

REVISED GUIDELINES AND PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AGREEMENTS BETWEEN GOVERNMENT AND PRIVATE ENTITIES

- 1.0 **Legal Basis.** These revised Guidelines are being issued pursuant to Section 8 (Joint Venture Agreements) of Executive Order (EO) No. 423 dated 30 April 2005, which mandates the National Economic and Development Authority (NEDA), in consultation with the Government Procurement Policy Board (GPPB), to issue the necessary guidelines on Joint Ventures (JVs). The Office of the Government Corporate Counsel (OGCC) and the Governance Commission for Government-Owned and/or Controlled Corporations (GCG) were likewise consulted in the revision of the Guidelines. The proposed revisions were deliberated and subsequently approved by the NEDA Board Committee on Infrastructure (INFRACOM) and the Economic Development Cluster (EDC).
- 2.0 **Principles.** The Government shall enter into a JV arrangement consistent with the following principles:
- 2.1 The creation of the JV should not prevent potential players from profitably entering into business venture/market;
 - 2.2 The cost of producing the particular product, activity, or service should be efficient or potentially efficient towards earning potential profits for government and the market player/private sector partner;
 - 2.3 The role of government as regulator of the business of the JV should be clearly and explicitly delineated from its role as implementer of the business to avoid conflicts of interest;
 - 2.4 As differentiated from projects procured under Official Development Assistance (ODA), Government Procurement Reform Act (GPRA), and Build-Operate-and-Transfer (BOT) Law except for the Build-Operate-and-Own (BOO) scheme and similar schemes under the BOT Law, where generally ownership of the asset/business will stay with the government, JV Agreements allow the private sector to take over the undertaking of the projects in its entirety after the government divests itself of any interest in the JV; and
 - 2.5 Accountability for the JV project ultimately devolves on the Head of the Government Entity involved in the JV Agreements and the implementation of the JV project. The private parties dealing with the Government are similarly held accountable for all their actions relative thereto.
- 3.0 **Purpose.** These Guidelines are being formulated to meet the following objectives:
- 3.1 To prescribe the rules, guidelines and procedures forging JV Agreements between government corporations as defined under Section 4.0 below, and private entities;
 - 3.2 To encourage pooling of resources and expertise between government and private sector entities through JVs as a viable, efficient, and practical alternative in pursuing development goals of the government; and
 - 3.3 To ensure that all JV Agreements are entered into under the policy that all government contracts shall be awarded through a transparent process.
- 4.0 **Coverage.**
- 4.1 These guidelines shall apply to all government-owned and/or controlled corporations (GOCCs), government corporate entities (GCEs), government instrumentalities with corporate powers (GICPs), government financial institutions (GFIs), state universities and colleges (SUCs), as defined under Section 5.0.
 - 4.2 These Guidelines shall not apply to the following:
 - a. Transactions of GFIs in the ordinary course of business as part of their normal and ordinary banking, financial or portfolio management operations;
 - b. JV activities of government corporate entities in the exercise of their primary mandate to dispose government assets or properties; and
 - c. JV activities or undertakings of the Local Government Units (LGUs).
- 5.0 **Definition of Terms.**
- 5.1 **Competitive Challenge.** An alternative selection process wherein third parties shall be invited to submit comparative proposals to a negotiated JV either initiated by a private sector proponent or, by the government in case it has failed to identify an eligible private sector partner for a desired activity after subjecting the same to a competitive selection as provided under Section VIII.9 of Annex "A" hereof. Accordingly, the private sector entity that submitted the negotiated proposal is accorded

the right to outbid, through a superior financial bid, any comparative financial offers given by comparative private sector participants who have met the eligibility requirements and have passed the technical qualification process.

- 5.2 **Competitive Selection.** Refers to a process of selection by a Government Entity of a JV Partner(s), based on transparent criteria, which should not constrain or limit competition, and is open to participation by any interested and qualified private entity.
- 5.3 **Contractual JV.** A legal and binding agreement under which the JV Partners shall perform the primary functions and obligations under the JV Agreement without forming a JV Company.
- 5.4 **Cost of JV Activity/Project.** Refers to the total amount of the contributions of the parties to the JV activity/project in present value with discount rate as prescribed by the appropriate Approving Authority.
- 5.5 **Government Entity.** Refers to GOCCs, GCEs, GICPs, SUCs, and GFIs, created by law, executive issuances, or pursuant to Batas Pambansa Bilang 68, otherwise known as the Corporation Code of the Philippines, as amended, and defined under Republic Act (RA) No. 10149, otherwise known as the GOCC Governance Act of 2011, among others.
- 5.6 **Head of Government Entity.** Refers to the governing board or its duly authorized official for GOCCs, GCEs, GICPs, SUCs, and GFIs.
- 5.7 **Joint Venture (JV).** An arrangement whereby a private sector entity or a group of private sector entities on one hand, and a Government Entity or a group of Government Entities on the other hand, contribute money/capital, services, assets (including equipment, land, intellectual property or anything of value), or a combination of any or all of the foregoing to undertake an investment activity. The investment activity shall be for the purpose of accomplishing a specific goal with the end view of facilitating private sector initiative in a particular industry or sector, and eventually transfer the activity to either the private sector under competitive market conditions or to the government. The JV involves a community or pooling of interests in the performance of the investment activity, and each party shall have the right to direct and govern the policies in connection therewith with the intention to share both profits and risks and losses subject to agreement by the parties. A JV may be a Contractual JV or a Corporate JV (JV Company).
- 5.8 **JV Company.** A stock corporation incorporated and registered in accordance with the provisions of Batas Pambansa Bilang 68, otherwise known as the Corporation Code of the Philippines, as amended, and based on the prevailing rules and regulations of the Securities and Exchange Commission (SEC) of which fifty percent (50%) or less of the outstanding capital stock is owned by the government. The JV Company shall be registered by the JV partners that shall perform the primary functions and obligations of the JV as stipulated under the JV Agreement. The JV Company shall possess the characteristics stipulated under these Guidelines.
- 5.9 **Infrastructure or Development Projects.** Include, but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroad and railways, transport systems, land reclamation projects, industrial estates or townships, commercial/real estates, housing, government buildings, tourism projects, public markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging and other infrastructure and development projects as may be authorized by the Government Entity pursuant to these Guidelines.
- 5.10 **Negotiated JV.** Refers to a proposal initiated by a private sector proponent or, by the government in case it has failed to identify an eligible private sector partner for a desired activity after subjecting the same to a competitive selection as provided under Section VIII.9 of Annex "A" hereof. The procedure for negotiated proposals is provided under Annex "B" of these Guidelines.
- 5.11 **Public Utility Projects.** Refers to projects or facilities that provide public services as defined under the Commonwealth Act No. 146 (Public Service Law), as amended, and for which a franchise is required.

