

REPUBLIC ACT NO. 7718

AN ACT AMENDING CERTAIN SECTIONS OF REPUBLIC ACT NO. 6957, ENTITLED "AN ACT AUTHORIZING THE FINANCING, CONSTRUCTION, OPERATION AND MAINTENANCE OF INFRASTRUCTURE PROJECTS BY THE PRIVATE SECTOR, AND FOR OTHER PURPOSES"

SECTION 1. Section 1 of Republic Act No. 6957 is hereby amended to read as follows:

"SECTION 1. Declaration of Policy. - It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government. Such incentives, aside from financial incentives as provided by law, shall include providing a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector."

SEC. 2. Section 2 of the same Act is hereby amended to read as follows:

"SEC. 2. Definition of Terms. - The following terms used in this Act shall have the meaning stated below:

"[a] Private sector infrastructure or development projects. - The general description of infrastructure or development projects normally financed and operated by the public sector but which will now be wholly or partly implemented by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, 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 appropriate agency pursuant to this Act. Such projects shall be undertaken through contractual arrangements as defined hereunder and such other variations as may be approved by the President of the Philippines.

"For the construction stage of these infrastructure projects, the project proponent may obtain financing from foreign and/or domestic sources and/or engage the services of a foreign and/or Filipino contractor. Provided, That, in case an infrastructure or a development facility's operation requires a public utility franchise, the facility operator must be Filipino or if a corporation, it must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos: Provided, further, That in the case of foreign contractors, Filipino labor shall be employed or hired in the different phases of the construction where Filipino skills are available: Provided, finally, That projects which would have difficulty in sourcing funds may be financed partly from direct government appropriations and/or from Official Development Assistance [ODA] of foreign governments or institutions not exceeding fifty percent [50%] of the project cost, and the balance to be provided by the project proponent.

"[b] Build-operate-and-transfer. - A contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, and operating and maintenance expenses in the project. The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term which shall not exceed fifty [50] years: Provided, That in case of an infrastructure or development facility whose operation requires a public utility franchise, the proponent must be Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent [60%] by Filipinos.

"The build-operate-and-transfer shall include a supply-and-operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government so requires, operates the facility providing in the process technology transfer and training to Filipino nationals.

"[c] Build-and-transfer. - A contractual arrangement whereby the project proponent undertakes the financing and construction of a given infrastructure or development facility and after its completion turns it over to the government agency or local government unit concerned, which shall pay the proponent on an agreed schedule its total investments expended on the project, plus a reasonable rate of return thereon. This arrangement may be employed in the construction of any infrastructure or development project, including critical facilities which, for security or strategic reasons, must be operated directly by the Government.

"[d] Build-own-and-operate. - A contractual arrangement whereby a project proponent is authorized to finance, construct, own, operate and maintain an infrastructure or development facility from which the proponent is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users: Provided, That all such projects, upon recommendation of the Investment Coordination Committee [ICC] of the National Economic and Development Authority [NEDA], shall be approved by the President of the Philippines. Under this project, the proponent which owns the assets of the facility may assign its operation and maintenance to a facility operator.

"[e] Build-lease-and-transfer. - A contractual arrangement whereby a project proponent is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the government agency or local government unit concerned on a lease arrangement for a fixed period after which ownership of the facility is automatically transferred to the government agency or local government unit concerned.

"[f] Build-transfer-and-operate. - A contractual arrangement whereby the public sector contracts out the building of an infrastructure facility to a private entity such that the contractor builds the facility on a turn-key basis, assuming cost overrun, delay and specified performance risks.

"Once the facility is commissioned satisfactorily, title is transferred to the implementing agency. The private entity however, operates the facility on behalf of the implementing agency under an agreement.

"[g] Contract-add-and-operate. - A contractual arrangement whereby the project proponent adds to an existing infrastructure facility which it is renting from the government. It operates the expanded project over an agreed franchise period. There may, or may not be, a transfer arrangement in regard to the facility.

"[h] Develop-operate-and-transfer. - A contractual arrangement whereby favorable conditions external to a new infrastructure project which is to be built by a private project proponent are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates such as higher property or rent values.

"[i] Rehabilitate-operate-and-transfer. - A contractual arrangement whereby an existing facility is turned over to the private sector to refurbish, operate and maintain for a franchise period, at the expiry of which the legal title to the facility is turned over to the government. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.

"[j] Rehabilitate-own-and-operate. - A contractual arrangement whereby an existing facility is turned over to the private sector to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity.

