

**PUBLIC-PRIVATE PARTNERSHIP GOVERNING BOARD**  
**PPP Governing Board Resolution No. 2023-06-02**  
June 8, 2023

**FOR: All Heads of Departments, Bureaus, Offices, Commissions, Authorities and Implementing Agencies of the National Government, Including Government-Owned and/or Controlled Corporations, Government Financial Institutions, and State Universities and Colleges, and Local Government Units**

**SUBJECT: GUIDELINES ON THE NEGOTIATION PROCESS FOR UNSOLICITED PROPOSALS UNDER THE REVISED 2022 IMPLEMENTING RULES AND REGULATIONS OF THE BUILD-OPERATE-TRANSFER LAW**

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### **1. Background**

In the series of public consultation sessions held for the amendment of the Implementing Rules and Regulations (IRR) of the Republic Act No. 6957, as amended by RA 7718, also known as the Build-Operate-Transfer (BOT) Law, stakeholders raised the following concerns on the provisions pertaining to the negotiation process for unsolicited proposals:

1. The 80-calendar day period for the negotiation between the implementing Agency or local government unit (Agency/LGU) and the Original Proponent is insufficient.
2. The consequence of failure to complete negotiations within 80 calendar days, which is the rejection of the proposal and the revocation of the Original Proponent status (OPS), is too significant for the short period given.

In the Revised 2022 IRR of the BOT Law, the BOT Law IRR Committee sought to address the above concerns through Section 10.9(b) of the Revised 2022 IRR, which provides for an allowable extension of the negotiation period, subject to the rules and procedures to be issued by the Public-Private Partnership (PPP) Governing Board.

In addition to the required issuance by the PPP Governing Board, it is recognized that the BOT Law and its Revised 2022 IRR do not provide sufficient operational guidance on how a negotiation may be successfully conducted within an 80-calendar day period.

There are, however, existing literature that suggest mechanisms on how to successfully manage negotiations in PPP projects. For instance, based on a review of guidelines on unsolicited proposals in other jurisdictions, such as in Australia,<sup>1</sup> and

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<sup>1</sup> Australian Government Department of Infrastructure and Regional Development. (2015). *National Public Private Partnership Guidelines* (Vol. 2). <https://www.infrastructure.gov.au/sites/default/files/migrated/infrastructure/ngpd/files/Volume-2-Practitioners-Guide-Oct-2015-FA.pdf>

issuances of the World Bank Group<sup>2</sup> and the Asian Development Bank,<sup>3</sup> a negotiation team with permanent members and clear protocols may be created to facilitate faster decision-making and conclusion of the negotiations within the prescribed period and ensure transparency in the process.

Given the foregoing, and pursuant to Section 10.9(b) of the Revised 2022 BOT Law IRR and to the authority vested to the PPP Governing Board to create an enabling policy and institutional environment for PPPs (Section 3 of Executive Order No. 136, series of 2013), these guidelines on the negotiation process for unsolicited proposals implemented under the BOT Law are being issued.

## 2. Objectives

These Guidelines aim to aid in the conduct of successful negotiations, identify key considerations in the negotiation process, and prescribe rules and procedures on the extension of the negotiation period, if necessary.

## 3. Scope and Applicability

These Guidelines shall provide rules and procedures during the negotiation process for unsolicited proposals — from the issuance of the formal advice by the Approving Body to commence negotiations, the conduct of negotiations between the Agency/LGU and the Original Proponent, the extension to the negotiation period, and up until the conclusion of negotiations.

These Guidelines shall apply to unsolicited proposals implemented under the BOT Law and its Revised 2022 IRR.

## 4. Definition of Terms

- a. **Approving Body** – refers to the entity authorized to approve projects proposed under the BOT Law and in accordance with Sections 2.9 and 2.10 of its Revised 2022 IRR:
  - i. The Investment Coordination Committee (ICC) of the National Economic and Development Authority (NEDA) Board for national projects costing up to Php 300 million;
  - ii. The NEDA Board, upon recommendation by the ICC, for national projects costing more than Php 300 million;
  - iii. The NEDA Board, upon recommendation by the ICC, for all negotiated national projects, regardless of project cost;
  - iv. The local *Sanggunians*, for all local projects, regardless of project cost.

