

PUBLIC HEARING PROPOSED AMENDMENTS TO THE RULES AND REGULATIONS OF THE BOT LAW

EDSA Shangri-la Hotel
Mandaluyong City
10 May 2007

SUMMARY

Around one o'clock in the afternoon, participants to the public hearing started to register. Said participants represented various sectors and organizations: the Implementing Rules and Regulations (IRR) Committee, Oversight Committee, Implementing Agencies, Government Owned and Controlled Corporations/ Government Financial Institutions, other government agencies, Regulatory Bodies, Private Sector, Academe/Institutions/International Financial Institutions, Non-government organizations, Private sector proponents, National Economic Development Authority, Economic Policy Reform and Advocacy and the media. A total of 224 registered, 85 of which are women and 139 are men.

Benjamin Turiano, Development Information Director III of NEDA, facilitated said public hearing.

At 1:55 in the afternoon, the public hearing formally began with the singing of the Philippine National Anthem.

Rolando Tungpalan, NEDA Assistant Director General, gave the Welcome Address. In his address, he highlighted that true partnership may be achieved with all of us having a shared objective of our country's development and that we owe it to the Filipino.

Ruben Reinoso presented the proposed amendments to the BOT-IRR law. He gave a background of said law. He said that the proposed amendments emanated from suggestions from other government agencies, BOT committee, and private sector that are interested to participate in the BOT process. At the same time, it was deliberated and discussed among government agencies, the BOT Committee as well as the cabinet of Gloria Macapagal-Arroyo. The proposed amendments seek to further improve streamlined and expedited BOT process. He also said that the proposed amendments give more flexibility to LGUs and agencies and make them accountable for the projects that are approved by them.

Highlights of the proposed amendments:

Sec. 2.2 Eligible Types of Projects

The requirement for a cost recovery component covering at least 50% of the project cost of eligible projects, or as determined by the approving body is being proposed for deletion.

The BOT Law did not give explicit authority to the approving body to determine such cost recovery component. Further, Section 2 of the Law did not state a cost recovery component. However, such component may be prescribed by the ICC in its review/approval of the List of Priority Projects

Sec. 2.7 Approval of the List of Priority Projects

While the present IRR mandates the approving body to approve individual projects and contracts, the proposed amendment mandates the approving authority (i.e. NEDA-ICC) to approve the List of Priority projects as endorsed by the head of agency/LGU. Said list shall have a 2-year validity period. As for unsolicited projects, the ICC shall only determine the reasonable rate of return on investments and O&M costs.

This amendment is being introduced to reflect the intent of Section 4 of the BOT Law. However, only those projects approved by the approving body shall be included in the List of Priority Projects. Nonetheless, detailed guidelines on the approval process shall be formulated by the concerned approving body. This gives agencies/LGUs greater flexibility and accountability in pursuing BOT projects.

Section 5.2 Publication of Invitation to Pre-Qualify and to Bid

The proposed amendment requires the head of agency/LGU to approve the bid/tender documents, including the draft contract, before publishing said invitation. Since project development is undertaken by the agency/LGU, the agency/LGU should likewise ensure that all project documents, including the draft contract, have been prepared diligently before it is bid out.

The proposed amendment requires the agency/LGU to consider all applicable laws, rules and regulations in the formulation of the pre-qualification requirements during project tendering. This will ensure that the requirements for pre-qualification do not violate any law, rule, or regulation that may apply to a specific pre-qualification requirement.

Section 5.5 Pre-qualified and disqualified proponents

The I fee to be PAID by a disqualified proponent together with its appeal for reconsideration of its disqualification has been reduced from the present ½ of 1% to 1/10th of 1%. Said fee is being reduced since past experience under a similar protest fee under RA 9184 (Procurement Law) reveals that the bigger amount may serve as basis for a court to grant a request for a TRO since this impedes on the basic right of a contractor to due process. The reduction will also lessen the constraints on the part of a disqualified proponent in appealing its disqualification.

Section 10.9 Approval of Unsolicited Projects/Contracts by the Approving Body

Said section is being proposed for deletion since the approving body shall no longer review projects and contracts, except for those specifically mandated by the BOT Law. Since the approval of the approving body shall apply only to the list of priority projects, pursuant to the intent of the BOT Law, the detailed review and processing of individual projects and contracts shall now be the accountability of the concerned agency/LGU.

Section 12.1 Execution/Approval of the Contract

The proposed amendment designates the concerned head of agency/LGU as the signatory to the contract. Prior approval of the project and contract by the approving body is no longer necessary. Said section also requires that the agency/LGU transmit a signed copy of the contract to the NEDA Board through the ICC for information only. This amendment clarifies the approving authority, being the signatory, to the head of agency/LGU for a specific contract.