"[k] Project proponent. - The private sector entity which shall have contractual responsibility for the project and which shall have an adequate financial base to implement said project consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project.

"[l] Contractor. - Any entity accredited under Philippine laws which may or may not be the project proponent and which shall undertake the actual construction and/or supply of equipment for the project.

"[m] Facility operator. - A company registered with the Securities and Exchange Commission, which may or may not be the project proponent, and which is responsible for all aspects of operation and maintenance of the infrastructure or development facility, including but not limited to the collection of tolls, fees, rentals or charges from facility users: Provided, That in case the facility requires a public utility franchise, the facility operator shall be Filipino or at least sixty per centum [60%] owned by Filipinos.

"[n] Direct government guarantee. - An agreement whereby the government or any of its agencies or local government units assume responsibility for the repayment of debt directly incurred by the project proponent in implementing the project in case of a loan default. ▀

"[o] Reasonable rate of return on investments and operating and maintenance cost. - The rate of return that reflects the prevailing cost of capital in the domestic and international markets: Provided, That, in case of negotiated contracts, such rate of return shall be determined by the ICC of the NEDA prior to the negotiation and/or call for proposals: Provided, further, That for negotiated contracts for public utility projects which are monopolies, the rate of return on rate base shall be determined by existing laws, which in no case shall exceed twelve per centum [12%].

"[p] Construction. - Refers to new construction, rehabilitation, improvement, expansion, alteration and related works and activities including the necessary supply of equipment, materials, labor and services and related items."

SEC. 3. Section 3 of the same Act is hereby amended to read as follows:

"SEC. 3. Private Initiative in Infrastructure. - All government infrastructure agencies, including government-owned and -controlled corporations and local government units are hereby authorized to enter into contract with any duly prequalified project proponent for the financing, construction, operation and maintenance of any financially viable infrastructure or development facility through any of the projects authorized in this Act. Said agencies, when entering into such contracts, are enjoined to solicit the expertise of individuals, groups, or corporations in the private sector who have extensive experience in undertaking infrastructure or development projects."

SEC. 4. Section 4 of the same act is hereby amended to read as follows:

"SEC. 4. Priority projects. - All concerned government agencies, including government-owned and -controlled corporations and local government units, shall include in their development programs those priority projects that may be financed, constructed, operated and maintained by the private sector under the provisions of this Act. It shall be the duty of all concerned government agencies to give wide publicity to all projects eligible for financing under this Act, including publication in national and, where applicable, international newspapers of general circulation once every six (6) months and official notification of project proponents registered with them.

"The lists of all such national projects must be part of the development programs of the agencies concerned. The list of projects costing up to Three hundred million pesos [300,000,000] shall be submitted to the ICC of the NEDA for its approval and to the NEDA Board for projects costing more than Three hundred million pesos [300,000,000]. The list of projects submitted to the ICC of the NEDA Board shall be acted upon within thirty [30] working days.

"The list of local projects to be implemented by the local government units concerned shall be submitted for confirmation to the municipal development council for projects costing up to Twenty million pesos; those costing above Twenty up to Fifty million pesos to the provincial development council; those costing up to Fifty million to the city development council; above Fifty million up to Two hundred million pesos to the regional development councils; and those above Two hundred million pesos to the ICC of the NEDA."

SEC. 5. A new section is hereby added after Section 4 of the same Act and numbered as Section 4-A, to read as follows:

"SEC. 4-A. Unsolicited proposals. - Unsolicited proposals for projects may be accepted by any government agency or local government unit on a negotiated basis: Provided, That, all the following conditions are met: [1] such projects involve a new concept or technology and/or are not part of the list of priority projects, [2] no direct government guarantee, subsidy or equity is required, and [3] the government agency or local government unit has invited by publication, for three [3] consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty [60] working days: Provided, further, That in the event another proponent submits a lower price proposal, the original proponent shall have the right to match that price within thirty [30] working days."

SEC. 6. Section 5 of the same Act is hereby amended to read as follows:

"SEC. 5. Public Bidding of Projects. - Upon approval of the projects mentioned in Section 4 of this Act, the head of the infrastructure agency or local government unit concerned shall forthwith cause to be published, once every week for three [3] consecutive weeks, in at least two [2] newspapers of general circulation and in at least one [1] local newspaper which is circulated in the region, province, city or municipality in which the project is to be constructed, a notice inviting all prospective infrastructure or development project proponents to participate in a competitive public bidding for the projects so approved.