6.0 **General Guidelines.**

- 6.1 JV Agreements entered into by the Government Entity concerned with the private sector partner, whether through contractual agreement or through the formation of a JV Company (Corporate JV) as provided in these Guidelines, should be clear in its intent to undertake a specific activity that is responsive to national development goals and objectives.
- 6.2 The JV Company shall be formed by the Government Entity and the private sector entity under the following parameters:
 - a. The JV Company shall be incorporated and registered as a stock corporation in accordance with the provisions of Batas Pambansa Bilang 68, otherwise known as the Corporation Code of the Philippines, as amended, and the prevailing and applicable rules and regulations promulgated by the SEC;
 - b. Ownership and nationality requirements under the Constitution and other pertinent laws should be complied with; provided, that the Government Entity's equity contribution in the JV Company shall be fifty percent (50%) or less of the outstanding

capital stock of the latter. Government's contribution may be through assets (including money, equipment, land, intellectual property or anything of value) which shall be subject to a third party independent valuation. For as long as the Government Entity is involved in the JV undertaking, the private sector party shall not sell/transfer its interest in the JV Company without the express written consent of the Government Entity;

- c. The Government Entity shall be represented in the Board of the JV Company in proportion to its investment;
 - d. The JV Company shall be permitted to derive income from the activities authorized under the JV Agreement during the term thereof. The Government Entity and the private sector partner shall be entitled to receive dividends each year from the net profits that would constitute portion of the unrestricted retained earnings of the company in each year in accordance with the JV Agreement;
 - e. The JV Company should stipulate a fixed period for term of existence not to exceed a maximum of fifty (50) years pursuant to the Corporation Code of the Philippines, as amended, for the participation of the Government Entity as determined by the attainment of the Government Entity's objective in pursuing the investment, upon which the Government Entity may divest its interest in the JV Company based on existing laws, rules and regulations. Further, the withdrawal of the Government Entity's capital contribution before the expiration of the said period is likewise encouraged; provided, that the divestment is made through competitive selection, initial public offering (IPO), or any other means that promote competition, fairness and transparency; and
 - f. In drafting the incorporation documents of the JV Company and other contracts governing the relationship between the Government Entity and the private sector participant, the parties should consider the following guidelines, among others: (1) clearly defined business objectives; (2) specified degree of participation and the management roles of each party in the JV activity; (3) defined contribution of capital and ownership rights to property; (4) specified division of the profits, risks and losses; (5) identified dispute mechanism to avoid management impasses that may produce deadlock or litigation; (6) specified termination/liquidation of the JV Company and indicate buy-out provisions; (7) specified confidentiality terms; and (8) stipulated indemnification mechanisms.
- 6.3 If the formation of a JV Company is not the best mode to implement a JV activity as determined by the Government Entity, it may opt to implement the JV project through a contractual agreement. Prior to entering into a Contractual JV, the parameters similar to those governing JV Companies under Section 6.2.f herein are to be observed.
- 6.4 The ownership of the JV project/facility may be transferred to either the Government Entity or the private sector partner after the expiration of the JV Agreement depending on the terms stated therein; provided that, pursuant to Section 7.2.a of these Guidelines, JV projects which involve full divestment or transfer of ownership of government assets or properties to a private sector partner or a private sector/entity shall be approved/cleared by the Privatization Council (PC), and JV projects which involve divestment of government equity that is not in the form of asset or property shall be approved/cleared by the GCG.
- 6.5 As may be applicable, the procurement activities financed by the Government Entity or Government of the Philippines (GOP) regardless of source of funds, whether local or foreign, shall comply with RA No. 9184, otherwise known as the GPRA and its Revised Implementing Rules and Regulations (IRR). The JV activity shall also comply with other laws, rules and regulations, guidelines, and legal issuances on procurement, as may be applicable.
- 6.6 A JV activity shall be subject to audit examination under existing laws, rules and regulations, and other legal issuances.
- 6.7 A JV activity may be entitled to investment incentives as may be approved by the Board of Investments (BOI) as provided for under EO No. 226, otherwise known as "The Omnibus Investment Code of 1987". As may be applicable, a JV activity may also be entitled to investment incentives under other existing laws.
- 6.8 For JVs involving government assets or properties, the JV contract/agreement may be terminated/rescinded if the private sector partner fails to deliver or perform any major obligation/s prescribed in the JV contract/agreement, e.g., construction of the proposed building/s within the period specified in the JV contract/agreement. In such cases, the Government Entity concerned may likewise forfeit the performance security of the private sector partner.
- 6.9 Consistent with EO No. 79 dated 06 July 2012, JVs under the mining sector shall be undertaken through competitive public bidding.

7.0 Process for Entering into JV Agreements.

- 7.1 Requirements/Conditions for JV Proposals. JV proposals shall comply with the following requirements/conditions:
- a. The JV activity is within the mandate and charter of the Government Entity concerned;
 - b. The JV activity is responsive in meeting national or specific development goals and objectives;

- c. The JV proposal clearly describes the proposed investment, including its total cost, activities, objectives, sources of funding, extent and nature of the proposed participation of the Government Entity concerned, and the relevant terms and conditions;
- d. The JV proposal establishes all the components in determining the over-all feasibility of the JV proposal which include, among others, the technical, financial, economic, and legal aspects; and
- e. The terms and conditions of the approval of the PC, if applicable.

7.2 Approval of JV Proposals. The approval of JV proposals shall be in accordance with the following:

- a. Prior to submission of a JV proposal to the Approving Authority as indicated in this Section, approval from concerned entities shall be secured as indicated below:
 - i. Projects which involve divestment or transfer of government assets or properties to the private sector partner or a private sector/entity shall be required to secure approval/clearance from the PC pursuant to EO No. 12 dated 14 August 1998, as amended by EO No. 323 dated 06 December 2000;
 - ii. Projects which involve the formation of a JV company shall be required to secure approval from GCG pursuant to RA No. 10149, otherwise known as the GOCC Governance Act of 2011; and
 - iii. Projects which involve divestment of government equity that is not in the form of asset or property shall be required to secure approval from GCG pursuant to RA No. 10149, otherwise known as the GOCC Governance Act of 2011.
- b. For the following projects, the Approving Authority shall be the NEDA Board Investment Coordination Committee (ICC):
 - i. Infrastructure projects as defined under Section 5.9 of these Guidelines with government contribution amounting One Hundred Fifty Million Pesos (PhP 150 Million) and above;
 - ii. Projects that are public utilities as defined under Section 5.11 of these Guidelines with government contribution amounting One Hundred Fifty Million Pesos (PhP 150 Million) and above;
 - iii. Negotiated JVs that are initiated by a private sector proponent with government contribution amounting One Hundred Fifty Million Pesos (PhP 150 Million) and above; and
 - iv. Projects that are not related to primary corporate mandate with government contribution amounting One Hundred Fifty Million Pesos (PhP 150 Million) and above.
- c. For the following projects, the Approving Authority shall be the Head of the Government Entity concerned:
 - i. Projects that are related to primary corporate mandate and not involving infrastructure projects as defined under Section 5.9 of these Guidelines; and
 - ii. Projects not covered under Section 7.2.b of these Guidelines.
- d. Project proposals that shall be submitted to NEDA ICC for approval as indicated in this Section should include the following: (i) endorsement of the JV proposal by the Head of the Government Entity concerned; (ii) project details; (iii) draft JV Agreement; and (iv) other documents and requirements as may be determined by the NEDA ICC pursuant to its guidelines. The Government Entity concerned shall furnish the Department of Finance (DOF) all the documents submitted to the NEDA ICC for the approval of a JV proposal;
- e. The Approving Authority shall act on the JV proposal within a period of thirty (30) calendar days upon submission of complete documents.

7.3 Clearance/Approval of DOF and Department of Budget and Management (DBM). For JV activity that will require national government undertakings, subsidies or guarantees, clearance/approval of the DOF and/or the DBM, as the case may be, shall be secured.

7.4 Approval for Registration of JV Company. All JV proposals which involve the pursuit of the project through a JV Company shall be submitted to the GCG for review and recommendation to the President of the Philippines for approval before registering the same with the SEC pursuant to Section 27 of RA No. 10149.

