

PCC MEMORANDUM CIRCULAR NO. 20-001

Subject: PROCESS FOR EXEMPTION FROM COMPULSORY NOTIFICATION IN JOINT VENTURE (JV) AGREEMENTS ENTERED INTO PURSUANT TO THE “GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AGREEMENTS BETWEEN GOVERNMENT AND PRIVATE ENTITIES” ISSUED BY THE NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY

Whereas, Republic Act No. (“R.A.”) 10667 or the Philippine Competition Act (the “PCA” or the “Act”) and its Implementing Rules and Regulations (“PCC-IRR”) mandates that the State, through the Philippine Competition Commission (“PCC”), shall enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, as well as establish a national competition policy to be implemented by the government and all of its political agencies as a whole;

Whereas, the Guidelines and Procedures for Entering Into Joint Venture (JV) Agreements between Government and Private Entities (the “NEDA Guidelines”) provide for the framework within which joint venture arrangements between government and private entities are executed, in a transparent and competitive process, to encourage pooling of resources and expertise between Government and Private Entities through JVs;

Whereas, the PCA is enforceable against any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines;

Whereas, joint ventures (“JV”) as defined under Rule 2 (i) of the PCC-IRR, between public or private entities, are subject to the compulsory notification requirement under Section 17 of the Act if the relevant thresholds under the PCC-IRR, as amended, are met;

Whereas, should a JV agreement is executed between the winning private sector participant and the government entity under the NEDA Guidelines, a notification to the PCC is mandatory once notification thresholds are breached under Rule 4, Section 3 of the PCC-IRR, as amended by Memorandum Circular No. 18-001;

Whereas, given that the delivery of JV projects should be transparent, competitive, and timely, the PCC recognizes the necessity of a coordinated approach in reviewing JV projects falling under the PCA’s mandatory notification and review requirements;

Whereas, the PCC is mandated to advocate pro-competitive policies of the Government, monitor and analyze the practice of competition in markets that affect the Philippine economy, implement and oversee measures to promote transparency and accountability, and ensure that prohibitions and requirements of competition laws are adhered to;

NOW, THEREFORE, pursuant to its authority under the Act, the Philippine Competition Commission hereby promulgates the following rules:

Section 1. Purpose. This Circular aims to establish and institute a framework to exempt joint ventures between private and government entities for a JV project formed pursuant to the NEDA Guidelines, consistent with the mandate of the PCC.

Section 2. Coverage. This Circular shall apply solely to JV projects undertaken by agencies and instrumentalities of the government (each an Agency) with private sector entities, pursuant to the NEDA Guidelines.

For purposes of this Circular, all capitalized terms shall have the same meaning ascribed in the PCA, the PCA-IRR, and the NEDA Guidelines.

Section 3. Procedure of review. Agencies may seek exemption from compulsory notification in behalf of their prospective bidders or proponent by filing an application for a Certificate of Project Exemption from the PCC, subject to PCC's review of the JV project in terms of: (1) the nature and scope of the project; (2) the bidding design and process; and (3) competition concerns that may arise from the nature and/or composition of prospective bidders and the winning Project Proponent and, if necessary, the PCC shall render advisory opinion/s and require undertakings.

In order to qualify for the exemption, the application shall be made prior to (i) the issuance of the Invitation to Apply for Eligibility and to Submit a Proposal under the Competitive Selection process or (ii) the issuance of Certification of Successful Negotiation or Conferment of Original Proponent Status for Negotiated JVs. PCC shall review the project and provide its inputs for a period not exceeding thirty (30) calendar days from receipt of complete documents and information.

The processing of the JV project by the Agency shall continue while the PCC's review is ongoing.

Section 3. Inputs to the project documents. The PCC may provide inputs on the selection or tender documents, instructions to private sector participants, feasibility study, draft JV agreement, JV proposal, and other related documents for review ("Project Documents"). Particularly, the feasibility study and/or the JV proposal submitted to the PCC shall include the following information:

1. A description of the supply chain of the market/s affected by the project;
2. A description of the products or services to be provided through the project;
3. A description of the geographic or catchment area where the project will operate;
4. Identification of potential competitors (or entities that provide or may provide substitutable products or services with the project) and their corresponding market shares;
5. A description of the target users or consumers of the products or services to be provided through the project (demographics);
6. Policy and regulatory framework of the market/s affected by the project;
7. Alternatives available to suppliers and users of the project;

8. Barriers to entry into the market/s affected by the project; and
9. Other information on industry structure and prevailing conditions of the market.

The PCC may provide inputs on how the project may affect competition in the market(s) affected by said project, using the substantive standards and practices as provided under the PCC Merger Review Guidelines and other PCC related issuances.

In addition to its inputs to the Project Documents, PCC may require undertakings to be complied with by the prospective bidders, likewise to be incorporated in the Project Documents (“Undertakings”). The Undertakings shall refer to a list of commitments that the PCC requires to be complied with by the the prospective bidders, which will address any potential competition issues identified by the PCC.

In cases where PCC finds that the documents submitted by the Agency are insufficient for a thorough review of the project, PCC may request additional information or documents from the Agency or the Project Proponent, as necessary.

Section 4. *Exemption from compulsory notification.*

Within fifteen (15) days from submission to the PCC of the final Project Documents evidencing observance of the above procedures and adoption of PCC’s inputs, counted from the date of submission of the last Project Document, the PCC shall issue a Certificate of Project Exemption in favor of the prospective winning bidder; *Provided that*, should PCC require Undertakings to be executed by prospective bidders pursuant to its inputs, the PCC shall issue the Certificate of Project Exemption within ten (10) days from submission by the prospective bidders of their executed Undertakings; *Provided further*, that the period for issuance of the Certificate of Project Exemption shall start to run from the date of last submission by a prospective bidder.

The PCC shall not be precluded from exercising its mandate to: (a) require the winning bidder to notify; and (b) conduct full review of such transaction, in cases where the PCC’s inputs were not implemented by the Agency, or was secured on the basis of fraud or false material information, or where the required Undertakings were not duly executed by the prospective bidders, or in the event of substantial changes to the project subsequent to the PCC’s review.

The PCC may, upon its discretion, commence a *motu proprio* review of the project in the event that a winning bidder violates any of its commitments under its Undertakings to the PCC.

Section 5. *Monitoring and reporting of compliance.*

The PCC, with the assistance of NEDA, shall monitor compliance by the Agency and winning Project Proponent to the terms and conditions of their contract, particularly its provisions which may affect competition in the Philippine markets.

The PCC may require the Agency and the winning Project Proponent, as the case may be, to submit periodic reports or conduct separate, independent inspections to ascertain compliance with the PCA, its implementing rules and regulations and other issuances relating to competition and prohibition of anti-competitive conduct.

Section 6. *Effectivity.*

This Memorandum Circular shall enter into force and take effect fifteen (15) days from publication in a newspaper of general circulation or the Official Gazette.

Quezon City, Philippines, _____ 2020.

Arsenio M. Balisacan
Chairman

Johannes Benjamin R. Bernabe
Commissioner

Amabelle C. Asuncion
Commissioner

Macario R. De Claro, Jr.
Commissioner

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