

PCC MEMORANDUM CIRCULAR NO. 20-002

Subject: **PROCESS FOR EXEMPTION FROM COMPULSORY NOTIFICATION OF 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 (“PCA-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 PCA-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 PCA-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 met under Rule 4, Section 3 of the PCA-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 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 from compulsory notification 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 (“BOT-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 Original Proponent (“OP”) and prospective bidders (collectively, prospective bidders) by filing an application for a Certificate of Project Exemption with 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 prospective bidders or the winning Project Proponent, and, if necessary, the PCC shall render advisory opinion/s and require undertakings to address competition concerns, if any.

In order to qualify for the exemption, the application shall be made any time from the commencement of the negotiations with the Original Proponent but prior to the issuance of a Certificate of Successful Negotiation under Section 10.8 of the BOT-IRR.

After receipt of an Agency’s application, the PCC shall determine whether all Project Documents¹ have been submitted. Upon complete submission by the Agency of all the Project Documents, the PCC shall issue a Notice of Sufficiency within seven (7) working days stating that it shall commence review of the application on the next working day. Otherwise, PCC shall issue a notice to the concerned Agency of any additional documents or information that must be submitted with the application.

PCC shall review the application and Project Documents, and provide its inputs for a period not exceeding twenty (20) working days from issuance of the Notice of Sufficiency (“Review Period”). However, notwithstanding the expiration of the Review Period, PCC shall be given ten

¹ As defined in Section 4 of this Circular.



(10) calendar days from receipt to provide its inputs to the most recent draft Unsolicited Contract under Section 10.9 of the BOT-IRR.

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.

Section 4. Inputs to the Project Documents. The PCC may provide inputs on the tender documents, feasibility study, draft Unsolicited Contract, project proposal, eligibility documents and other related documents for review ("Project Documents"). Particularly, the feasibility study submitted to the PCC shall include 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.

The PCC may provide inputs on how the project may affect competition in the market(s) affected by the Unsolicited Proposal, 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.

During the Review Period, PCC may request additional information or documents from the Agency, 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 this Circular.



Section 5. Exemption from compulsory notification. Within seven (7) working 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 Project Proponent; *Provided that*, should PCC require Undertakings to be executed by the prospective bidders pursuant to its inputs, the PCC shall issue the Certificate of Project Exemption within seven (7) working 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, 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 6. 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 USP² 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.

Applications filed beyond the period provided under Section 3 of this Circular are not qualified for exemption from compulsory notification under the PCA and the PCA-IRR.

Section 7. Unsuccessful negotiation or modifications. 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 8. 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 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 9. Effectivity. This Circular shall take effect fifteen (15) calendar days after the date of publication in a newspaper of general circulation.

² Substantial changes include, but is not limited to, changes in the composition or identity of the winning Project Proponent, subsequent transfers or assignments of the assets of the winning Project Proponent, changes in the parameters of the project which impacts the competition issues identified.



Quezon City, Philippines, 16 June 2020.


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