7.5 Modes of Selecting a JV Partner

- a. Competitive Selection – The process for the conduct of Competitive Selection, contract award and approval shall be stipulated under Annex “A” of these Guidelines. In the conduct of the Competitive Selection process, the Government Entity shall ensure the following:

- i. All activities during the competitive selection, award, and approval are conducted in a transparent and competitive process that promotes accountability and efficiency; and
 - ii. The competitive selection parameters are clearly defined and shall include the parameters as approved by the Approving Authority.
- b. Negotiated JVs – Negotiated JVs may be entered under the circumstances stated under Annex “B” of these Guidelines.
- 7.6 **Approval of the JV Agreement.** Upon approval of the JV proposal by the Approving Authority, the Head of the Government Entity concerned shall approve the draft contract or JV Agreement. The Head of the Government Entity concerned shall be responsible for ensuring the consistency of the tender/bid parameters and the draft contract or JV agreement with the parameters, terms and conditions set forth by the Approving Authority.
- 7.7 **Deviations and Amendments to the JV Agreement.** The concerned Government Entity shall not proceed with the award and signing of the contract if there are material deviations from the parameters and terms and conditions set forth in the proposal/tender documents that tend to increase the financial exposure, liabilities and risks of government or any other factors that would cause disadvantage to government and any deviation that will cause prejudice to losing private sector participants. Said material deviations and amendments shall be subjected to the approval requirements under Sections 7.2, 7.3, and 7.4 hereof. The Head of the Government Entity concerned shall be responsible for compliance with this policy. Violation of this provision shall render the award and/or the signed JV Agreement invalid.

Any amendment to a JV Agreement after award and signing of contract shall undergo approval by the appropriate Approving Authority as provided in Sections 7.2, 7.3, and 7.4 of these Guidelines. Noncompliance with the corresponding approval process stated shall render the amendment null and void.

- 8.0 **Reporting Requirement.** During the course of implementation of the JV Agreement, the concerned Government Entity shall submit an annual report on the status of its implementation during a current year to the DOF and GCG for monitoring purposes. The annual report shall be submitted within the first quarter of the succeeding year and may be in any format, electronic/digital copy or hard copy, as may be required by DOF and GCG. The report shall use current standards in the production of corporate annual reports and shall include the audited financial statements of the JV. In addition, the report shall also contain the JV's work program for a period as specified and required by DOF starting from the year the annual report is issued.

The heads of government entities as defined in Section 5 of these Guidelines, shall submit to NEDA, DOF and GCG the salient features and a copy of JV Agreements together with all documents required thereto for monitoring of compliance with relevant policies, procedures and conditions for approval of the JV undertaking.

- 9.0 **Amendments.** These Guidelines may be amended and/or modified from time to time by NEDA through its Director-General, in consultation with the GPPB, the OGCC, and the GCG.
- 10.0 **Separability.** If any provision of these Guidelines is held or declared void or unenforceable by final judgment of a court of competent jurisdiction, the other provisions unaffected thereby shall remain in full force and effect.
- 11.0 **Effectivity.** These Revised Guidelines and any subsequent amendment or modification shall take effect fifteen (15) calendar days from the date of its publication in a newspaper of general circulation or the Official Gazette or other modes legally acceptable, and a copy of it shall be submitted to the Office of the National Administrative Registry (ONAR) and the University of the Philippines (UP) Law Center.
- 12.0 **Transitory Provision.** The following shall be governed by the old Guidelines (2008 JV Guidelines): (a) All negotiated JVs wherein a JV contract/agreement between the winning private sector participant and the Government Entity concerned has been executed prior to effectivity of the Revised JV Guidelines; and, (b) All JVs undertaken through competitive selection wherein the bid/s have already been opened prior to the effectivity of these Revised JV Guidelines.

For JVs not covered under items (a) and (b) above, these Revised JV Guidelines shall govern, provided that the Revised Guidelines shall not, in any manner, operate to impair vested rights already accruing to a party.

ANNEX A

DETAILED GUIDELINES AND PROCEDURES FOR COMPETITIVE SELECTION FOR PUBLIC-PRIVATE JOINT VENTURES

I. The Joint Venture Selection Committee (JV-SC)

1. **Composition.** The Head of the Government Entity shall create a JV-SC for purposes of selecting a private partner for a proposed JV. The JV-SC shall be composed of the following:

Regular Members (voting):

- a. Chairman – At least a third ranking officer of the Government Entity;
- b. Secretary – Any legal officer of the concerned Government Entity;
- c. One (1) officer knowledgeable in finance;
- d. One (1) officer knowledgeable in management/operation of the JV; and
- e. One (1) officer knowledgeable with the technical aspects or requirements of the project, duly designated by the Head of the Government Entity concerned on a project-to-project basis.

Provisional Members (non-voting):

- f. One (1) technical officer from a concerned regulatory body, when applicable, knowledgeable with the project at hand, to be invited by the Government Entity concerned on a project-to-project basis; and
- g. Observers:
 - i. One (1) representative from the Government Entity's statutory counsel (OGCC or the Office of the Solicitor-General [OSG] or as designated by the Department of Justice [DOJ]);
 - ii. Two (2) representatives from the private sector – one (1) representative from a duly recognized association related to the project at hand, and one (1) representative from either the facility users, if applicable, or duly recognized accounting associations; and
 - iii. One (1) representative from the Commission on Audit (COA).

Observers will be notified at least two (2) calendar days before the following stages: pre-selection conference, opening of technical and financial proposals, evaluation of technical and financial proposals, contract award, and special meetings of the JV-SC. The absence of observers will not nullify the JV-SC proceedings, provided that they have been duly invited in writing.

2. **Responsibilities.** The JV-SC shall be responsible for all aspects of the pre-selection and selection process, including, among others, the preparation of the selection/tender documents, publication of the invitation to apply for eligibility and to submit a proposal, pre-qualification of prospective private sector participants, conduct of pre-selection conferences and issuance of supplemental notices, interpretation of the rules regarding the selection process, the conduct of the selection process, evaluation of the financial and technical proposals, resolution of disputes between private sector participants, and recommendation for the acceptance of the proposal and/or for the award of the contract.
3. **Quorum.** A quorum of the JV-SC shall be composed of a simple majority of all voting members. The Chairman shall vote only in case of a tie.

II. Selection/Tender Documents

1. **Selection/Tender Documents.** The Government Entity concerned shall prepare the selection/tender documents which shall include the following:
 - a. Instructions to Private Sector Participants;
 - b. Minimum Design, Performance Standards/Specifications, and other Financial and Economic Parameters, where applicable, among others;

- c. Feasibility Study or a Business Case/Pre-feasibility Study of the Project;
- d. Draft Contract (as approved in accordance with Section 7.6 of these Guidelines) reflecting the terms and conditions in undertaking the JV activity including, among others, the contractual obligations of the contracting parties and the ownership of the JV activity, project, or property after the termination of the JV Agreement;
- e. Selection Form reflecting the required information to properly evaluate the technical and financial proposal;
- f. Forms of technical and financial proposals and performance securities; and
- g. Other documents as may be required by the Government Entity concerned and other requirements of concerned regulatory agencies as may be pertinent or applicable to the JV activity.

The documents enumerated above are just for guidance/reference. The Government Entity concerned is given full discretion to select the appropriate provisions as they may deem suitable for a particular contract/project.

2. **Instructions to Private Sector Participants.** The instructions to private sector participants, which establish the rules of the selection process, shall be clear, comprehensive and fair to all private sector participants and shall, as far as necessary and practicable, include the following information:

- a. General description and objectives of the JV activity;
- b. Proposal submission procedures and requirements, which shall include information on the manner of proposal submission, the number of copies of the technical and financial proposal to be submitted, where the proposals are to be submitted, the deadline for the submission of proposals, permissible mode of transmission of technical and financial proposals, etc.;
- c. Amount and form of proposal security and proposal security validity period;
- d. Milestones;
- e. Method, parameters and criteria for the evaluation of the proposals;
- f. Minimum amount of equity of the prospective JV Partner;
- g. Requirements of concerned regulatory bodies/agencies as may be pertinent or applicable to the JV activity;
- h. Revenue sharing arrangement, if any; and
- i. Nationality and ownership requirements as required by law.

