



Republic of the Philippines
House of Representatives
Quezon City

FIFTEENTH CONGRESS
First Regular Session

HOUSE BILL No. 4919

Introduced by Honorable Raul A. Daza

EXPLANATORY NOTE

This bill seeks to enhance the public-private partnership for infrastructure development in the Philippines.

It is hereby declared the policy of the state to recognize the indispensable role of the private sector as the main engine for national growth and development and provides 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.

For this purpose, Republic Act No. 7718 otherwise known as the Philippine Build and Operate Transfer Law (BOT Law) was enacted to encourage private participation in public-infrastructure investments. Following the laws enactment, the BPT program was able to generate a number of projects in the power and transport sectors in the early 1990's. However, the government's tight fiscal situation along with the voiding of a large airport terminal project dampened the interest in the BOT program.

To rekindle the private interest in Public-Private Partnership (PPP) and to restore confidence in the BOT law, profound policy reforms must be made, foremost is creating a legal framework that protects property rights and is committed to the enforcement of contracts. Moreover, the legal and judicial system must be conducive to contractual performance, to fair and timely adjudication of any contractual dispute that may emerge and must be supported by a substantive and operationally efficient set of implementing rules and regulations (IRR).

It is also important that governmental Implementing Agencies (IAs) and local government units (LGUs) must acquire the necessary technical, legal and financial expertise to be able to identify, design, implement and monitor PPP projects. Regulating bodies included in the implementation of such PPP projects must be credible, transparent, accountable and technically competent.

Taking the various concerns at this stage about the existing BOT law, this proposed BOT bill is guided by the principles aligned with the making of Public-Private Partnership a state policy in infrastructure development, upholding competitive bidding as the core of government procurement policy.

In view of the foregoing, approval of this bill is highly recommended.

RAUL A. DAZA

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**AN ACT ENHANCING THE PUBLIC-PRIVATE PARTNERSHIP IN
INFRASTRUCTURE DEVELOPMENT IN THE PHILIPPINES**

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. *Short Title.* – This act shall be known as the “Public – Private Partnership in Infrastructure Development Act of 2008.”

Sec. 2. *Declaration of Policy.* – It is hereby declared the policy of the state to:

- a. Recognize the indispensable role of the private sector as the main engine for national growth and development;
- b. create and enabling environment for public-private partnership (PPP) projects, that is, private-sector investment in public infrastructure for efficient provision of public services;
- c. recognize the long-term nature of private investment in infrastructure and services and to mitigate the associated risks by ensuring that the validity and enforceability of contracts are respected through the due process of law;
- d. encourage private investment in public infrastructure and/or public services that:
 - (i) yields value for money for the state by allocating risks to the party best able to manage them;
 - (ii) is affordable in light of overall budgetary sustainability, forward commitment in relation to public expenditure and the potential returns on private-sector investment;
 - (iii) maximizes the benefits of private-sector efficiency, expertise, flexibility and innovation;
 - (iv) is financially viable; and
 - (v) is desired in light of economic and social benefits and costs;
- e. ensure a consistent approach among government agencies at both national and local levels in the adjudication, design, assessment, solicitation and management of projects; and

- f. build capacity of government agencies and local government units, hereinafter referred to as LGUs to avail themselves of investment opportunities.

Sec. 3. Scope of Contractual Arrangements. — For this purpose, the government agencies including Government-Owned and Controlled Corporations, hereinafter referred to as government agency and LGUs may select from the list of contractual arrangements provided below: Provided, however, each agency may adopt other contractual arrangements that may be decided upon during contract negotiations: Provided, finally, that new contractual arrangements not listed under this Act may be adopted but shall be approved by the Investment Coordination Committee (ICC). The Contractual arrangements are as follows:

- a. **Build- operate-and-transfer (BOT):** 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 the fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals and charge 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 transfer the facility to the government agency or LGU 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 the operation of which requires a public utility franchise, the proponent must be Filipino or, if a corporation, must be duly registered with the Security and Exchange Commission (SEC) 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 in the process provide technology transfer and training to Filipino nationals.