"In the case of a build-operate-and-transfer arrangement, the contract shall be awarded to the bidder who, having satisfied the minimum financial, technical, organizational and legal standards required by this Act, has submitted the lowest bid and most favorable terms for the project, based on the present value of its proposed tolls, fees, rentals and charges over a fixed term for the facility to be constructed, rehabilitated, operated and maintained according to the prescribed minimum design and performance standards, plans and specifications. For this purpose, the winning project proponent shall be automatically granted by the appropriate agency the franchise to operate and maintain the facility, including the collection of tolls, fees, rentals, and charges in accordance with Section 5 hereof.

"In the case of a build-and-transfer or build-lease-and-transfer arrangement, the contract shall be awarded to the lowest complying bidder based on the present value of its proposed schedule of amortization payments for the facility to be constructed according to the prescribed minimum design and performance standards, plans and specifications: Provided, however, That a Filipino contractor who submits an equally advantageous bid with exactly the same price and technical specifications as those of a foreign contractor shall be given preference.

"In all cases, a consortium that participates in a bid must present proof that the members of the consortium have bound themselves jointly and severally to assume responsibility for any project. The withdrawal of any member of the consortium prior to the implementation of the project could be a ground for the cancellation of the contract.

"The public bidding must be conducted under a two-envelope/two-stage system: the first envelope to contain the technical proposal and the second envelope to contain the financial proposal. The procedures for this system shall be outlined in the implementing rules and regulations of this Act.

"A copy of each contract involving a project entered into under this Act shall forthwith be submitted to Congress for its information."

SEC. 7. A new section is hereby added after Section 5 of the same Act and numbered as Section 5-A, to read as follows:

"SEC. 5-A. Direct Negotiation of Contracts. - Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder:

"[a] If, after advertisement, only one contractor applied for prequalification and it meets the prequalification requirements, after which it is required to submit a bid/proposal which is subsequently found by the agency/local government unit [LGU] to be complying.

"[b] If, after advertisement, more than one contractor applied for prequalification but only one meets the prequalification requirements, after which it submits bid/proposal which is found by the agency/LGU to be complying.

"[c] If, after prequalification of more than one contractor, only one submits a bid which is found by the agency/LGU to be complying.

"[d] If, after prequalification, more than one contractor submit bids but only one is found by the agency/LGU to be complying: Provided, That, any of the disqualified prospective bidder may appeal the decision of the implementing agency/LGUs Prequalification Bids and Awards Committee within fifteen [15] working days to the head of the agency, in case of national projects or to the Department of the Interior and Local Government, in case of local projects from the date the disqualification was made known to the disqualified bidder. Provided, furthermore, That the implementing agency/LGUs concerned should act on the appeal within forty-five [45] working days from receipt thereof."

SEC. 8. Section 6 of the same Act is hereby amended to read as follows:

"SEC. 6. Repayment Scheme. - For the financing, construction, operation and maintenance of any infrastructure project undertaken through the Build-Operate-and-Transfer arrangement or any of its variations pursuant to the provisions of this Act, the project proponent shall be repaid by authorizing it to charge and collect reasonable tolls, fees, and rentals for the use of the project facility not exceeding those incorporated in the contract and, where applicable, the proponent may likewise be repaid in the form of a share in the revenue of the project or other non-monetary payments, such as, but not limited, to the grant of a portion or percentage of the reclaimed land, subject to the constitutional requirements with respect to the ownership of land: Provided, That for negotiated contracts, and for projects which have been granted a natural monopoly or where the public has no access to alternative facilities, the appropriate government regulatory bodies, shall approve the tolls, fees, rentals, and charges based on a reasonable rate of return: Provided, further, That the imposition and collection of tolls, fees, rentals, and charges shall be for a fixed term as proposed in the bid and incorporated in the contract but in no case shall this term exceed fifty [50] years: Provided, furthermore, That the tolls, fees, rentals, and charges may be subject to adjustment during the life of the contract, based on a predetermined formula using official price indices and included in the instructions to bidders and in the contract: Provided, also, That all tolls, fees, rentals, and charges and adjustments thereof shall take into account the reasonableness of said rates to the end-users of private sector-built infrastructure: Provided, finally, That during the lifetime of the franchise, the project proponent shall undertake the necessary maintenance and repair of the facility in accordance with standards prescribed in the bidding documents and in the contract. In the case of a Build-and-Transfer arrangement, the repayment scheme is to be effected through amortization payments by the government agency or local government unit concerned to the project proponent according to the scheme proposed in the bid and incorporated in the contract."

