



**Investment Coordination Committee Resolution
No. 1 (s. 2021)**

**Guidelines on the Evaluation of Private Proponents' Financial Capability to
Provide Equity for Proposals under ICC Review and Related Requirements for
Management of Contingent Liabilities**

WHEREAS, Section 10.7 of the Implementing Rules and Regulations of Republic Act No. 6957, as amended by Republic Act No. 7718, or the Build-Operate-Transfer ("BOT") Law IRR, tasks the Agency/Local Government Unit ("LGU") with the evaluation of unsolicited public-private partnership ("PPP") proposals. This includes the appraisal of the project's merits, the qualification of the proponent based on the provisions of Rule 5 of the BOT Law IRR, the assessment of the appropriateness of the project's contractual arrangement and risk allocation, and the recommendation of a reasonable rate of return for the project.

WHEREAS, Section 10.7 of the BOT Law IRR likewise requires that such evaluation and qualification should be accomplished by the Agency/LGU prior to the acceptance or rejection of the project, the issuance of original proponent status, and the endorsement of the project to the Investment Coordinating Committee ("ICC")/Approving Body.

WHEREAS, Section 10.7 of the BOT Law IRR further states that in case of acceptance, the Agency/LGU shall submit all pertinent documentation, including the results of its evaluation of the unsolicited proposal to the ICC/Approving Body.

WHEREAS, Sections 1.3 and 10.8 of the BOT Law IRR likewise provide that the ICC shall act on the proposals, determine the Reasonable Rate of Return ("RROR") and other parameters for negotiation. In its determination of RROR, the ICC shall take into account the following, among others:

1. Prevailing cost of capital (equity and borrowings) in the domestic and international markets;
2. Risks being assumed by the Project Proponent; and
3. Level of Government Undertakings extended for the project.

WHEREAS, Section 5.4 of the BOT Law IRR outlines the legal, technical, and financial requirements that must be complied by prospective proponents and reviewed by the Agency/LGU during the pre-qualification stage, as applies to solicited and unsolicited proposals.

WHEREAS, Section 5.4(c) of the BOT Law IRR defines 'financial capability' of private proponents as having 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, as applies to solicited and unsolicited proposals.

WHEREAS, Section 5.4(c) of the BOT Law IRR likewise tasks the Agency/LGU concerned to determine on a project-to-project basis, and before pre-qualification, the minimum amount of equity needed, to be used as basis of proof of the ability of the prospective private proponent and/or the consortium to provide equity and debt, as applies to solicited and unsolicited proposals.

WHEREAS, Section 5.4(c)(i) specifically prescribes that the financial capability of the proponent to provide equity shall be measured in terms of the net worth of the company, or in the case of consortia, the net worth of the lead member or the combined net worth of members, or a set-aside deposit equivalent to the minimum equity required for the project.

WHEREAS, Section 2.7 of the BOT Law IRR allows the Approving Body to prescribe or revise detailed guidelines on the process and procedures for the approval of projects as well as the requirements to be submitted in support thereof, provided that the same are consistent with the BOT Law and the BOT Law IRR.

NOW, THEREFORE, BE IT RESOLVED, AS IT IS HEREBY RESOLVED, that all Agencies/LGUs submitting or endorsing PPP proposals for ICC approval must ensure proper evaluation of financial pre-qualification requirements of proponents, through the following:

- 1.1. The ICC reiterates and shall strictly enforce compliance with the following responsibilities of the Agencies/LGUs according to the BOT Law IRR:



- 1.1.1. Agencies/LGUs shall evaluate PPP proposals and pre-qualify proponents strictly based on the BOT Law IRR. Accordingly, the proponents' financial capability shall be determined based only on the criteria identified in Section 5.4(c).
- 1.1.2. Pursuant to Section 5.4(c), the Agency/LGU shall determine the minimum amount of equity needed for the project. This should be based on the total project cost¹ and planned capital structure (*i.e.*, debt-to-equity ratio) for the project.
- 1.1.3. Pursuant to Section 5.4(c), the proponent's financial capability shall be measured in terms of proof of the ability of the proponent to provide equity and debt.
- 1.1.4. Pursuant to Section 5.4(c)(i), proof of the proponent's financial capability to provide the minimum amount of equity required for the project shall be measured in terms of either (a) the net worth of the proponent, or in the case of consortia, the net worth of the lead member or the combined net worth of members, or (b) a set-aside deposit equivalent to the minimum amount of equity required for the project.
- 1.1.5. Pursuant to Section 5.4(c)(i), proof of the proponent's financial capability to provide debt shall be by way of a letter testimonial from a domestic universal/commercial bank or an international bank with a subsidiary/branch in the Philippines or any international bank recognized by the Bangko Sentral ng Pilipinas (BSP) attesting that the prospective project proponent and/or members of the consortium are banking with them, and that they are in

¹ Which should include costs incurred to finance the construction of the project (*i.e.*, *interest during construction*).



good financial standing and/or are qualified to obtain credit accommodations from such banks to finance the project.

