
PCC MEMORANDUM CIRCULAR NO. 20-002

Subject: PROCESS FOR EXEMPTION FROM COMPULSORY NOTIFICATION IN UNSOLICITED PUBLIC-PRIVATE PARTNERSHIP (PPP) PROJECTS

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, R.A. 6957, as amended by R.A. 7718 (Build-Operate-and-Transfer [“BOT”] Law), mandates that the Government shall provide the most appropriate incentives to mobilize private resources in the financing of infrastructure projects, and that such incentives shall include providing a climate of minimum government regulations and procedures. In addition, Executive Order No. 8, series of 2010, as amended, identifies PPP projects as the cornerstone strategy to accelerate infrastructure development and recognizes the need to fast-track the implementation of PPP projects;

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 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 winning bidder/s in unsolicited PPP projects form a joint venture, 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 PPP projects should be transparent, competitive, and timely, the PCC recognizes the necessity of a coordinated approach in reviewing PPP projects falling under the PCA’s mandatory notification and review requirements;

Whereas, on July 20, 2018, a Memorandum of Understanding was executed by the PCC and the PPP Center, where it was agreed, among others, that guidelines for the facilitation and review of PPP projects and in furtherance of the effective exercise of their respective mandates, shall be formulated;

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 of private entities formed for an unsolicited PPP project, consistent with the mandate of the PCC and the objectives of the BOT Law.

Section 2. Coverage. This Circular shall apply solely to Unsolicited Projects (“USP”) undertaken by agencies and instrumentalities of the national government (each an Agency), pursuant to the BOT Law and its Implementing Rules and Regulations (“IRR”).

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

Section 3. Procedure of review. Agencies may seek exemption from compulsory notification in behalf of the prospective bidders by filing an application for a Certificate of Project Exemption from the PCC, subject to PCC’s review of the USP 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 the Original Proponent (“OP”) 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 the commencement of the Negotiation Stage with the OP (“Negotiation Stage”) under Section 10.8 of the IRR of the BOT Law and Section 12 of PPP Resolution No. 2017-08-03, subject to the requirements in Section 3.1 of this Circular. PCC shall review the project and provide its inputs during the Negotiation Stage for a period not exceeding sixty (60) calendar days from receipt of complete documents and information.

The processing of the USP by the Agency shall continue while the PCC’s review is ongoing. The Agency may, at any stage, consult with the PCC on matters affecting competition in the markets affected by the USP.

3.1 *Project Evaluation Stage.*

During the Project Evaluation Stage of the USP¹, the Agency must submit the Feasibility Study (“FS”) to the PCC, which shall contain the following information:

1. A description of the supply chain of the market/s affected by the Unsolicited Proposal;
2. A description of the products or services to be provided through the Unsolicited Proposal;
3. A description of the geographic or catchment area where the Original Proponent will operate;
4. Identification of potential competitors (or entities that provide or may provide substitutable products or services with the Unsolicited Proposal) and their corresponding market shares;
5. A description of the target users or consumers of the products or services to be provided through the Unsolicited Proposal (*i.e.*, demographics);
6. Policy and regulatory framework of the market/s affected by the Unsolicited Proposal;
7. Alternatives available to suppliers and users of the Unsolicited Proposal;
8. Barriers to entry into the market/s affected by the Unsolicited Proposal; and
9. Other information on industry structure and prevailing conditions of the market.

A copy of the OP’s draft Unsolicited Contract, Pre-Qualification Documents, and other related documents for review (“Project Documents”) shall likewise be submitted to the PCC prior to the commencement of the negotiations with the OP under Section 3.2.

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

Pursuant to Section 2.1 of the PPP Center-PCC MOA, the PPP Center, upon the request of PCC, shall facilitate obtaining the clearance of the relevant Agencies to provide the latter access to information and documents within the former’s custody, which are relevant and necessary to the effective enforcement of the objectives of these guidelines.

¹ Section 10.7 of the IRR of the BOT Law and Section 8 of PPP Resolution No. 2017-08-03.

3.2 *Negotiation Stage with the Original Proponent.*

The PCC may provide inputs on how the draft Unsolicited Contract, Pre-Qualification Documents, and other related Project Documents for review may affect competition in the market(s) affected by the 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 winning Project Proponent, 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 winning Project Proponent, which will address any potential competition issues identified by the PCC.

Within seven (7) days from the issuance of a certification of successful negotiation, the Agency must submit copies of the final Project Documents to the PCC.

In case of an unsuccessful negotiation or substitution of any of the members of an OP or if the USP is bid out as a solicited proposal or the Agency accepts a new USP, the Agency must apply for a new Certificate of Project Exemption observing the relevant PCC issuances.

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 Agency; *Provided that*, should PCC require an Undertaking to be executed by the winning Project Proponent pursuant to its inputs, the PCC shall issue the Certificate of Project Exemption within ten (10) days from submission by the winning Project Proponent of their executed Undertaking.

The PCC shall, at its discretion, commence a *motu proprio* review of the project in the event that a winning Project Proponent violates any of its commitments under its Undertakings to the PCC.

Section 5. *Application of compulsory notification and merger review under the PCA.* 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 winning Project Proponent, or in the event of substantial changes to the USP subsequent to the PCC’s review, the PCC shall not be precluded from exercising its mandate to: (a) require the winning Project Proponent to notify; and (b) conduct full review of such transaction.

Section 6. *Monitoring and reporting of compliance.* The PCC, with the assistance of the PPP Center, shall monitor compliance by the implementing 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 7. *Effectivity.* These Guidelines shall enter into force and take effect immediately fifteen (15) days from publication in a newspaper of general circulation or the Official Gazette.

Quezon City, Philippines, --- 2020.

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