SEC. 9. Section 7 of the same Act is hereby amended to read as follows:

"SEC. 7. Contract Termination - In the event that a project is revoked, canceled or terminated by the Government through no fault of the project proponent or by mutual agreement, the Government shall compensate the said project proponent for its actual expenses incurred in the project plus a reasonable rate of return thereon not exceeding that stated in the contract as of the date of such revocation, cancellation or termination: Provided, That the interest of the Government in these instances shall be duly insured with the Government Service Insurance System or any other insurance entity duly accredited by the Office of the Insurance Commissioner: Provided, finally, That the cost of the insurance coverage shall be included in the terms and conditions of the bidding referred to above."

"In the event that the government defaults on certain major obligations in the contract and such failure is not remediable or if remediable shall remain unremedied for an unreasonable length of time, the project proponent/contractor may, by prior notice to the concerned national government agency or local government unit specifying the turn-over date, terminate the contract. The project proponent/contractor shall be reasonably compensated by the Government for equivalent or proportionate contract cost as defined in the contract."

SEC. 10. Section 8 of the same Act is hereby amended to read as follows:

"SEC. 8. Regulatory Boards. - The Toll Regulatory Board which was created by Presidential Decree No. 1112 is hereby attached to the Department of Public Works and Highways with the Secretary of Public Works and Highways as Chairman."

SEC. 11. Section 9 of the same Act is hereby amended to read as follows:

"SEC. 9. Project Supervision. - Every infrastructure project undertaken under the provisions of this Act shall be in accordance with the plans, specifications, standards, and costs approved by the concerned government agency and shall be under the supervision of the said agency or local government unit in the case of local projects."

SEC. 12. A new section to be numbered as Section 10 is hereby added to read as follows:

"SEC. 10. Investment Incentives. - Among other incentives, projects in excess of One billion pesos [1,000,000,000] shall be entitled to incentives as provided by the Omnibus Investments Code, upon registration with the Board of Investments."

SEC. 13. Section 10 of the same Act is hereby renumbered as Section 11 to read as follows:

"SEC. 11. Implementing Rules and Regulations. - A committee composed of one (1) representative each from the Department of Public Works and Highways, the Department of Transportation and Communications, the Department of Energy, the Department of Environment and Natural Resources, the Department of Agriculture, the Department of Trade and Industry, the Department of Finance, the Department of the Interior and Local Government, the National Economic and Development Authority, the Coordinating Council of the Philippine Assistance Program, and other concerned government agencies shall within sixty [60] days from the effectivity of this Act, formulate and prescribe, after public hearing and publication as required by law, the implementing rules and regulations including, among others, the criteria and guidelines for evaluation of bid proposals, list of financial incentives and arrangements that the Government may provide for the project, in order to carry out the provisions of this Act in the most expeditious manner.

"The Chairman of this committee shall be appointed by the President of the Philippines from its members.

"From time to time the Committee may conduct, formulate and prescribe after due public hearing and publication, amendments to the implementing rules and regulations, consistent with the provisions of this Act."

SEC. 14. A new section to be numbered as Section 12 is hereby added to read as follows:

"SEC. 12. Coordination and Monitoring of Projects. - The Coordinating Council of the Philippine Assistance Program [CCPAP] shall be responsible for the coordination and monitoring of projects implemented under this Act.

"Regional development councils and local government units shall periodically submit to CCPAP, information on the status of said projects.

"At the end of every calendar year, the CCPAP shall report to the President and to Congress on the progress of all projects implemented under this Act."

SEC. 15. Section 11, 12 and 13 of the same Act are hereby renumbered as Sections 13, 14, and 15, respectively.

SEC. 16. Repealing Clause. - All laws or parts of any law inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SEC. 17. Separability Clause. - If any provision of this Act is held invalid, the other provisions not affected thereby shall continue in operation.

SEC. 18. Effectivity Clause. - This Act shall take effect fifteen [15] days after its publication in at least two (2) newspapers of general circulation.

Approved:

[Sgd.] EDGARDO J. ANGARA [Sgd.] JOSE DE VENECIA, JR.
President of the Senate Speaker of the House of Representatives

This Act which is a consolidation of House Bill No. 10943 and Senate Bill No. 1586 was finally passed by the House of Representatives and the Senate on April 12, 1994 and April 27, 1994, respectively.

[Sgd.] EDGARDO E. TUMANGAN [Sgd.] ROBERTO P. NAZARENO
Secretary of the Senate Acting Secretary General
House of Representatives

Approved: 8 MAY 1994

[Sgd.] FIDEL V. RAMOS
President of the Philippines