- 1.2. The Agency/LGU shall require the proponent to disclose all its ongoing and proposed government projects submitted to other Agencies/LGUs, the corresponding project cost schedule, and the respective debt and equity financing components. In case of a consortium proponent, the Agency/LGU shall require the lead member to disclose the same; ***provided that***, in cases where the equity shares and balance sheets of minority members were used to prequalify the entire consortium, each consortium member shall accordingly be expected by the Agency/LGU to disclose the same.
- 1.3. Joint and several liability agreements, accession agreements, guarantee letters from parent companies, or other documents not explicitly stated in Section 5.4 (c)(i) shall not be considered by the Agency/LGU in determining the proponent's financial capability to provide equity.
- 1.4. In the validation of the proponent's financial capability measured in terms of proof of its ability to provide a minimum amount of equity to the project measured in terms of its net worth, the net worth shall be based on the proponent's latest audited financial statements ("AFS"). In addition, in validating the proof of the proponent's ability to provide a minimum amount of equity to the project, the TWG should factor in the pending costs of the proponent's ongoing and proposed projects to be financed through equity.³

$$\text{Financial Capacity} = \text{net worth} - e_{\text{ongoing}} - e_{\text{OPS}}$$

Where: net worth = total assets – total liabilities (based on latest AFS)

³ This should cover all projects pursued under the BOT Law IRR framework.



$e_{ongoing}$ = equity requirement 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);

e_{OPS} = the sum of required equity contributions to unsolicited proposals where original proponent status has been granted to the proponent

[Note: " e_{OPS} " should exclude the project being evaluated. The proponent is financially capable to undertake a project if its financial capacity is greater than or equal to the required project equity.]

The TWG shall be responsible for evaluating proposals prior to evaluation by the ICC – Technical Board. The Agency/LGU shall submit all pertinent documentation of its due diligence and evaluation of the proponent's financial capability to provide equity for the project, including the information required to be provided by this resolution, in accordance with Section 3.2 of this Resolution.

- 1.5. Upon determination by the NEDA Board or the ICC, upon a report and recommendation by the TWG pursuant to Section 3.2 of this Resolution, that the private proponent is financially incapable of undertaking the proposed project, the proposal shall be returned to the Agency/LGU, which shall have the following effects:
 - a. Rejection of the proposal by the Approving Body; and
 - b. Revocation of OPS previously issued by the Agency/LGU.

Approval Requirements for Government Guarantees and Contingent Liabilities

- 2.1. ***Factors in Determining Reasonable Rate of Return ("RROR") provided in Sections 1.3 and 10.8 of the BOT Law IRR.*** In determining the RROR, the following factors shall be considered by the ICC:



- a. Prevailing Cost of Capital (equity and borrowings) in the domestic and international markets;
- b. Risks assumed by the private proponent;
- c. Level of Government Undertakings extended for the project; and
- d. Risks assumed by the Government.

2.2. *Written approval of the Approving Body of Government Guarantees and Contingent Liabilities in relation to Sections 2.6 and 10.8 of the BOT Law IRR.* In the evaluation of proposals, the NEDA Board and/or ICC, as Approving Body, shall issue its written approval before government guarantees and contingent liabilities can be assumed by the Government, either by the Agency/LGU or other government agencies, including government-owned or -controlled corporations ("GOCCs").

2.3. *Prohibition to include Government Guarantees and Contingent Liabilities Not Approved.* In relation to the preceding section, all government agencies are prohibited from issuing government guarantees or assuming contingent liabilities not approved by the Approving Body in writing in the concession agreement, performance undertaking, or any other similar document in writing.

2.4. *Enumeration of Approved Government Guarantees.* The Department of Finance ("DOF") is hereby directed to enumerate in its Opinion, provided in Sections 2.8 / 10.9 of the BOT Law IRR, the approved government guarantee and contingent liability provisions. Only those identified in the DOF Opinion shall be incorporated in concession agreements, performance undertakings, or similar documents in writing.

TWG for Project Evaluation

3.1. *Membership.* There is hereby created a TWG composed of representatives from the following agencies which shall be responsible for the initial evaluation of projects submitted to the ICC:

- a. NEDA;



- b. DOF; and
- c. Agency/LGU.

Secretariat of TWG: PPP Center.

- 3.2. Functions.** The TWG created in this Resolution shall be responsible for evaluating proposals prior to their elevation to the ICC - Technical Board. Pursuant to its mandate, it shall perform the following, among others:
- a. Validation whether the private proponent is financially, technically, and legally capable to undertake the proposed project;
 - b. Validation of the completeness of the information submitted by the Agency/LGU;
 - c. Determination of the Project Cost and preliminary Reasonable Rate of Return for approval of the ICC; and
 - d. Recommendation to the ICC – Technical Board, through a Report signed by the members of the TWG, which proposals should be elevated or rejected for failure to comply with the requirements of the BOT Law IRR.