Section 12.11 Contract Variations

The proposed amendment to this provision identifies the head of agency/LGU as the approving authority on any contract variation during contract implementation. Any variation implemented without the approval of the head of agency/LGU shall be considered void.

The amendment is being proposed to clarify that being the signatory for the government in the contract, the head of agency/LGU is likewise mandated to authorize/approve a contract variation.

Section 15.3 Transitory Provision

The proposed amendment shall make the IRR applicable to all BOT projects including those undergoing and completed project processing. Projects under implementation shall not be covered by the revised IRR, but shall be governed by their respective contracts. This amendment sets the applicability of the amended IRR to include all projects not yet implemented.

Reduction of Timelines in the Processing/Evaluation of Proposals

The reduction of timelines in some activities under the IRR is being introduced in order to facilitate the processing and evaluation of BOT proposals.

Under Section 5.3, for the preparation of prequalification documents for projects costing below PhP 300 million, the period shall be 15 working days from the last date of publication of the Invitation to Pre-qualify and to bid. For projects costing at least PhP 300 million, the period shall be 30 working days from the last date of said publication.

Under Section 5.5, disqualified bidders shall be given 7 working days from receipt of the notice of disqualification to file an appeal. Action on the appeal should be made within 30 working days upon receipt of the appeal. This is to facilitate resolution of issues during the bidding process.

Under Section 6.3, for projects costing at least PhP 300 million, the pre-bid conference should be undertaken 45-90 calendar days before the submission of bids. This gives leeway for the agency/LGU to set the period of bid preparation depending on project scope and complexity.

Under Section 10.11, the publication of the invitation for comparative proposals shall be made within 7 calendar days upon issuance of the certification of a successful negotiation between the agency/LGU and the private sector proponent. This is to expedite the conduct of the price challenge.

Reactors

Representative from the Academe

Dr. Dante Canlas

Professor

UP School of Economics

He pointed out that in actual implementation, agencies may go overboard and therefore there is a need for an oversight body that will be looking at some of the conditions that can be spelled out for contract reopening.

He likewise emphasized that the proposed IRR weaken the oversight function of ICC, and he did not believe that this was the way to modernize the country's infrastructure system.

On Section 2.3, he expressed that the key word is priority not list.

He said that the approving body must have assurance that the projects included in the priority list were given priority work, undergone evaluation and cost-benefit analysis.

He suggested that the IRR must be unambiguous with regard to the proposal to delete the reference to the MTPDP and MTIP. Projects in the priority list may not fall within the plans mentioned resulting in disintegrated infrastructure program.

On Section 2.7, the IRR must articulate all the requirements and analysis that proper project evaluation entails. The approving body (i.e. agency or LGUs as the IRR amendments proposed) must be responsible in meeting the requirements; hence, the need for an oversight body to ensure compliance.

He likewise said that without any oversight on variation orders, for example, the country would be inviting another Foreign Debt Crisis.

Dr. Dante Canlas made a summary in which he pointed out the following:

- Do not weaken nor remove oversight function of ICC.
- Streamline ICC and make it a pure oversight body with a similar core group made up of (DOF, NEDA, DBM, BSP, OP legal).
- Let agencies "own" the projects but they must raise their technical, financial, and legal expertise.
- The agencies can enlist Infracom for assistance on technical matters

Representative from the Private Sector

Atty. George dela Cuesta

Legal Counsel

Hanjin Heavy Industries and Construction, Ltd.

He explained that in the review of the proposed and existing regulations, business is usually guided by the following questions:

Will it entail cost? On its face, he said that the proposed IRR does not seem to produce such an effect. Cost may be incurred, however, if the agency-LGU does not have sufficient sophistication to handle complex PSP contracts thus, the plan to make agencies the one responsible for evaluating and approving projects may not be feasible. He cited the Commission on Audit 2005 Report, which studied five (5) PSPS projects. All of the five (5) projects failed and lack of technical capacity of the agencies that was cited as one of the reasons. One wonders whether all agencies are now equipped of institutional capacity to process PSP projects on their own.

Section 29 of the present IRR, in relation to Section 2.9 of the proposed revision, made him ask as to what will happen when there is material change in the contract afterwards? Who would be responsible for such deviation? And at what cost? Will there be new requirements?

Should private proponents apply for prequalification in every agency-LGU that will take charge of the projects?

Who will monitor PSP projects in general? The proposed IRR would stop monitoring after all. Will this work? Would self-monitoring eventually be a part of the Philippines' best practices?