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<sup>2</sup> World Bank Group and PPIAF. (2018). *Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects* (Vol. 1). [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/UnsolicitedProposals\\_Volume2\\_Guidelines\\_WEB%20%281%29.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/UnsolicitedProposals_Volume2_Guidelines_WEB%20%281%29.pdf)

<sup>3</sup> Asian Development Bank. (2008). *Public-Private Partnership Handbook*. <https://www.adb.org/sites/default/files/institutional-document/31484/public-private-partnership.pdf>

- 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. **Local Government Unit (LGU)** – refers to provincial, city, municipal, and/or barangay government entities.
- d. **Negotiation** – refers to the means or process under Section 10.9(b) of the Revised 2022 BOT Law IRR, which is aimed at reaching an agreement on the parameters, terms, and conditions (PTCs) of the project within 80 calendar days, which may be subject to extension.
- e. **Negotiation Committee** – refers to the committee composed of representatives from the Agency/LGU and the Original Proponent that shall conduct negotiations, without prejudice to Section 5(a)(vi) of these Guidelines.
- f. **Original Proponent** – refers to the private proponent which submitted an unsolicited proposal that has been accepted, has been pre-qualified by the Agency/LGU,<sup>4</sup> and has been conferred the OPS, in accordance with Section 10.6 of the Revised 2022 BOT Law IRR.
- g. **Parameters, terms, and conditions (PTCs)** – refer to project details and stipulations as approved by the Approving Body, which shall serve as the basis for the drafting and approval of tender documents.

## 5. Negotiation Process

The Revised 2022 BOT Law IRR provides that after an unsolicited proposal is approved by the Approving Body, the Agency/LGU and the Original Proponent shall negotiate on the PTCs for the project.

- a. ***Prior to conducting negotiations***
  - i. Section 10.9(a) of the Revised 2022 BOT Law IRR states that within seven (7) calendar days upon receipt of the Agency/LGU of the formal advice of the Approving Body to commence negotiations, the Agency/LGU shall inform in writing the Original Proponent of the initial mechanics of the negotiations, including the commencement date and the authorized representatives of the Agency/LGU.
  - ii. To facilitate efficient negotiations, the initial mechanics shall include, at the minimum, the following elements:

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<sup>4</sup> Pursuant to Section 5.4 of the Revised 2022 BOT Law IRR.

1. Timeframe for the completion of negotiations, including the commencement date;
  2. Modalities of communication between the Agency/LGU and the Original Proponent, e.g., face-to-face, virtual, hybrid;
  3. Proposed house rules during negotiations, which shall include proposed rights and obligations, who shall preside over the proceedings, procedures for negotiating terms and decision-making, and documentation, among others;
  4. Management of conflicts of interest, e.g., disclosure of business relationships and close personal affiliations, inhibition from the performance of duties in connection to the project in case a conflict of interest arises;
  5. Next steps in case of successful negotiation or failure of negotiation; and
  6. Reporting requirements, i.e., reports to the Approving Body.
- iii. The commencement date of the negotiations shall be set at a date no earlier than two (2) weeks and no later than three (3) weeks from the issuance of the notice to commence negotiations by the Agency/LGU.
- iv. In addition to the formal advice, the Agency/LGU shall provide the Original Proponent the approved PTCs to allow the Original Proponent to review the same prior to the commencement of negotiations.
- v. The Agency/LGU shall designate, through a special order, permanent representatives to the Negotiation Committee for the unsolicited proposal. Such designated representatives must have the authority to negotiate and make decisions on behalf of the Agency/LGU.

Designated representatives shall, as far as practicable, consist of the following:

1. One (1) team lead officially designated by the Head of Agency/LGU;
2. One (1) legal officer;
3. One (1) officer knowledgeable in finance; and
4. One (1) officer knowledgeable in the technical aspects and/or management and operations of the project.

In the case of co-grantors, each Agency/LGU shall have adequate representation in the Negotiation Committee.

Designated representatives of the Agency/LGU shall avoid conflicts of interest at all times, pursuant to Republic Act No. 6713, otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees.

- vi. At any time prior to conducting negotiations, the Agency/LGU may begin the procurement of transaction advisors/consultants to assist in the negotiation process. Such transaction advisors/consultants may be obtained through Republic Act No. 9184 or the Government Procurement Reform Act (GPRA); provided, that the procurement of such advisors/consultants should be completed prior to the commencement date of the negotiations and shall in under no circumstances delay the negotiation process.
  