3. **Minimum Designs, Performance Standards/Specifications and Economic Parameters.** Minimum design and performance standards/specifications, including appropriate environmental standards by the Department of Environment and Natural Resources (DENR), and standards by concerned regulatory agencies as may be pertinent or applicable to the JV activity, shall be clearly defined and shall refer more to the desired quantity and quality of the outputs of the JV activity and should state that non-conformity with any of these minimum requirements shall render the proposals as non-responsive. Likewise, for the purpose of evaluating proposals, the following economic parameters, among others and where applicable, shall be prescribed:

- a. Discount rate, foreign exchange rate and inflation factor;
- b. Maximum period of project construction;
- c. Fixed term and price indices to be used in the adjustments of tolls/fees/rentals/charges, if applicable; and
- d. Minimum period of repayment, if applicable.

4. **Draft Contract.** The draft contract should clearly define the basic and legal relationship between the parties and their rights and responsibilities including specific Government Undertakings to be provided by the Government Entity relative to the JV activity, if any. Specifically, the draft contract shall also contain provisions on the following matters, as far as practicable:

- a. The date on which the agreement is established, executed, and considered effective;
- b. The names, addresses and identification of the parties, including the type of business of each member of the JV;
- c. The name under which the JV will do business;
- d. The principal place of business of the JV;

- e. Clearly defined purpose and objective/s, contractual/agreement mode (whether JV Company/Corporate JV or contractual JV), term and scope of the JV. The term should be a fixed period not to exceed a maximum of fifty (50) years for the participation of the Government Entity as determined by the attainment of the Government Entity's objective in pursuing the investment;
- f. Total cost of the JV activity, project specifications and features;
- g. The relationship between the parties, management roles of each party in the JV activity, and a statement that the parties are actually co-venturers for the project, whether or not the contract is in the name of all members;
- h. The establishment of a fund by the parties to finance the work, together with the amount, type (cash, assets, etc.), and valuation of committed contributions of each party and when such contributions will be made, with the fund being deposited in a special bank account under dual control and all progress payments and other revenues being deposited in such account. If the equity/contribution of the private sector is to be borrowed, a statement that there shall be no government guarantee for said loan;
- i. Procedure for additional capital infusions, if required, and a statement that there shall be no government guarantee for loans to be incurred by the private sector in case the additional contribution of the private sector is to be borrowed;
- j. A declaration of the participation of the parties and percentage in which profits and losses are shared, in proportion to the contributions of the party to the working fund. The amount of contribution of funds by the parties can be increased or decreased, depending on the contributions of equipment or expertise;
- k. Specified termination/liquidation of the JV Company, buy-out provisions, and details on the transfer of ownership of the JV activity/facility pursuant to Section 6.4 of these Guidelines including provisions on what happens to the JV's assets after the expiration of the JV agreement or end of the JV period. If equity other than cash is to be contributed, a statement as to how the property will be valued and the ownership of the property during and after the effectivity of the JV Agreement;
- l. Designation of one of the parties as general manager of the project, with authority to bind the JV Company/Partnership/Parties; or, in the alternative, the constitution of a management committee, with a provision for remuneration. Management duties, other duties of the co-venturers and procedures to be followed in dealing with unusual situations or problems that may develop should be specified;
- m. Implementation milestones, regular meeting schedules, financial and periodic JV and progress reporting procedure;
- n. Establishment of a JV bank account, and the appointment of a chartered accountant and lawyer;
- o. Provide for the acquisition of licenses in the name of the JV or each co-venturer, as required;
- p. Type of insurance carried by the JV and clearly defined liabilities to be insured against by each participant;
- q. Definition of items which are to be considered as costs to the JV for the purpose of determining profit or loss and a description of items which are not reimbursable to members of the JV and specified division of the profits and, risks and losses;
- r. Confidentiality of trade information passed between the co-venturers;
- s. Ownership or retention of patents, technology, and consultant reports;
- t. Performance security requirements of the project and the bonding obligations of the co-venturers;
- u. Undivided pro-rata interests held by the co-venturers on all assets of the JV;
- v. Restriction regarding assignment of private sector participant's undivided pro-rata interests in assets of the JV;
- w. Cost recovery scheme, including payment to the government of royalties/rights, the form/description and amount of earnings (cash, asset, etc.), whether it is in absolute amounts or variable, and the period and timing such earnings or payment shall be received. In case of non-cash payment or payment in form of asset, a statement/provision on how it will be valued, the minimum value of the asset, and the determination/selection of asset such as how and who will determine/select the asset;
- x. Indemnification and liquidated damages;
- y. Performance and warranty bonds;
- z. Minimum insurance coverage;
- aa. Acceptance tests and procedures;

- bb. Validity of the performance security, warranty period and procedures;
- cc. Grounds for and effects of contract termination/default including modes for settling disputes, procedure for handling guarantees, defects and insurance after termination, and threshold (in terms of amount, time/period, or both) for which non-payment or delay in payment and delay in starting the project/s shall be grounds for termination/rescission of the JV contract/agreement;
- dd. The manner and procedures for the resolution of warranty against corruption;
- ee. Compliance with all other laws, rules and regulations;
- ff. Procedure and/or period for withdrawal by the government entity of its contribution to the JV, or exit divestment by the Government Entity of its interest in the JV, and Substitution or addition of parties;
- gg. Payout of funds;
- hh. Alternative Dispute Resolution (ADR) mechanisms pursuant to EO No. 78 dated 04 July 2012 to avoid management impasses that may produce deadlock or litigation; and
- ii. Disputes arbitration clause.

III. Publication of Invitation to Apply for Eligibility and to Submit a Proposal (IAESP)

1. Prior to issuance/publication of the IAESP, the Government Entity concerned shall submit a copy of the draft JV agreement, instructions to private sector participants, and minimum designs, performance standards/specifications and economic parameters to NEDA, DOF and GCG for information.
2. The IAESPs shall be advertised once in a newspaper of general nationwide circulation, and posted continuously for a period of seven (7) calendar days, starting on date of advertisement, at the following:
 - a. Website of the Government Entity concerned, if available;
 - b. Website of the Government Entity's service provider, if any; and
 - c. Any conspicuous place within the premises of the procuring entity.
3. Private sector participants shall be given at least thirty (30) calendar days from the last date of publication of the IAESP to apply for eligibility and to submit a proposal. Notwithstanding, the Government Entity concerned may adjust said period as may be appropriate for the nature, scope, size and complexity of the proposed JV activity. Provided, that the principles of transparency, competition and accountability are observed.

IV. Qualification of Private Sector Participants

1. **Who may Participate.** Any individual, partnership, corporation or firm, or consortium, whether local or foreign, subject to the limits set herein.
2. **Eligibility Requirements**
 - a. **Legal Requirements.** If the JV activity requires a public utility franchise, the private sector participant must be duly registered with the SEC and be at least sixty percent (60%) Filipino-owned. For projects other than these, prospective private sector participant shall comply with nationality and ownership requirements under the Constitution and other applicable laws and issuances.

For JV activities to be operated by the prospective JV Partner or a facility operator where operation of the facility does not require a public utility franchise, the JV partner or facility operator or concessionaire may be Filipino or foreign-owned, as maybe allowed under applicable laws, rules, and regulations.
 - b. **Technical Requirements.** The prospective JV Partner must have completed a project similar or related to the JV activity whose value, adjusted to current prices using the National Statistics Office (NSO) Consumer Price Index (CPI), must be at least fifty percent (50%) of the cost of the JV activity subject of the selection process within the relevant period as determined by the Government Entity. The prospective JV Partner shall submit a statement of all its ongoing and completed government and private contracts similar or related to the JV activity subject of the selection process, including contracts awarded but not yet started, if any.