- b. **Build-and-transfer (BT):** A contractual arrangement whereby the project component undertakes the financing and construction of a given infrastructure or development facility and after its completion turns it over to the government agency or LGU concerned, which shall pay the proponent on an agreed schedule its total investments expended on the projects, 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.
- c. **Build-own-and-operate (BOO):** A contractual arrangement whereby a project proponent is authorized to finance, construct, own, operate and maintain and infrastructure or development facility from which the proponent is allowed to recover its total investment, operating and maintenance costs plus reasonable return thereon by collecting tolls, fees, rentals or other charges from the facility users: Provided, that all such projects, upon recommendation of ICC, shall be approved by the President of the Philippines as chair of the NEDA Board. Under this project, the proponent that owns the assets of the facility may assign its operation and maintenance to a facility operator.
- d. **Build-lease-and-transfer (BLT):** 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 and LGU concerned on a lease arrangement for a fixed period after

which ownership of the facility is automatically transferred to the government agency or LGU concerned.

- e. **Build-transfer-and-operate (BTO):** 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 arrangement.

- f. **Contract-add-and-operate (CAO):** 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.
- g. **Development-operate-and-transfer (DOT):** 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.
- h. **Rehabilitate-operate-and-transfer (ROT):** 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.
- i. **Rehabilitate-own-and-operate (ROO):** 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.

Sec. 4. Private Delivery of Public Infrastructure and/or Services. – (1) Any government agency or LGU may contract with the private sector for the delivery of public infrastructure and/or services in any of the following areas:

- a. Energy, including oil and gas;
- b. transport, including railways, roads, tunnels, bridges, ports, canals, channels, airports, pipelines;
- c. water, including water storage and wastewater;
- d. communications;
- e. information technology;
- f. education;
- g. health;
- h. tourism;
- i. culture, sports, and leisure facilities;
- j. government buildings, industrial estates and townships, and housing;
- k. markets, warehouses, and slaughterhouses;
- l. any other area as may be prescribed.

(2) Contractual arrangements that may be utilized for the purposes of projects contemplated in Section 3 shall be determined during the negotiations between the government agency or LGU, on one hand, and the private sector, on the other.

(3) For the purpose of this section and subsequent reference in the following sections "prescribed" means prescribed in the IRR issued in terms of this Act, except as otherwise indicated.

Sec. 5. *Project Preparations.* – (1) Each government agency or LGU shall within its areas of responsibility prepare a project for approval by the approving authority mentioned in Section 6 of this Act.

(2) Prior to preparing a project for approval, the head of the concerned government agency or LGU shall review or assess the following:

a. the risks associated with the proposed project taking into account the various methods for sharing these risks; and

b. the economic and financial feasibility of the proposed project, including a comparison of the costs and benefits of implementing the project in terms of this Act with the costs of implementation in another form.

(3) A government agency or LGU that lacks the capacity to prepare a project in the manner prescribed (including the pre-bidding, bidding and contract management stages of the project) can tap the Project Development Facility (PDF). The PDF will provide the fund, the start-up capital of which shall come from the national government budget or grants from donors of Official Development Assistance (ODA). In the case of a government agency, the PDF shall be appropriated within its budget ceiling, to enable the government agency to solicit assistance or expert advice as necessary. In the interest of sustainability, the winning bidder for a PPP project shall be required to compensate for the cost that the government agency expended in developing its proposal. In the case of LGUs, the Department of Finance (DOF) shall act as custodian of the PDF and the winning bidder for a LGU-initiated PPP project shall likewise compensate the cost expended in developing the proposal. In the event that resources from the PDF are expended in developing the proposals in the event that resources from the PDF are expended in developing the required assistance within the prescribed period, the government agency or LGU shall report to the ICC and National Economic Development Authority (NEDA) Board, respectively.

