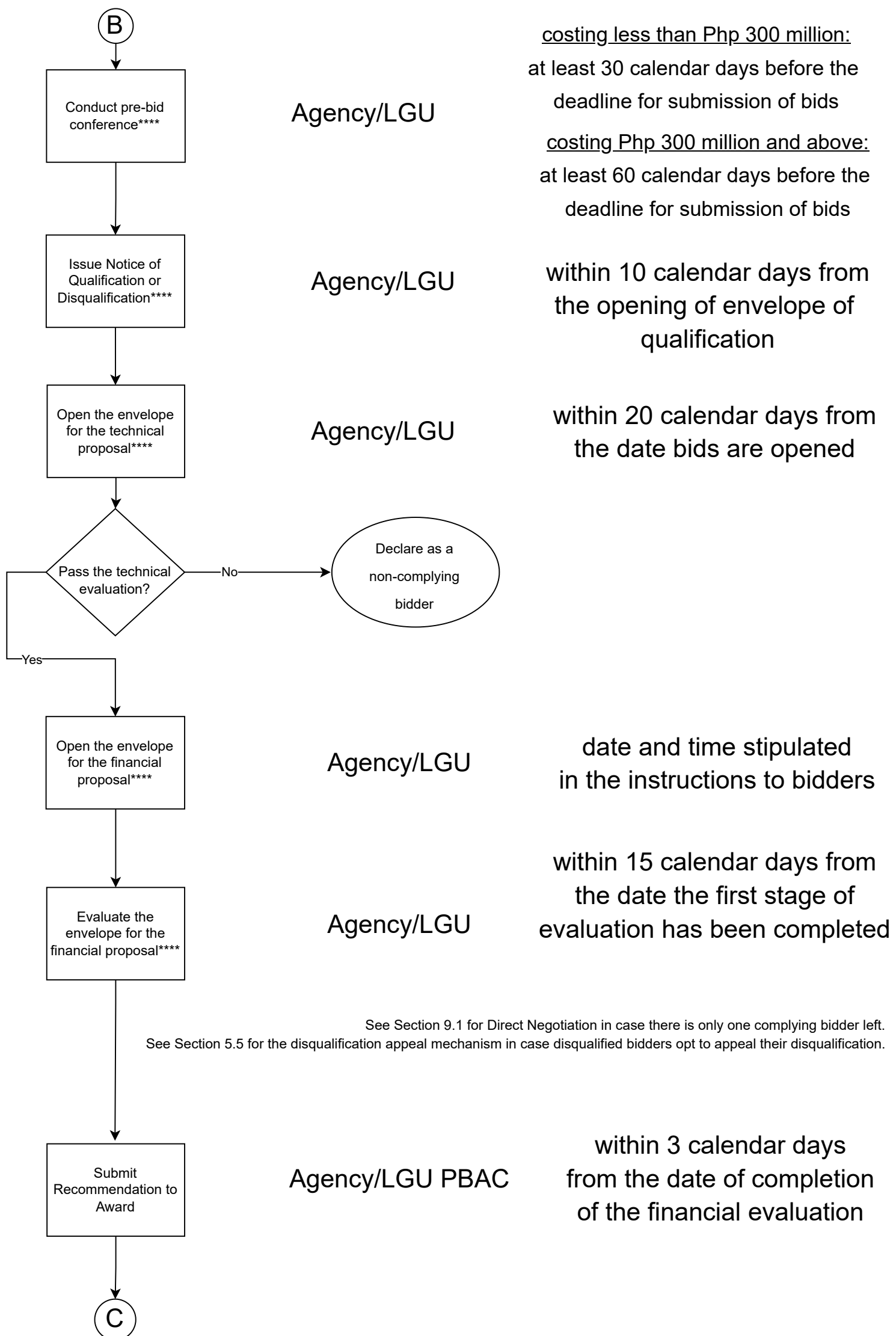


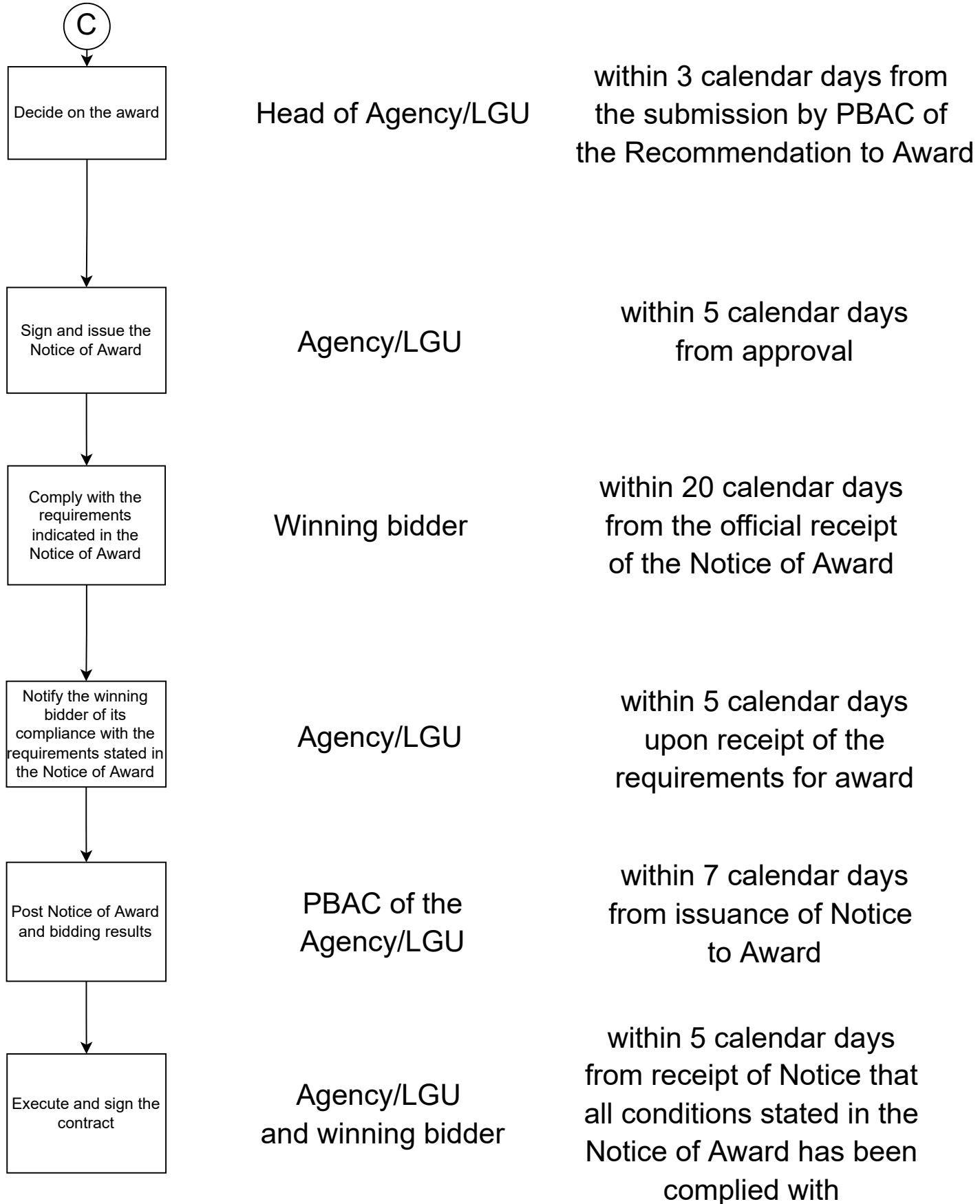
Solicited Project Flowchart

In case of inconsistency between the provisions of the IRR and the contents of the flowchart, the provisions of the IRR shall prevail.