- c. **Financial Capability.** The Government Entity shall determine before evaluation of eligibility, the minimum amount of equity needed for the JV activity.

The following documents shall be submitted by the prospective JV Partner:

- i. Audited financial statements for the past three (3) calendar years. If the prospective JV Partner is Filipino, the audited financial statements to be submitted must be stamped "received" by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions; and
 - ii. Latest tax returns, if the JV Partner is Filipino.
- d. In case of consortia, all member-entities of the prospective JV Partner shall also submit the above legal, technical and financial eligibility requirements to determine the overall capability of the consortia for the JV undertaking.
- e. **Acceptance of Criteria and Waiver of Rights to Enjoin JV Activity.** In addition to the above, all prospective private sector participants shall be required to submit, as part of their qualification documents, a statement stipulating that the private sector participant: (i) has accepted the qualification criteria established by the JV-SC of the Government Entity concerned; and (ii) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the concerned Government Entity or its JV-SC to prevent or restrain the qualification proceedings related thereto, the award of the contract to a successful private sector participant, and the carrying out of the awarded contract. Such waiver shall, however be, without prejudice to the right of a disqualified or losing private sector participant to question the lawfulness of its disqualification or the rejection of its proposal by appropriate administrative or judicial processes not involving the issuance of a writ of injunction or prohibition or restraining order.

Financial capability shall be measured in terms of: i) proof of ability of the prospective JV Partner to provide a minimum amount of equity to the JV activity, measured in terms of the net worth of the company, or a deposit equivalent to the minimum equity required set aside or ear-marked for the proposed JV activity; and ii) a letter 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 JV Partner is one of its current clients, and is in good financial standing.

3. **Eligible and Ineligible.** The Government Entity, through its JV-SC, shall within a period of fifteen (15) calendar days after the deadline set for the submission of the eligibility documents, complete the evaluation of the eligibility documents of the prospective JV Partners, and determine which among them are "eligible" and "ineligible". Accordingly, the JV-SC shall duly inform the eligible JV Partners within seven (7) calendar days after approval thereof. Ineligible private sector participants shall be similarly given notice of such ineligibility, stating therein the grounds for ineligibility within the same period.

Those ineligible may appeal their ineligibility to the Head of the Government Entity or his authorized representative, within seven (7) calendar days from receipt of the notice of ineligibility. The selection process will be suspended for a maximum period of thirty (30) calendar days while the appeal is being evaluated. The Head of the Government Entity or his authorized representative shall act on the appeal within the thirty (30)-calendar day period of suspension of the selection process. The decision of the Head of the Government Entity, or his authorized representative, on the appeal shall be final and immediately executory. If the appeal is not resolved within said period, the appeal is deemed denied, and the selection process will proceed.

4. **Issuance of Tender Documents.** The Government Entity concerned shall make available the related competitive selection documents to all eligible private sector participants as soon as practicable to provide respective private sector participants ample time to examine the same and to prepare their respective proposals prior to the date of opening of the proposals. The time period from the last day of the issuance of tender documents to the date of opening of the proposal shall not exceed sixty (60) calendar days for JV facility/project costing Five Hundred Million Pesos (PhP 500 Million) and above, and thirty (30) calendar days for JV facility/project costing less than Five Hundred Million Pesos (PhP 500 Million).

The proposal parameters for the proposed JV activity should be transparent and fair. It should not, in any way, be tailor-made for or meant to favor or give advantage to a particular private sector participant.

V. Supplemental Competitive Selection Bulletins and Pre-Selection Conferences

1. **Responsibility of the Private Sector Participant.** The prospective private sector participant shall be solely responsible for having taken all the necessary steps to carefully examine and acquaint himself with the requirements and terms and conditions of the selection documents with respect to the cost, duration and execution/operation of the project as it affects the preparation and submission of its proposal. The Government Entity concerned shall not assume any responsibility regarding erroneous interpretations or conclusions by the prospective private sector participant out of data furnished or indicated in the competitive selection documents.
2. **Supplemental Notices.** A prospective private sector participant may submit a written request to the Government Entity concerned on or before the pre-selection conference as to the meaning of any data or requirements or any part of the selection documents. Any substantive interpretation given by the concerned Government Entity shall be issued in the form of a Supplemental Notice, and

furnished to all prospective private sector participants. The Government Entity concerned may also issue Supplemental Notices to all prospective private sector participants at any time for purposes of clarifying any provisions of the selection documents, provided that the same are issued within a reasonable period to allow all private sector participants to consider the same in the preparation of their proposals. Receipt of all Supplemental Notices shall be duly acknowledged by each private sector participants prior to the submission of his proposal and shall be so indicated in the proposal.

3. **Pre-Selection Conference.** For JV activities with facility/project cost amounting to less than Five Hundred Million Pesos (PhP 500 Million), pre-selection conference shall be conducted by the Government Entity at least fifteen (15) calendar days before the deadline for the submission of proposals. For JV activities with facility/project cost amounting to Five Hundred Million Pesos (PhP 500 Million) and above, the pre-selection conference shall be conducted at least thirty (30) calendar days before the deadline for the submission of proposals. Notwithstanding, the Government Entity concerned may adjust said period as may be appropriate for the nature, scope, size, and complexity of the proposed JV activity. Provided, that the principles of transparency, competition and accountability are observed.

VI. Submission and Receipt of Proposals

1. **Requirements for Submission of Proposals.** Private sector participants shall be required to submit their proposals on or before the deadline stipulated in the "Instructions to Participants". For eligible participants, proposals shall be submitted in two (2) separate sealed envelopes, the first being the technical proposal and the second the financial proposal.

a. The technical proposal shall contain the following, as applicable:

- i. Compliance statements with regard to the technical parameters as stated in the tender documents;
- ii. Operational feasibility;
- iii. Technical soundness, including proposed project timeline;
- iv. Preliminary environmental assessment;
- v. Cost and financing plan of the JV activity;
- vi. Proposal security in the form as required by the government entity concerned which may be in cash, certified check, manager's check, letter of credit, or bank draft/guarantee issued by a reputable local/foreign bank, or a surety bond callable on demand issued by the Government Service Insurance System (GSIS) or an entity duly registered and recognized by the Office of the Insurance Commissioner, or any combination thereof payable to the Government Entity concerned in accordance with the following schedule:

Total Contribution of the Private Sector Participant As Estimated by the Government Entity	Required Proposal Security
Less than PhP 5.0 Billion	2.0% of the private sector participant's contribution as estimated by the Government Entity
PhP 5.0 Billion to less than PhP 10.0 Billion	1.5% of the private sector participant's contribution as estimated by the Government Entity
PhP 10.0 Billion and more	1.0% of the private sector participant's contribution as estimated by the Government Entity

- vii. Other documents to support the private sector participant's technical proposal, as may be required by the concerned Government Entity.

b. The financial proposal shall contain the following, as the case may be:

- i. Compliance statements with regard to the financial parameters stated in the tender documents;
- ii. Proposed cost of the JV activity, operation and maintenance cost, the amount of equity to be infused and debt to be obtained for the project, sources of financing, and all other related costs; and
- iii. Financial proposal corresponding to the parameters set by the concerned Government Entity.

Fifty percent (50%) of the equity to be provided by the private sector entity should as much as possible come from its own resources and not borrowed.

The Government Entity concerned is not precluded from specifying other requirements for the technical and financial proposals that are best suited for the specific JV activity.