Sec. 6. *Approving Authority.* – the National Economic Development Authority (NEDA) shall issue the necessary rules and regulations for the effective implementation of this Act. To this end, the NEDA Board, through the Investment Coordination Committee (ICC), shall request national agencies and local government units to submit program reports of PPP projects:

(1) A national government agency that has identified and prepared a project in the manner specified in Sec. 5 shall:

(a) be required to endorse through the head of the government agency, the project proposal and contract to the ICC. This endorsement shall serve as the first-pass approval for the project and draft contract. All government agencies are required to review technical, legal, financial, economic and social implications of the project and approve the same prior to endorsement to the ICC

(b) submit projects of major national importance with a contract value above an amount as may be prescribed, to the NEDA Board for approval; all other projects to the ICC for approval.

(2) All local government Public-Private Partnership (PPP) projects shall be approved following the provisions of the Local Government Code.

Sec. 7. *Implementing, Monitoring and Auditing Functions.* – (1) A government agency or LGU that has secured approval for a project in the manner provided in Sec. 6 of this Act, shall be responsible for the implementation, management and supervision of the project. Regular monitoring reports shall be submitted to the ICC for its information.

- (2) Regular auditing shall likewise be conducted following Commission on Audit (COA) guidelines. Reports may be required from the respective government agency, LGU or COA as deemed necessary.

Sec. 8. *Competitive Bidding Procedures.* – (1) Competitive bidding procedures shall apply to all projects for which private investment is solicited in terms of this Act.

- (2) Under exceptional cases, government agencies may resort to direct negotiations under such conditions prescribed in Section 53 of RA 9184. LGUs may resort to direct negotiations under conditions prescribed in the Local Government Code and/or RA 9184 as may be applicable. Such conditions shall include a requirement that the government agency or LGU must give public notice in the prescribed manner of:

- (a) the intention to enter into direct negotiations;
- (b) the conclusion of negotiations to enter into a contract through direct negotiations; and
- (c) the salient terms of the contract to be concluded.

- (3) A government agency may only entertain an unsolicited proposal provided that such proposal is not contained in its prioritized projects in the Medium term Philippine Investment Program (MTPIP). In the case of LGUs, an unsolicited proposal may be entertained provided it does not appear in the local development plan of the LGU concerned.

In addition, the unsolicited proposal to be acceptable is subject to other conditions as follows:

- (a) the government agency or LGU has notified in writing the approving authority within seven (7) working days of the receipt of the proposal;
 - (b) the head of the government agency or head of LGU has conducted an assessment as contemplated in Section 5 (2) and has certified in writing to the approving authority that it is capable of conducting all proceedings relating to the proposal;
 - (c) the head of the government agency or LGU certified in writing that the proposed project serves the public interest;
 - (d) the proposal does not entail the provision of any form of government guarantee, subsidy or undertakings as may be prescribed;
 - (e) the proposal complies with such requirements for unsolicited proposals as may be prescribed; and
 - (f) the proponent has indicated its costs for developing the proposal in the prescribed manner.
- (4) Notwithstanding compliance by any government agency or LGU with the provisions of subsection (3) Section 8 of this Act, the ICC may direct a government agency or LGU not to proceed with its consideration of an unsolicited proposal until such time as the latter satisfies the approving authority that:

- (a) It has access to adequate resources to properly assess the proposal, to conduct the evaluation of comparative proposals, to conduct negotiations and to oversee implementation; and
 - (b) The proposal meets such requirements related to the public interest as may be prescribed.
- (5) All unsolicited proposals shall be subject to comparative proposals, after approval by the approving authority, in the manner as may be prescribed.
- (6) A government agency or LGU may, during its negotiation and before issuing a request for comparative proposals, negotiate with the proponent that the latter be compensated for the cost of developing the proposal and to submit the proposal to competitive bidding procedures. The government agency or LGU shall introduce, as part of the bidding conditions, a requirement that the winning bidder (if not the original proponent) reimburse the original proponent for its cost in developing the proposal or for such amount as the government agency or LGU and the proponent may agree beforehand in writing.
- (7) Non-compliance with the provision of subsection (3) hereof shall be ground for declaring a contract null and void.

Sec. 9. *Contract and Public Disclosure.* – (1) reproduction of copies of all contracts concluded in terms of this Act shall be the responsibility of the government agency or LGU. The said government agency or LGU is required to forward a copy of the signed agreement to the ICC for record purposes.