Pursuant to its functions, the TWG is directed to generate a list of documentary requirements⁵ to be imposed on Agencies/LGUs, which may include the current documentary requirements imposed by the Secretariat, if approved by the TWG.

Management of Contingent Liabilities

- 4.1. Authority of the Development Budget Coordination Committee ("DBCC").** The DBCC shall continue to serve as the Lead Committee of the NEDA Board responsible for the management of Contingent Liabilities of the National Government. Pursuant to its functions, the DBCC shall continue to oversee the implementation of the Risk Management Program ("Program") and issue the necessary implementing guidelines and any amendment thereto.

⁵ a. ICC Checklists for Unsolicited and Solicited Proposals; b. Unsolicited Proposal Assessment Forms; and c. Parameters, Terms, and Conditions Template.



- a. The TWG for Contingent Liabilities shall continue to recommend the amount to be appropriated for the Program. The assessment of contingent liabilities shall take into account submitted claims to any agency of the Government, including GOCCs;
- b. The DBCC shall require monitoring and reporting from the PPP Center of actual and contingent liabilities in PPP contracts, including the updating of financial models; and
- c. The DBCC shall establish procedures for the payment of contingent liabilities.

4.2. Agency/LGU Disclosure Requirements. All Agencies/LGUs are hereby required to disclose to the ICC, the specifics of commitments and risks that the Agency/LGU will be assuming. In addition, all Agencies/LGUs shall be required to submit a Risk Mitigation Plan containing the following:

- a. Risks assumed by the Agency/LGU;
- b. Risk mitigating measures;
- c. Estimated costs to be incurred; and
- d. Target dates to have each measure in place.

4.3. Certification Requirements for IAs Assuming Contingent Liabilities. All Agencies/LGUs shall submit the following documents, as part of their submission to the ICC:

- a. Certification that it has the resources and capabilities to perform every obligation in relation to the proposed project;
- b. Plan for delivery of obligations, which shall identify the following:
 - i. Obligations;
 - ii. Office or division responsible for executing each obligation;
 - iii. Due date for the obligation to be executed;
 - iv. Cost to be budgeted for each obligation; and
 - v. Contingency plan in cases of delay and other unforeseen events.

4.4. Disclosure and Consent Requirements Relative to Loan Covenants. All projects under the BOT Law shall obligate the project proponent to:

- a. Disclose to the Agency/LGU and ICC all loan covenants;



- b. Obtain prior consent from the Agency/LGU to terminate, amend, waive its rights or in any case novate its loan covenants if such action may reasonably be expected to have a material adverse effect on the ability of the project proponent to perform its obligations under the PPP contract or the loan covenant; and
- c. Obtain prior consent of the Agency/LGU for any cure agreed with the lender that may increase the liabilities of the Agency/LGU.

All concession agreements to be drafted after effectivity of this Resolution shall incorporate this provision and shall not constitute material adverse government action (MAGA).

4.5. *Contingent Liability Management for Projects Implemented Outside the BOT Law Framework.* The ICC recommends to the NEDA Board and DBCC the issuance of rules and guidelines imposing similar requirements on projects implemented outside the BOT Law Framework, including the following, among others:

- a. Concession Agreements entered into by the Metropolitan Waterworks and Sewerage System;
- b. Supplemental Toll Operation Agreements entered into by the Toll Regulatory Board;
- c. Joint Ventures covered by the NEDA Joint Venture Guidelines; and
- d. Joint Ventures implemented by GOCCs outside the NEDA Joint Venture Guidelines.

5.1. *Transitory Provisions.*

- a. For proposals previously returned by the ICC Secretariat, the ICC shall issue directives to all Agencies/LGUs to comply with the requirements under this Resolution and re-submit their respective proposals to the ICC for initial review of the TWG within thirty (30) calendar days from issuance of the directive;
- b. For solicited and unsolicited proposals that have been submitted to NEDA for ICC review as of the approval date of this Resolution, the TWG, as is hereinafter defined in this Resolution, is tasked to validate



the pre-qualification documents and the submissions of the Agencies/LGUs based on the provisions of this Resolution.⁶

- c. All previously issued resolutions and/or guidelines which are inconsistent with this Resolution shall be deemed repealed, modified, or amended accordingly.

5.2. Effectivity. This Resolution shall take effect immediately.

APPROVED, 3 November 2021.

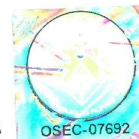



⁶ The evaluation of the private proponents' net worth shall be based on their latest AFS during the Government/ICC review process of the project.

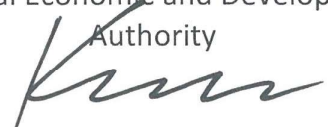

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