- c. Submission of late proposals. Proposals submitted after the deadline for submission prescribed in the "Instructions to Private Sector Participants" shall be considered late and shall be returned unopened.

VII. Opening and Evaluation of Proposals

1. **Opening of the envelope for the technical proposal.** At the date and time of the proposal opening stipulated in the "Instructions to Private Sector Participants", the JV-SC shall open only the first envelope containing technical proposal and ascertain: (a) whether the same is complete in terms of the data/information required under Section VI.1 (a) above; and (b) whether the same is accompanied by the required proposal security in the prescribed form, amount, and period of validity. All private sector participants, or their representatives, present at the opening of the envelopes containing the technical proposal shall sign a register of the proposal opening.
2. **Evaluation of the technical proposal.** The evaluation of the first envelope containing the technical proposal shall involve the assessment of the technical, operational, environmental, and financing viability of the proposal, vis-à-vis the prescribed requirements and criteria/minimum standards, and basic parameters prescribed in the competitive selection documents.

The JV-SC of the Government Entity concerned shall complete the evaluation of the technical proposal within thirty (30) calendar days from the date the proposals are opened. Only those proposals that have been determined to have positively passed the evaluation of the technical proposal shall be qualified and considered for the evaluation of the financial proposal.

3. **Opening of the envelope for the financial proposal.** Only the financial proposals of private sector participants who passed the evaluation described under Section VII.2 hereof, shall be opened for further evaluation. The financial proposals tendered by private sector participants who failed the technical proposal evaluation under Section VII.2 hereof, shall not be considered further, and shall be returned unopened, together with a notice stating the reasons for disqualification from further consideration.

The JV-SC shall notify the private sector participants qualifying for the second stage of evaluation of the date, time and place of the opening of the envelopes for the financial proposal. The opening thereof shall follow the same procedure prescribed for the opening of the envelopes containing technical proposals.

4. **Evaluation of the financial proposal.** The evaluation of the financial proposal shall involve the assessment and comparison of the financial proposals against the financial parameters stated in the tender documents and proposal parameters set by the Government Entity concerned. The proposed financing plan must show that the same adequately meets the costs relative to the JV activity. The evaluation of financial proposals shall be completed by the JV-SC of the concerned Government Entity within fifteen (15) calendar days.
5. **Simultaneous evaluation of the technical and financial proposals.** Subject to the determination of the Head of the Government Entity wherein the nature of the JV activity shall warrant the appreciation of both the technical and financial proposals as a whole in order to determine the best proposal, simultaneous evaluation of the technical and financial proposals may be resorted to. Provided, that, said evaluation procedure shall be explicitly stated in the proposal documents. Simultaneous evaluation of the technical and financial proposals shall be completed within thirty (30) calendar days from the date the proposals are opened.
6. **Prescriptive periods.** The periods stated for the evaluation of the technical and financial proposals are prescriptive. The Government Entity concerned may adjust said periods as may be appropriate for the nature, scope, size, and complexity of the proposed JV activity. Provided, that the principles of transparency, competition and accountability are observed.
7. **Rejection of proposals.** Non-compliance to the information required on either the first or second envelope shall be grounds for rejection of proposals.
8. **Withdrawal and/or modification of proposals.** Withdrawal and/or modification of proposals may be allowed upon written notice by the private sector participant concerned, to the Government Entity prior to the time and date set for the opening of the envelope containing the technical proposal as specified in the "Instructions to Private Sector Participants". No proposals shall thereafter be modified or withdrawn. Proposal modifications received after said period shall be considered late and will be returned unopened. Withdrawal of proposals after the proposal opening date shall cause the forfeiture of the private sector participant's proposal security.
9. **Right to Reject All Proposals.** The Government Entity concerned reserves the right to reject any or all proposals, waive any minor defects therein and accept the offer it deems most advantageous to the government.
10. **Breaking Tie Bids.** In case tie bids occur under competitive selection or competitive challenge, the procedure for breaking tie bids shall be done through drawing of lots or similar methods that are non-discretionary and non-discriminatory such that it is based on sheer luck or chance.

VIII. Award and Approval of Contract

1. **Recommendation to Award.** Within seven (7) calendar days from the date the evaluation procedure adopted is completed, the JV-SC shall submit the recommendation of award to the Head of the Government Entity concerned. The JV-SC shall include as part of its recommendation, a detailed evaluation/assessment report on its decision regarding the evaluation of the proposals, and explain in clear terms the basis of its recommendations.
2. **Decision to Award.** Within seven (7) calendar days from the submission by JV-SC of the recommendation to award, the Head of the Government Entity shall approve or reject the same. The approval shall be manifested by signing and issuing the "Notice of Award" to the winning private sector participant within seven (7) calendar days from approval thereof.

All participating private sector participants shall be informed of the award in writing. Such decision shall be made available to the public upon request.

3. **Notice of Award.** The "Notice of Award" to be issued by the Head of Government Entity concerned, shall contain among others, an instruction to the winning private sector participant to comply with conditions precedent for the execution of the JV Agreement and to submit compliance statements with regard thereto, within thirty (30) calendar days from receipt of the "Notice of Award" unless otherwise specified or extended by the appropriate Approving Authority.

Conditions precedent for the execution of the contract shall include among others the posting of a performance security in favor of the Government Entity concerned. The Government Entity concerned shall determine which form of performance security it will require which may be in the form of cash, bank draft or guarantee confirmed by a local bank (in the case of foreign bidders bonded by a foreign bank), letter of credit issued by a reputable bank, surety bond callable on demand issued by Government Service Insurance System (GSIS) or by a surety or insurance companies duly accredited by the Office of the Insurance Commissioner, or a combination thereof, in accordance with the following schedules:

- a. Cash, manager's check, irrevocable letter of credit, bank draft – a minimum of two percent (2%) of the private sector participant's contribution to the JV activity.
- b. Bank Guarantee – a minimum of five percent (5%) of the private sector participant's contribution to the JV activity.
- c. Surety Bond – a minimum of ten percent (10%) of the private sector participant's contribution to the JV activity.

Failure to comply with the conditions precedent for the execution of the contract within the prescribed thirty (30)-calendar day period or as specified or extended by the appropriate Approving Authority will result in confiscation of the proposal security. Within seven (7) calendar days from receipt of the compliance statements from the winning private sector participant, the Head of the Government Entity shall determine the sufficiency of the same, and notify the winning private sector participant accordingly.

4. **Validity and Return of Proposal and Performance Securities.** The execution of the JV Agreement shall be made within the period of the validity of the proposal security. The required proposal security shall be valid for a reasonable period, but in no case beyond one hundred eighty (180) calendar days following the opening of the proposals. Proposal securities shall be returned to the winning bidder and unsuccessful private sector participants upon signing of the JV Agreement by the winning private sector participant.

The performance security shall be valid within the period of one (1) year after the expiration of the JV agreement or end of the JV period, or as may be stipulated in the JV agreement. Upon certification by the Head of Government Entity concerned that there are no claims filed against the private sector partner after the expiration of the JV agreement or end of the JV period, the performance security shall be released by the former. As may be agreed upon in the JV agreement, a portion of the performance security shall be released upon compliance with corresponding milestones.

5. **Extension of Validity of Proposals.** When an extension of validity of proposals is considered necessary, those who submitted proposals shall be requested in writing, to extend the validity of their proposals before the expiration date of the same. However, private sector participants shall not be allowed to modify or revise the price or other substantial aspect of their proposals.

Private sector participants shall have the right to refuse such an extension without forfeiting their proposal security. As a condition of the extension of the validity of their proposals, participating private sector participants must correspondingly extend the validity of their proposal security.

