

PCC MEMORANDUM CIRCULAR NO. 19-001

Subject: **PROCESS FOR EXEMPTION FROM COMPULSORY NOTIFICATION IN SOLICITED 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 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 20 July 2018, a Memorandum of Understanding was executed by the PCC and the PPP Center (the “PPP Center-PCC MOU”), 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;



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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 a 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 Solicited Projects undertaken by agencies and instrumentalities of the 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 their Solicited Project’s prospective bidders by filing an application for a Certificate of Project Exemption from the PCC, subject to PCC’s review of the Solicited 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 the Project Development Stage under Section 3.1 of this Circular. PCC shall review the project and provide its inputs under the Project Procurement Stage or Section 3.2 of this Circular, for a period not exceeding thirty (30) calendar days from receipt of complete documents and information. However, if the application is made after 3.1 but prior to the Project Procurement Stage under 3.2, the PCC may allow the application to proceed, provided that it will be entitled to a total of sixty (60) days to provide its inputs under 3.2.

The processing of the PPP project by the Agency and the PPP Center shall continue while the PCC’s review is ongoing.

The PCC’s review of the project shall proceed in accordance with the following stages:

3.1. Project development stage.

During project development stage, the PCC may provide inputs on the terms of reference (TOR) of the transaction advisor (TA) or consultant to be procured by the



Agency for the development of the project feasibility study (“FS”). The Agency shall provide PCC a copy of the completed FS which shall include the following information:

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

3.2. Project procurement stage.

Agencies shall provide PCC a copy of the Solicited Project’s draft Pre-Qualification Documents, Bidding Documents, draft PPP Contract, and other related documents for review (“Project Documents”).

The PCC may provide inputs on how the Pre-Qualification Documents, Bidding Documents, PPP Contract, and other related 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 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 PPP Center or the Project Proponent, as necessary.

Pursuant to Section 2.1 of the PPP Center-PCC MOU, 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.

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 the 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 PPP 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 the PPP Center, 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, 2 July 2019.




Arsenio M. Balisacan
Chairman


Johannes Benjamin R. Bernabe
Commissioner


Amabelle C. Asuncion
Commissioner

(On Official Business)
Macario R. De Claro, Jr.
Commissioner