- f (2) The grant of access to the signed agreements by the public shall be the responsibility of the government agency or LGU.

Sec. 10. *Validity of Contracts.* – (1) No party shall in any proceedings before any court, allege the invalidity of any contract concluded under this Act on the grounds of non-compliance with the provision of this Act or its IRR after a period of ninety (90) days has elapsed from the date of publication of the approval of the government-procured project in the Official Gazette.

Sec. 11. *Contract Termination.* – in the event that a project is revoked, cancelled or terminated by the Government through no fault of the project proponent or by mutual agreement, the project proponent shall be compensated by the government as provided for in the contractual agreement.

In cases where 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 may, by prior notice to the concerned government agency or LGU, specifying the turn-over date, terminate the contract. The private proponent shall likewise be compensated by the Government according to the provisions of the contractual agreement.

Sec. 12. *Investment Promotion.* – there shall be established a build-operate-and-transfer Center to be attached as a unit to the Department of Trade and Industry (DTI) to be known as the Public Partnership Center (PPC) which shall have the following responsibilities:

- (a) Promote and market the government's private-sector investment program, including the formulation and implementation of a promotion and marketing plan, providing service as an information center for investors/developers as well as for government agencies;

- (b) Participate in the technical working group(TWG) that may be established by the IRR Committee;
- (c) Perform business development and investment-related activities in support of the other functions and mandate of the DTI; and
- (d) Perform such other functions as may be prescribed under the IRR.

Sec. 13. *Liability.* – In accordance with Section 38, Chapter 9 of the administrative Code of 1987, the head of the government agency shall not be held liable for acts done in the performance of his official duties, to undertake the purposes of implementing this Act or its IRR unless there is a clear showing of bad faith, malice, or gross negligence.

Sec. 14. *Implementing Rules and Regulations.* – (1) The Implementing Rules and Regulations issued by virtue of Republic Act No. 6957 as amended by Republic Act No. 7718 shall remain in full force and effect until repealed.

- (2) The IRR committee may, subject to the approval of the NEDA Board and after conducting public consultations and publication as required by law, issue the IRR to provide for the implementation of this Act in the most expeditious manner. The committee may, as needed, update such IRR from time to time.

- (3) Without limiting the generality of the foregoing, the IRR may provide for:

- (a) contractual arrangements and repayment schemes that may be entered into under this Act;
- (b) areas in which private investment may be solicited;
- (c) institutional arrangements for bid management;
- (d) manner of preparation and content of documents, including, clarifications and pre-bid conferences;
- (e) qualifications of proponents, contractors, bidders, and facility operators;
- (f) procedures for competitive bidding;
- (g) procedures for direct negotiation;
- (h) procedures for unsolicited proposals;
- (i) contract negotiation and award;
- (j) contract approval and implementation;
- (k) investment incentives, government guarantees, support and undertaking;
- (l) contract management, coordination, monitoring and auditing;
- (m) the powers, functions and duties of concerned agencies;
- (n) any other matter required for the expeditious implementation of the Act.

- (4) For the purposes of this section, "committee" means a committee created by the President comprising one representative from each of the following:

- (a) The Department of Public Works and Highways (DPWH);
- (b) The Department of Transportation and Communication (DOTC);
- (c) The Department of Energy (DOE);
- (d) The Department of Trade of Industry (DTI);
- (e) The Department of Finance (DOF);
- (f) The Department of Interior and Local Government (DILG);
- (g) The National Economic and Development Authority (NEDA);
- (h) The Department of Budget and Management (DBM); and
- (i) The Office of the President (OP).

Sec. 15. *Repealing Clause.* – Any law, particularly Republic Act No. 6957 as amended by Republic Act No. 7718, Presidential Decree, Executive Order, Rules, and Regulations, contrary to or inconsistent with this Act are hereby repealed or modified accordingly.

Sec. 16. *Separability Clause.* – If any provision of this Act is held invalid, the other provisions not affected thereby shall continue to be in full force and effect.

Sec. 17. *Effectivity Clause.* – This Act shall take effect fifteen (15) days after its publication in the Official gazette and in at least two (2) newspaper of general circulation.

Approved.