6. **Single Responsive Bid.** A single and responsive bid shall be considered for award if it falls under any of the following circumstances:
 - a. If after advertisement, only a single party submits eligibility documents within the deadline stipulated in the IAESP, and it meets the eligibility requirements, after which it submits a bid which is responsive to the technical and financial requirements;
 - b. If after advertisement, more than one private sector participant or prospective bidder submits eligibility documents in accordance with the provisions of these Guidelines, but only one bidder meets the eligibility requirements, after which it submits a bid which is responsive to the technical and financial requirements;

- c. If after the eligibility check, more than one bidder meets the eligibility requirements but only one bidder submits a bid, and its bid is found to be responsive to the technical and financial requirements; or
 - d. If after qualification/evaluation of proposals, only one bidder meets the technical requirements but is not able to comply with financial requirements, after which a negotiation on the financial terms/proposal in accordance with Section 8 hereof is conducted and is successful.
7. **Prospective Bidder/s Compliant with the Technical Requirements.** In case of a single technically qualified prospective bidder but is not able to comply with financial requirements or, in case of technically qualified prospective bidders but are not able to comply with financial requirements, the concerned Government Entity may conduct negotiation on the financial terms/proposal in accordance with Section 8 hereof.
8. **Negotiation on the Financial Terms/Proposal under the Competitive Selection Process.** In case the private sector participants or prospective bidders, whose technical proposals are rated "passed", are not able to comply with the financial requirements, the concerned Government Entity shall request said prospective bidders to submit their new financial proposals. Thereafter, concerned Government Entity shall notify and negotiate with the proponent on the financial proposal/terms with the most advantageous financial proposal. The technical proposal shall remain valid and binding. In the event the concerned Government Entity fails to successfully negotiate with said proponent within thirty (30) calendar days reckoned from the date of notification, the Government Entity shall negotiate with the next ranked most advantageous financial proposal, and so on and so forth, until a successful negotiation has been concluded.

In case of a single technically qualified prospective bidder, concerned Government Entity may conduct negotiation on the financial terms or on the financial proposal and shall conclude said negotiation within thirty (30) calendar days. The technical proposal shall remain valid and binding.

In the event that there is no successful negotiation, the concerned Government Entity shall conduct another competitive selection. In case of second failure of competitive selection, the concerned Government Entity may resort to negotiated JV pursuant to Annex "B" of these Guidelines.

9. **Failure of Competitive Selection.** There shall be a failure of competitive selection in any of the following instances:
- a. No prospective bidder/s is/are eligible;
 - b. No bids or proposals are received;
 - c. No prospective bidder/s is/are able to comply with technical requirements; or
 - d. No successful negotiation on the financial terms/proposal as provided under Section 8 hereof.

In the event of a failed competitive selection brought about by instances stipulated above, the concerned Government Entity shall review the Terms of Reference (TOR)/bidding documents and conduct another competitive selection. In case of second failure of competitive selection, the concerned Government Entity may resort to negotiated JV pursuant to Annex "B" of these Guidelines.

10. **Execution/Approval of the JV Agreement.** The authorized signatory(ies) of the winning private sector participant and the Government Entity concerned, shall execute and sign the JV Agreement, within seven (7) calendar days after the Head of the Government Entity notifies the winning private sector participant of its compliance to the conditions or requirements precedent to the execution of the contract as referred to in Section VIII.3 above.

Consistent with Article 1159 of the New Civil Code, said JV Agreement is considered the law between the parties, and the parties shall perform their respective prestations, obligations, and undertakings thereunder with utmost good faith, with a view to attaining the objective thereof. An original signed copy of the contract shall be submitted to:

- a. The Office of the President (OP);
- b. NEDA;
- c. GCG;
- d. Statutory Counsel; and
- e. DOF in case of GOCCs and GFIs, and DBM in case of other entities.

In the event of refusal, inability or failure of the winning private sector participant to enter into contract with the Government Entity concerned, within the time provided therefore, said Government Entity shall forfeit its proposal security. In such event, the Government Entity concerned shall consider the private sector participant with the next ranked complying proposal as the winning private sector participant, and notify said private sector participant accordingly. If the next ranked complying private sector

participant shall likewise refuse or fail to enter into contract with the Government, its proposal security shall likewise be forfeited and the Government Entity concerned shall consider the next ranked complying proposal, and so on, until a contract shall have been entered into. In the event that the concerned Government Entity is unable to execute the contract with any of the complying private sector participants, a failure of competitive selection will be declared and the JV may be subjected to a competitive selection again.

11. **Other Approvals for Contract.** The entity tasked under the JV Agreement shall, as may be required under existing laws, rules and regulations, secure any and all other approvals for the contract, or the implementation thereof, from government agencies or bodies including the regulator, in the case of public utility projects. This includes securing the necessary and appropriate environmental clearances from the DENR prior to actual project implementation. The DENR shall act on the environmental clearance of the JV activity within the time frame prescribed and following the guidelines of the DENR Administrative Order No. 96-37 and subsequent guidelines as may be issued from time to time. The Government Entity may provide the necessary assistance to its JV Partner in securing all the required clearances. The contract shall provide milestones in securing such other approvals required for the implementation of the contract.

Prior to the execution of the JV Agreement, the OGCC, DOJ, or other entity prescribed by law/issuances as the statutory counsel of GOCCs, GCEs and GICPs, shall issue the corresponding Counsel's Opinion.

12. **Presidential Approval, When Required.** Subject to the charter of the Government Entity concerned, no further higher approval is necessary, unless the same is required by law to be acted upon by the President of the Philippines. In which case, as deemed applicable, the provisions of existing laws, guidelines, rules and regulations shall be followed and adhered to by the Government Entity concerned.
13. **Contract Effectivity.** The contract shall be effective upon signing thereof by the Head of Government Entity unless another date is stipulated therein.

IX. Appeals Mechanism

Decisions of the JV-SC with respect to conduct of the competitive selection process may be appealed in writing to the Head of the Government Entity concerned: Provided, however, that a prior motion for reconsideration should have been filed by the party concerned, and the same has been resolved by the JV-SC. The appeal must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the JV-SC denying its motion for reconsideration. An appeal may be made by filing a verified position paper with the Head of the Government Entity concerned, accompanied by the payment of a non-refundable appeal fee. The non-refundable appeal fee shall be in an amount equivalent to no less than one-half (1/2) of one percent (1%) of the project cost.

ANNEX B

DETAILED GUIDELINES FOR NEGOTIATED JV AND COMPETITIVE CHALLENGE FOR PUBLIC-PRIVATE JOINT VENTURES

I. Negotiated JVs – Any Government Entity may directly negotiate a JV activity with a private sector entity under any of the following circumstances:

- a. When a Government Entity receives a proposal from the private sector for a project; or
- b. When after a failed competitive selection as provided under Section VIII.9 of Annex "A" hereof, the concerned Government Entity conducts another competitive selection which again fails. In this case, the concerned Government Entity may seek out a JV Partner and request the latter to submit a proposal for the JV activity manifestly advantageous to government, provided that negotiations must be concluded within one (1) year from date of submission of bids for which there was a second failure of competitive selection, and that negotiation shall only be on the financial terms or aspect.

II. Competitive Challenge Procedure – In all cases where the Government Entity directly negotiates with a private sector participant for a proposed JV undertaking, the negotiated terms shall be subjected to a competitive challenge wherein other private sector entities shall be invited to submit comparative proposals, to ensure that JV Agreements are entered into under a transparent and competitive process that promotes accountability in government transactions.

III. Three-Stage Framework – Negotiated JV shall be subjected to a three-stage process summarized as follows:

Stage One – Initial Evaluation of Proposals by Concerned Government Entity

The initial evaluation shall be completed by the concerned Government Entity within sixty (60) calendar days upon submission of complete documents by the private sector entity/ies including the eligibility requirements as provided under Section IV of Annex "A" of these Guidelines.