He observed that majority of the changes to the IRR pertains to the reduction of period for the parties to act. He pointed out that the concern at this point is whether there are repercussions in case of delay on the part of the agencies-LGU. The IRR is silent on what will happen if the deadlines set in the IRR are not met.

On the opening of Sec 5.4 which mandates the agency to ensure that all pre-qualified/pre-qualification requirements are consistent with all applicable laws, rules and regulations, he asked if this should really be included in the IRR.

Atty. George dela Cuesta highlighted the ICCs central role in the approval of the PSP projects. It is the ideal approving body. It is cross-sectoral and a multi-agency entity. He maintained that the advantage about having this ICC is that it allows coordination of multi-agency involvement.

Further, the absence of an inter-agency cross sectoral approach could lead to the proliferation of unsolicited proposals. Without a monitoring/oversight of the PSP projects, there is now a wider window for unsolicited proposals. In his last statements, he explained that rules to fast track the project development projects phase are appreciated. However, the business community's more fervent desire is to see a process that will ensure that a project will be able to withstand any legal, financial, technical and procedural inquiry.

Representative from an NGO
Atty. Nepomuceno Malaluan
Trustee, Action for Economic Reforms
Co-convenor, Access to Information Network

Atty. Nepomuceno Malaluan asserted that the proposed amendments strip to the barest the oversight functions of the NEDA ICC and local development councils, purportedly with the objective of fast-tracking the approval and execution of BOT projects and contracts. He said that their experience has been that the BOT Law and its implementation have in general resulted in the marginalization of public access to

information and to mechanisms for participation and redress. He pointed out concretely:

- There is no mechanism in the BOT law or in the IRR for access to information and public consultation in the project development phase.
- In the project solicitation phase, there is a requirement for publication and notice of the list of priority projects, and of the invitation to pre-qualify and bid, but this is clearly intended for private project proponents. Often there is a fee to access of pre-qualification documents, which discourages public access.
- In the bidding phase, the hurdle to public access to information and participation becomes insurmountable as the issuance of bid or tender documents is made available exclusively to the pre-qualified bidders. There is only token non-voting observer representation by a facility user in the Pre-qualification, Bids, and Awards Committee (PBAC), who may even be replaced by a representative from duly recognized accounting associations.
- The concluded contracts in general make the public strangers thereto. There is no access to consultation, and no recognition of any right to intervene in contractual processes such as contract amendments or revisions and dispute resolutions.
- There is no provision on right and procedure of access to concluded contracts, reviews thereof, and amendments thereto.

The proposed amendments do no attempt to address these concerns.

In his last statements, he mentioned that while local agencies can go overboard, there are instances when the oversight agencies can go overboard as well.

Representative from Donor Community
Mr. Ben Eijerben
Infrastructure Sector Coordinator
World Bank

In his presentation, he said that there are required activities for ICC/NEDA Priority List Approval based on possible guidelines:

- Assess the Extent of Governmental Financial Support and Determine the Appropriate Project Modality (Public, Corporate, Private or Mixed)
- Based on the Appropriate Modality, determine the Extent of Government Financial Support (Direct and Contingent Liability)
- If project includes Government Financial Support, determine if the sponsoring Line Agency/GOCC has the NG budget Allocation or GOCC Board Approval

- Project must have NG MTEF Budget Allocation or GOCC Board Approval before proceeding to the Feasibility Phase (25-30% of Final Design)

His comments to the BOT IRR Law are below:

- The IRR should reflect an upfront rigorous project preparation and appraisal by sponsors, line agencies and oversight agencies
- Not meant to slow down the process but to accelerate
- Extra funding needed to prepare the feasibility studies, project preparation facility

Open Forum

Mr. Aquino

Congressional Planning and Budget Development Office

He asked several questions:

(1) Which is more exhaustive, the MTPDP, MTIP versus the list of priorities?

The delay in the approval actually comes from the lack of separation and with the past system, the solution is not to do away with the ICC. Rather, the past system should be reviewed to streamline the membership of the ICC, as proposed by Dr. Canlas and give it purely oversight role. It is also necessary to improve the capacity of agencies to avoid delays in the approval due to deficiencies in their evaluation.

(2) As to sec. 4.3, who will now prescribe the economic parameters?

(3) Can draft contracts as approved by heads of agencies or the LGU's be published or be uploaded from the web or be made available to all stakeholders?

(4) The original copy of the contract is not submitted to NEDA/ICC within the specified timeframe. Who would then be accountable repository agency of all filed contracts?

(5) Who approves the fundamental variations in the contract which has been approved by the Sanggunian or by the ICC....?

Mrs. Teresita Fernandez Lamong

President of Travel International and member of MRT4 consortium

She said that the IRR should be made to apply to new projects unlike what the proposed transitory provisions provide. The latter states that the new IRR will apply to all projects so long as they are not yet in the implementation stage.