- vii. The Original Proponent shall also designate permanent representatives to the Negotiation Committee. The Original Proponent shall, within seven (7) calendar days upon receipt of the issuance of the notice to commence negotiations, notify in writing the Agency/LGU of its duly authorized representatives. Attached to such notice shall be the following:
  - 1. document/s authorizing the designated representatives to negotiate and make decisions on its behalf, and declaring that they have no potential or actual conflicts of interest, i.e., they are not related to the Head of Agency/LGU and designated representatives of the Agency/LGU by consanguinity or affinity up to the third civil degree, and that they are not involved in projects which may be in competition with the unsolicited proposal; and
  - 2. comments on the initial mechanics, if any.
  
- viii. As a general rule, designated representatives of the Agency/LGU and the Original Proponent shall be kept at a minimum to facilitate more efficient negotiations.
  
- ix. The PPP Center shall also designate one (1) representative to the Negotiation Committee.

In addition, the Agency/LGU shall involve government lawyers specializing in PPPs from the Office of the Solicitor General (OSG), the Office of the Government Corporate Counsel (OGCC), or the prescribed statutory counsel of the Agency/LGU, as the case may be, to assist them in the negotiation process.

The Agency/LGU may also invite other government agencies with expertise in areas relevant to the project to assist them in the negotiation process.

- x. At least three (3) calendar days prior to the commencement date of the negotiations, the Agency/LGU and the Original Proponent shall agree in writing on the final mechanics of the negotiations.

***b. Conducting negotiations***

- i. 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.
- ii. To facilitate the conduct of negotiations, the Negotiation Committee shall be presided over by a representative from the Agency/LGU.
- iii. The mechanics of the negotiations shall be binding throughout the conduct of negotiations. Any amendments thereto shall be agreed upon by the Negotiation Committee, also in writing.
- iv. The Negotiation Committee shall ensure that the negotiated terms conform to and do not change the approved PTCs. Moreover, the negotiated terms shall not:
  1. change the reasonable rate of return (RROR) approved by the Approving Body for the project; and
  2. adversely affect the project's viability indicators, such as but not limited to the economic internal rate of return, project internal rate of return, economic net present value, and project net present value.
- v. All agreed matters shall be documented and agreed upon at the end of each meeting to avoid revisiting concluded items and to facilitate clear contract drafting.
- vi. If the negotiations are progressing but are unfinished within the 80-calendar day period, the negotiation period may be extended, following the rules and procedures in Section 5(c) of these Guidelines.
- vii. If there are irreconcilable differences, at any point during negotiations or at the lapse of the prescribed period, the Agency/LGU and/or Original Proponent may move to end the negotiations. Thereafter, the Agency/LGU shall declare a failure of negotiation. Section 5(d)(i) of these Guidelines provides the subsequent procedures in case of failure of negotiation.
- viii. If an agreement has been reached by the Agency/LGU and the Original Proponent on the PTCs within the prescribed period, the Agency/LGU shall declare the negotiation as successful. Section 5(d)(ii) of these Guidelines provides the subsequent procedures in case of successful negotiation.

- ix. The PPP Center shall provide the Approving Body with updates on the progress of the negotiations.

**c. *Extending the negotiation period***

- i. If the negotiations are progressing but are unfinished within the 80-calendar day period, the Agency/LGU and the Original Proponent may extend the negotiation period for a period not more than sixty (60) calendar days.
- ii. In such cases, the Agency/LGU and the Original Proponent shall, within three (3) working days after the lapse of the 80-calendar day period, notify in writing the Approving Body and the PPP Center of the extension of the negotiation period, including the reasons therefor. During such extended negotiation period, the Negotiation Committee shall endeavor in good faith to finish the negotiations.
- iii. If there are irreconcilable differences, at any point during the extended negotiations or at the lapse of the extended negotiation period, the Agency/LGU and the Original Proponent may move to end the negotiations. Thereafter, the Agency/LGU shall declare a failure of negotiation. Section 5(d)(i) of these Guidelines provides the subsequent procedures in case of failure of negotiation.
- iv. If an agreement has been reached by the Agency/LGU and the Original Proponent on the PTCs within the extended negotiation period, the Agency/LGU shall declare the negotiation as successful. Section 5(d)(ii) of these Guidelines provides the subsequent procedures in case of successful negotiation.
- v. The PPP Center shall provide the Approving Body with updates on the progress of the extended negotiations.