Upon completion of the initial evaluation, the Head of the Government Entity shall either issue a letter of acceptance or non-acceptance of the proposal. An acceptance shall not bind the Government Entity to enter into the JV activity, but, shall mean that authorization is given to proceed with detailed negotiations on the terms and conditions of the JV activity. In case of non-acceptance, the private sector entity shall be informed of the reasons/grounds for non-acceptance.

Stage Two – Conduct of Negotiation between Concerned Government Entity and Private Sector Entity/ies, Conferment of Original Proponent Status, and Evaluation by the Approving Authority

The parties shall negotiate on the terms and conditions of the JV activity. The following rules shall be adhered to in the conduct of detailed negotiations, and evaluation by the Approving Authority in case of successful negotiations:

1. Both parties shall negotiate on the terms and conditions, scope, as well as all legal, technical, and financial aspects of the JV activity.
2. The negotiation shall be completed within thirty (30) calendar days upon acceptance by the Government Entity concerned of the proposal as provided in Stage One above.
3. Negotiations shall comply with the process, requirements and conditions as stipulated under Sections 6 (General Guidelines) and 7 (Process for Entering into JV Agreements) of these Guidelines.
4. In case similar proposals are received prior to acceptance of the proposal as the original proponent, the Government Entity may reject all such proposals or instead, subject it to competitive selection pursuant to Annex "A" of these Guidelines. Otherwise, the Government Entity shall evaluate the proposals using a first in time approach. Under this approach, the first complete proposal is evaluated and decided upon. The second complete proposal will only be entertained if the first one is rejected. Otherwise, the second proposal will be considered only if there is a failure in the negotiation of the first proposal, or when the proponent of the second proposal applies for eligibility and submits its comparative proposal based on the selection/tender documents during the invitation to apply for eligibility and to submit a comparative proposal as provided in Stage Three below.

Under the first in time approach, the Head of Government Entity concerned shall acknowledge the submission of other private sector proponent for the same or similar project concept, and advise the proponent on existence of similar project concept and its rank/position based on date of submission of the proposals. If a contract is awarded to a private sector proponent, the unopened envelope/s shall be returned to the respective proponents.

The Government Entity shall conduct an initial evaluation of the proposal as provided in Stage One above and negotiate with the respective proponent.

5. Within seven (7) days after the successful negotiation, the Head of the Government Entity and the authorized representative of the private sector entity shall issue a signed certification that an agreement has been reached by both parties and both agree to submit the proposal to competitive challenge. Said certification shall also state that the Government Entity has found the private sector participant eligible to enter into the proposed JV activity and shall confer to the proponent the original proponent status. However, should negotiations not result to an agreement acceptable to both parties, the Government Entity shall have the option to reject the proposal by informing the private sector participant in writing stating the grounds for rejection and thereafter may accept a new proposal from private sector participants, or decide to pursue the proposed activity through alternative routes other than JV.

After conferment of the original proponent status, the concerned Government Entity shall endorse the JV proposal and submit pertinent documentation to the appropriate Entity and Approving Authority pursuant to Section 7.2 of these Guidelines for approval. The appropriate Approving Authority, as provided in Sections 7.2.b and 7.2.c of these Guidelines, shall approve the proposal within thirty (30) calendar days. The concerned Government Entity shall not entertain any other proposal after such endorsement and submission to the Approving Authority.

6. For projects wherein the Approving Authority is the Head of the Government Entity concerned pursuant to Section 7.2.c of these Guidelines, conferment of the original proponent status shall be deemed an approval of the project proposal subject to compliance of the proposal with the conditions stated in Section 7 of these Guidelines.
7. For projects wherein the Approving Authority is the NEDA Board ICC pursuant to Section 7.2.b of these Guidelines, in case the JV proposal is disapproved by the NEDA Board ICC, the concerned Government Entity shall inform the original proponent of such disapproval and that the original proponent status shall be withdrawn. The concerned Government Entity may accept other proposals.
8. After approval by the Approving Authority, the draft contract including the selection documents for the competitive challenge are prepared.

Stage Three – Competitive Challenge and Reimbursement to the Original Proponent the Cost Incurred from Producing the JV Proposal

Once the JV proposal is approved by the Approving Authority, the JV activity shall be subjected to a competitive challenge as follows:

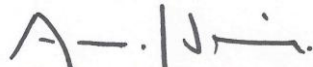
1. The Government Entity shall prepare the tender documents consistent with the terms and conditions approved by the Approving Authority and pursuant to Section II (Selection/Tender Documents) of Annex "A" of these Guidelines.
2. The Head of Government Entity, through the JV-SC, shall approve all tender documents including the draft contract before the publication of the invitation to apply for eligibility and to submit a comparative proposal.
3. Within seven (7) calendar days upon approval by the Approving Authority of the JV proposal as referred to in Stage Two above, the JV-SC shall publish the invitation to apply for eligibility and to submit a comparative proposal in accordance with the procedures under Section III of Annex "A" of these Guidelines.
4. Interested private proponents shall be qualified in accordance with Section IV.2 (Eligibility Requirements) under Annex "A" of these Guidelines. The tender documents which shall be prepared by the Government Entity shall only be issued to eligible private proponents.
5. Proprietary information shall, however, be respected and protected, and treated with confidentiality. As such, it shall not form part of the tender and related documents.
6. The original proponents shall post the proposal security at the date of the first day of the publication of the invitation to apply for eligibility and to submit a comparative proposal in the amount and form stated in the tender documents.
7. Prospective comparative private sector participants or challengers shall be given at least one hundred twenty (120) calendar days or as may be approved by the appropriate Approving Authority from the issuance of tender/bidding documents to develop and submit comparative proposals. If no comparative proposal is received by the Government Entity, the JV activity shall be immediately awarded to the original proponent.
8. The procedure for the determination of eligibility of comparative proponents/private sector participants, issuance of supplemental competitive selection bulletins and pre-selection conferences, submission and receipt of proposals, opening and evaluation of proposals shall follow the procedure stipulated under Annex "A" of these Guidelines. In the evaluation of the financial proposals, the modified competitive challenge procedure as defined hereunder shall be applied.

9. Under the modified competitive challenge, the original proponent may opt to submit on or before the date of the opening of financial proposals its second financial proposal. The financial proposal(s) of the comparative private sector participant(s) or the challenger(s) who have been determined to have passed the technical evaluation and the second financial proposal, if applicable, of the original proponent shall be opened at the same time during the scheduled opening of financial proposals.

If the Government Entity, upon recommendation of the JV-SC, determines that an offer made by the challenger is superior or more advantageous to the government than the financial proposal of the original proponent, the JV contract shall be awarded to the challenger offering the most advantageous price.

In case the challenger(s) fail(s) to outbid the financial proposal of the original proponent or in case there is/are no challenger/s, the JV contract shall be awarded to the original proponent.

10. In case tie bids occur between the original proponent and challenger(s), the JV contract shall be awarded to the original proponent.
11. In case tie bids occur between the challengers offering better financial proposals than the second financial proposal of the original proponent, the procedure for breaking tie bids shall be done through drawing of lots or similar methods that are non-discretionary and non-discriminatory such that it is based on sheer luck or chance.
12. Within seven (7) calendar days from the date of completion of the Competitive Challenge, the JV-SC shall submit the recommendation of award to the Head of the Government Entity. Succeeding activities shall be in accordance with Section VIII (Award and Approval of Contract) of Annex "A" of these Guidelines.


ARSENIO M. BALISACAN
Secretary of Socio-Economic Planning