Marlyn Aquino

Sycip, Salazar, Hernandez

She said that the IRR amendments attempt to change the system from a centralized system to the devolution of bidding approval/process to agencies and LGUs. She pointed out that amendments are empowering the LGUs which may not have the expertise to properly write contracts and evaluate project proposals. Devolution will mean that the years of expertise of lawyers, technical evaluators at the NEDA-ICC will be lost.

John Fort
American Chamber of Commerce

He said that the government should work to change the perception that there is too much corruption that we should be performing in accordance to international standards.

Also, he asked on what happened to the BOT Center. Thinking about the public hearing on the BOT-IRR he attended years ago, he asked on what happened to said exercise. He did not know what actions were taken on the proposals generated from the hearing.

Pancho Umali
Villaraza Law

He said that he requested for a solicited proposal that involved a Build Own and Operate (BOO) or BOT variant. When is a presidential approval in the flow chart of process? It appears that in determining a reasonable return via negotiations does not mean that it is a BOO or a variant project. And hence, no presidential approval is required.

Tyler Holt
USAID

He said that if ultra-streamlining in the interest of fast-tracking this project is just going to exacerbate the public perception that there's something shady going on. He also said that it is prudent to use the NEDA-ICC oversight.

Dr. Cielito Habito
EPRA

He pointed out that unsolicited projects have become the rule instead of exception in the experience of BOT. The removal of the IRR's reference to the MTPDP only invites even more unsolicited projects because there is no parameter to serve as basis for priority list. NEDA-ICC oversight is not the problem.

Transparency is key. He pointed out that years ago, EPRA assisted government in conducting various consultations with stakeholders that resulted in proposed amendments to the BOT IRR Law. He said that this is the alternative that he would like to suggest because it has undergone public scrutiny and due diligence.

Lauro Ortille
Clark Development Corporation

He asked if under the proposed IRR, the winning proponent will go to the regulator and the project be submitted to a public hearing.

Ronald Ortega
LRA

Some questions:

(1) Would it be not possible to indicate in the IRR itself the formula for determining liquidated damages other than allow or give it to the agencies-LGU the prerogative to make such determination.

(2) In Section 12.19: Does it mean that in so far as revenues and receipts are, now, not subject to the audit of COA?

(3) Being a representative of the government, to whom can we go to or to seek guidance in setting the amount for liquidated damages?

Ben Austria
Chairman
Energy Committee of the Philippine Chamber of Commerce

With regard to liquidated damages, he explained that the government can use the experience in other countries. There are also for certain agencies which specialize in the technical, legal aspects and other expertise.

Also, it's not unusual for winners of contract to make some amendments in order to have a mechanism to mitigate risk.

Michael Mundo
Makati Business Club

He suggested to the BOT-IRR Committee that the private sector representation be increased from 2 to 3, adding another one (1) from a duly recognized non-government organization.

Responses from NEDA

- The discomfort about coming with a list of priority projects is unfounded. It is not meant to set aside the MTPDP. The president has stated in all cabinet meetings that government cannot reinvent priorities because there is already the MTPDP that constitutes as set of priorities.
- He agreed that public disclosure is a must. He said that everyone is working for the freedom for information act. He mentioned that even draft contracts seems to be inaccessible to many except to those who are directly involved.
- He noted the suggestion from the participants: (1) to keep a strong oversight function, (2) to improve the competencies of the line agencies so that they can also be accountable, (3) the need for quality project preparation despite the review process.
- He presumed that the president has decided to abolish the BOT Center for the reason that it was not intended for such purpose. Originally, the BOT Center was for promotional purpose only. It clearly overlaps with the functions of the Board of Investment. That is why it was transferred to DTI years ago.
- There cannot be an automatic grant of franchise to the winning bidder. The winning bid must still be subjected to a public hearing by law and it must meet the requirements of the regulator before a franchise is given.
- That is what we want, an independent regulator not bound by implementing agencies.
- The idea of a list of priority projects is subject to many interpretations. One is that, for a project to be included in the list, it should have been analyzed. Otherwise, how can one say that it is a priority? At the very least there must be a feasibility study on the project.
- On the unsolicited proposals, the ICC is required under the proposed amendments to set a reasonable return of investment on the assumption that there will be no government exposure of the project if it is purely private sector undertaking, capital cost must come from the revenues that will be generated from the project. This will be considered in setting the rate of return.
- Setting a formula in the IRR for computing liquidated damages is not feasible because each project has its peculiarities.

Sec. Romulo Neri of NEDA gave the Closing Remarks at past 5 in the afternoon. Dinner followed.

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