**d. *Concluding negotiations***

- i. In case of failure of negotiation
  - 1. Within seven (7) calendar days from the lapse of the negotiation period,<sup>5</sup> or declaration of the failure of negotiation, the Agency/LGU shall reject the proposal and revoke the OPS in writing. The Agency/LGU shall have the option to:
    - a. Accept a new unsolicited proposal, or evaluate the next-in-line proposal,<sup>6</sup> if there be any;
    - b. Bid out the project as a solicited proposal; or

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<sup>5</sup> Pursuant to Section 10.9(c) of the Revised 2022 BOT Law IRR.

<sup>6</sup> Pursuant to Section 10.5 of the Revised 2022 BOT Law IRR.

- c. Undertake the project on its own, through government appropriations or official development assistance (ODA).

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.

ii. In case of successful negotiation

1. Pursuant to Section 10.9(d) of the Revised 2022 BOT Law IRR, 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:

- a. conform to and do not change the approved PTCs;
- b. do not change the approved RROR for the project; and
- c. do not adversely affect the project's viability indicators.

**Annex A** provides a template for the said certification.

2. The Agency/LGU shall, within seven (7) calendar days after the conclusion of negotiations or the end of the negotiation period, whichever comes first, submit the signed certification and a report to the Approving Body regarding the successful negotiation.

Said report shall, at the minimum, include the following:

- a. a list of negotiated terms; and
  - b. highlights of the negotiations.
3. The Approving Body shall, within twenty (20) working days from the receipt of the report, validate whether the negotiated terms are in accordance with the approved PTCs.<sup>7</sup>
  4. For national projects, the procedures for the validation of the negotiated terms and approval of the complete and final PTCs shall be in accordance with the ICC Guidelines and Procedures on Processing PPP Proposals for NEDA Board/ICC Evaluation and Approval. The Guidelines and their attachments may be accessed through the NEDA and PPP Center websites.

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<sup>7</sup> Pursuant to Section 3.2.10(d)(i) of the ICC Guidelines and Procedures on Processing PPP Proposals for NEDA Board/ICC Evaluation and Approval, the NEDA Board, as the Approving Body for national projects, shall act on the validation report on the results of negotiation within twenty (20) working days from receipt of such report from the NEDA Board Secretariat.



5. For local projects, the procedures for the validation of the negotiated terms and approval of the complete and final PTCs shall be in accordance with guidelines or ordinances issued by local *Sanggunians*. Such guidelines or ordinances shall include who shall receive the report, validate the negotiated terms, and notify the LGU in cases the negotiated terms conform or do not conform to the approved PTCs, and the applicable timelines.

## 6. Transitory Provision

Upon the effectivity of these Guidelines, the negotiation process for unsolicited proposals currently being assessed and/or reviewed but not yet approved by the Approving Body shall hereafter be conducted in accordance with these Guidelines.

## 7. Separability Clause

If, for any reason, any provision of these Guidelines is declared unconstitutional or contrary to law, other parts or provisions hereof which are not affected thereby shall continue to be in full force and effect.

## 8. Repealing Clause

All PPP Governing Board issuances or parts thereof which are inconsistent with these Guidelines are deemed amended, repealed, or modified accordingly.

## 9. Effectivity

These Guidelines shall take effect immediately upon approval by the PPP Governing Board.

*I hereby certify that these Guidelines were approved by the PPP Governing Board at its meeting held on June 8, 2023.*



**MA. CYNTHIA C. HERNANDEZ**  
Undersecretary and Executive Director  
Head, PPP Governing Board Secretariat

## ANNEX A

Template certification that an agreement has been reached by the Agency/LGU and the Original Proponent

### CERTIFICATION

Pursuant to Section 10.9(d) of the Revised 2022 Implementing Rules and Regulations of Republic Act 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 (the “Revised 2022 BOT Law IRR”), we hereby certify that the (*Agency/LGU*) and (*Original Proponent*) have reached an agreement on the parameters, terms, and conditions of the unsolicited proposal for (*Name of project*).

Furthermore, we hereby certify that the negotiated terms:

- (1) conform to and do not change the parameters, terms, and conditions approved by the (*Approving Body*) for the project on (*date of approval*);
- (2) do not change the reasonable rate of return approved by the (*Approving Body*) for the project on (*date of approval*); and
- (3) do not adversely affect the project’s viability indicators.

Attached herewith is a detailed report on the negotiations, for reference of the (*Approving Body*) in its validation of the negotiated terms for the project.

Issued this \_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_.

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**Head of Agency/LGU**

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**Authorized signatory of the  
Original Proponent**