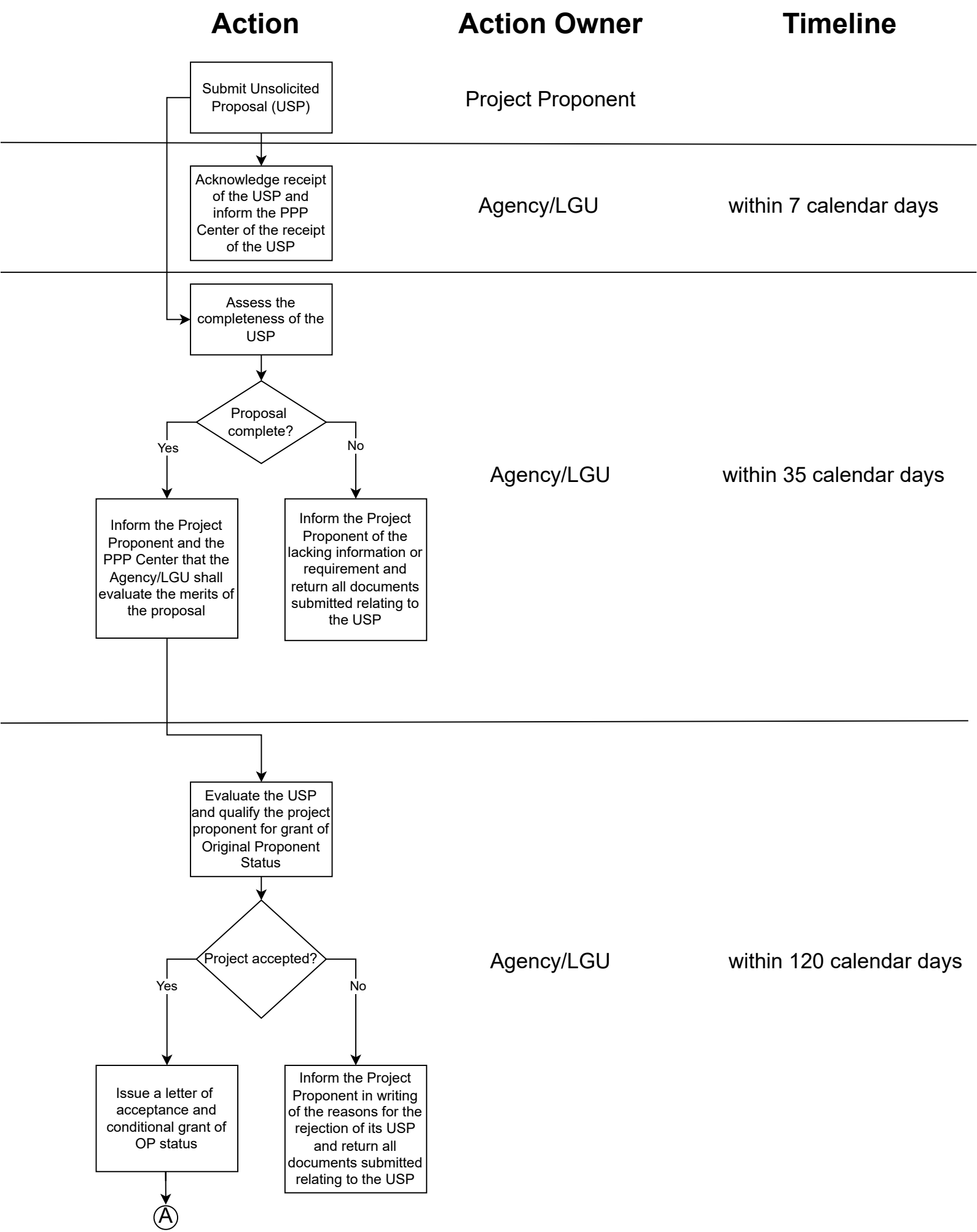


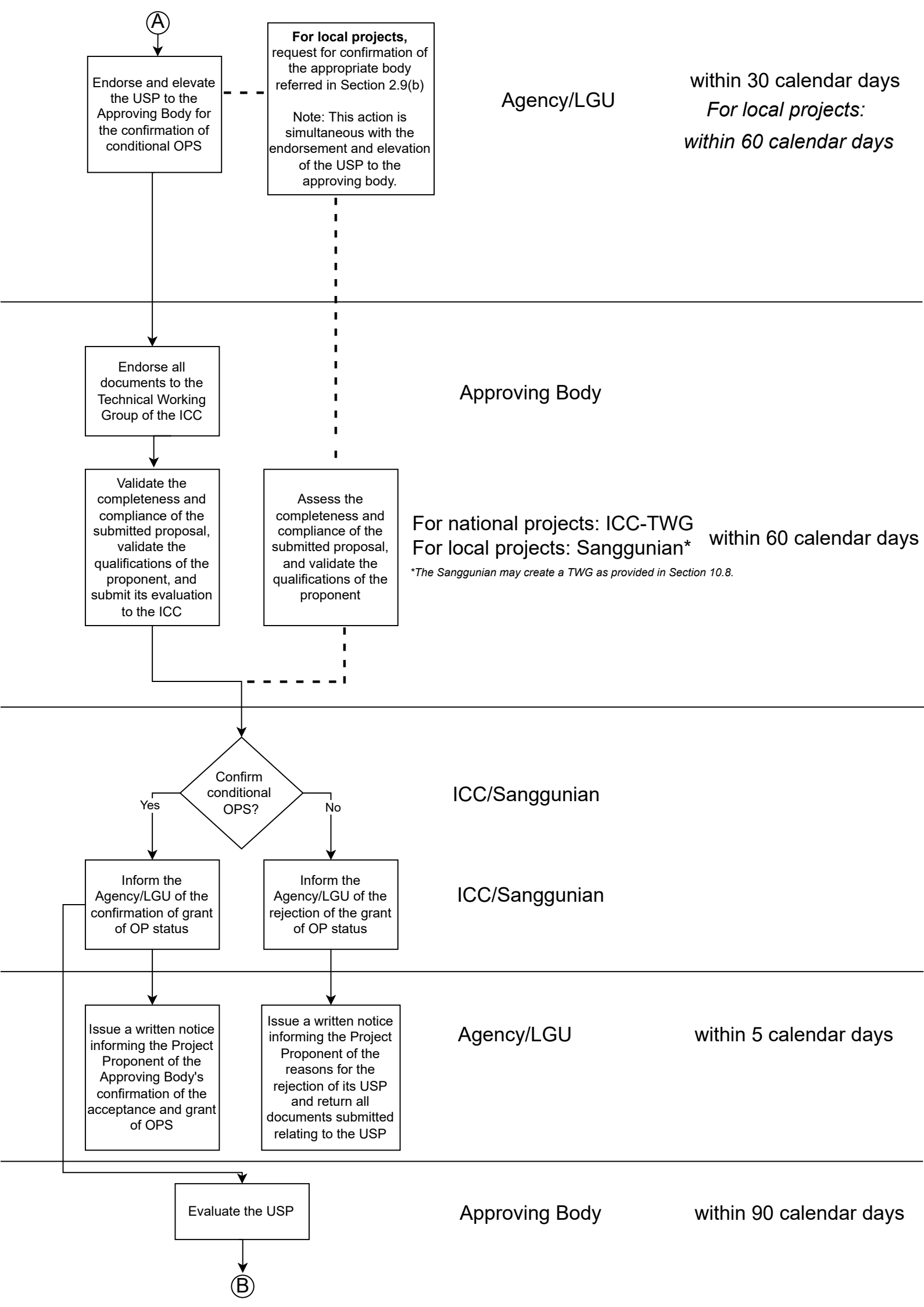


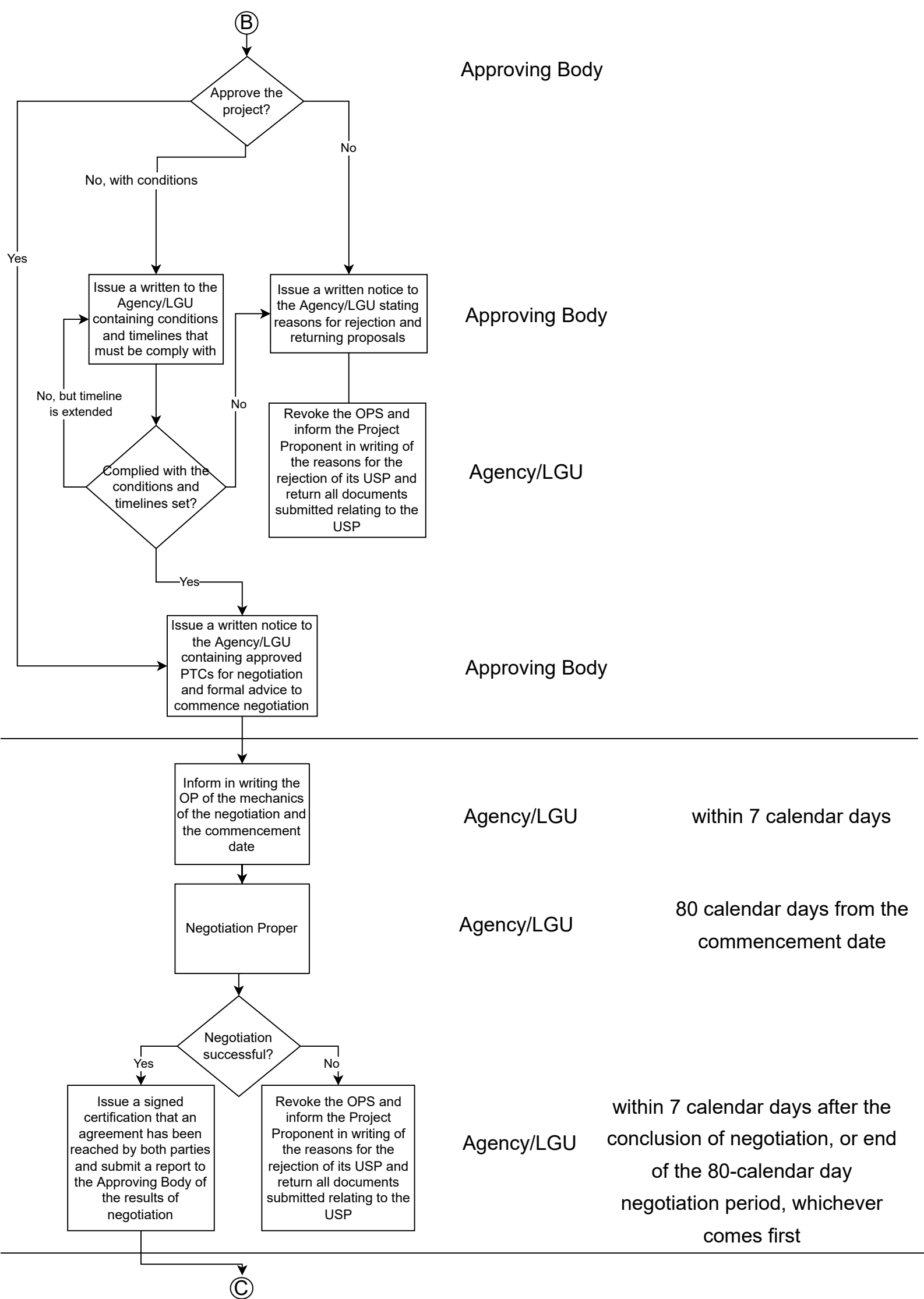


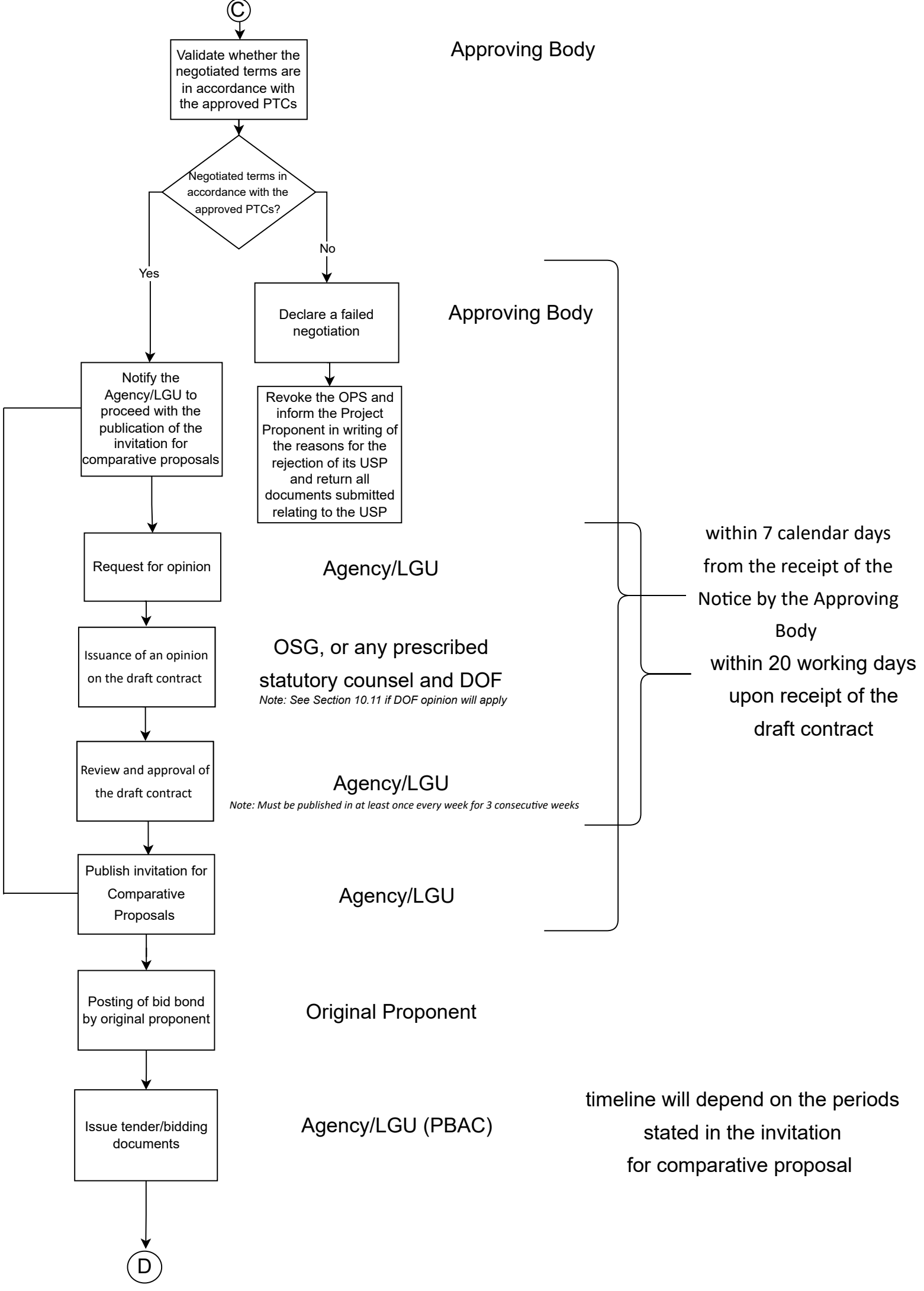
Unsolicited Proposal Flowchart

In case of inconsistency between the provisions of the IRR and the contents of the flowchart, the provisions of the IRR shall prevail.









D

Submit comparative proposals

Bidders

60 working days from the date of the issuance of the tender/bidding documents upon which proposals shall be received

Evaluate comparative proposals

Agency/LGU (PBAC)

Note: See Rule 5 and Rule 8 for the criteria for evaluation

evaluation of technical proposal: within 20 calendar days from opening of bids

evaluation of financial proposals: within 15 calendar days from completion of evaluation of technical proposal

Exercise right to match

Original Proponent

within 30 working days from the receipt of notification

Recommend to award

Agency/LGU

within 3 calendar days from the date of of completion of the financial evaluation

Issuance of Notice of Award

Agency/LGU

within 3 calendar days from the date of of completion of the financial evaluation

Post and disseminate Notice of Award and bid results online

Agency/LGU

within 7 calendar days from issuance of Notice of Award

Submit Notice of Award requirements

Winning Bidder

within 20 calendar days from official receipt of the Notice of Award

Notify compliance to Notice of Award

Agency/LGU

within 5 calendar days upon receipt of the Notice of Award

Execute and sign the contract

Agency/LGU and winning bidder

within 5 calendar days from receipt by the winning bidder of the Notice of Award