



Republic of the Philippines
House of Representatives
Constitution Hills, Quezon City

Fifteenth Congress

Second Regular Session

House Bill No. 5238

Introduced by **HON. ROMEO M. ACOP**

EXPLANATORY NOTE

The function of modern and efficient infrastructure in the economic development of the country is crucial and all-important. These goods and services generate benefits which justify their traditional provision by the government. However, chronic budgetary deficits have compelled the government to turn to the private sector for the funding and supply of public infrastructure. Republic Act No. 6957, better known as the 'Build-Operate-and Transfer' (BOT) Law, as amended by Republic Act No. 7718, serves as the statutory basis for these private-public partnerships (PPP).

Following the enactment of the law, the BOT program, through increased private investments, generated a number of projects mostly in the power and transport sectors in the 1990's. However, the program's momentum slowed down after the turn of the century due to legal problems encountered in the implementation of the projects, controversial transactions and owing to their generally low quality at entry level. These recent experience with the implementation of the BOT Law necessitates the need to address various issues relating to the legal framework of the law and to the responsibilities and functions of the participating institutions involved in the project cycle.

Strategically, the effective implementation of BOT projects hinges on the following :

- 1) A legal and economic environment conducive to a mutually beneficial partnership. Policy reforms which uphold the parties' commitment to the enforcement of contracts must be in place to restore confidence in the BOT law.
- 2) Certainty of recovering investments and availability of mechanisms for dealing with risks and unforeseen events. The government should allow the private proponents a reasonable return commensurate to the opportunity cost of its invested funds to ensure

project viability. While the proper allocation of cost and risk-sharing in the partnership is vital, the government must move toward project financing structures which will minimize the provision of direct and indirect subsidies and guarantees.

- 3) Clarity in articulating the duties and responsibilities of the parties to the contract. The law, as a primary statute, should establish the government's policies and provide the enabling framework which clearly defines the roles, functions, powers and duties among government agencies involved in the project cycle in implementation of the policies.
- 4) Transparency and credibility of the government's processes from project identification, review and approval of proposed BOT projects to contract implementation. Signed contracts and related documents, being imbued with public interest, should be made available to the approving bodies and to the implementing agencies, as well as to the general public.

Hence, to strengthen the Public-Private-Partnership (PPP) program and to enhance the utilization of the Build-Operate-and-Transfer (BOT) scheme and its variants in the development undertakings of the government, this bill proposes that the policy declaration in the law must explicitly state and recognize the important role of the private sector and its investments in the provision of public infrastructure and services.

In line with such policy, the State should facilitate the mitigation of risks attached to the investments by ensuring that the validity and enforceability of contracts involving BOT projects are respected through due process of the law. Moreover, the government should secure private investments through open and competitive bidding procedures permitting non-competitive procedures only in exceptional circumstances allowed in the law and consistent with the provisions of RA 9184 or the Government Procurement Act. Unsolicited projects or direct contracting do not go through regular consultative and planning procedures and are more prone to corruption. Resort to non-competitive procedures should be adopted restrictively and only upon full compliance with the requirements of the law.

To further encourage the private sector to invest in public infrastructure or services, the State shall allow a reasonable rate of return on its investments. The rate of return should reflect the prevailing weighted average cost of capital for investments of equivalent risks in the domestic and international markets. The weighted average cost of capital (WACC) is the investor's opportunity cost of taking on the risk of putting money into a project and is a foremost barometer in valuing and selecting investments. For this purpose, a redefinition of the concept of a 'reasonable rate of return' is sought in the bill.

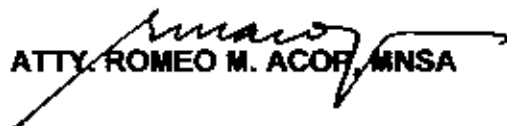
Public infrastructure projects carry various risks that may discourage private sector financing. To encourage private sector participation, the government has given guarantees to minimize or eliminate these risks. The provision of guarantees, however, is not without cost to the government. They create contingent liabilities which imply guarantee claims for payments which burden the fiscal standing of the government. Given a renewed confidence of the private sector to risk its capital in infrastructure projects, future project financing structures must decrease government exposure and increase private sector share of the risks of financing. While the government and the private sector may agree on project specific risks-sharing schemes, commercial and market risks that appropriately belong to the private sector, specifically revenue losses or shortfalls, must no longer be covered by government guarantees. This bill seeks to enunciate such a policy prohibition.

Likewise, government approving authorities need to be facilitative without compromising their mandates, ensuring the consistency of their decisions with the requirement and conditions of the law and existing policies of the government. Before the awarding of contracts to the

private proponents, implementing agencies and approving bodies must satisfy themselves that the terms and conditions agreed upon by the proponent on project specifications and parameters have been faithfully observed, and that the rules and regulations on contract variations, if any, have been complied with. With this objective, the bill proposes that the approval of any contract shall be strictly subject to review and shall be primarily in consideration of the draft contract, feasibility study and similar documents submitted for the purpose. As deterrent for any violation of this provision, concerned reviewing officers may be held administratively liable for any dereliction of duty thereof.

Finally, the implementing agencies and approving bodies of the government must be accountable for the successful commissioning of the projects. They must ensure that the private entities to which the contracts have been awarded comply with their obligations and deliver the project specifications that have been agreed upon. Officials of these agencies and bodies, as well as parties representing the private proponents should be held criminally liable in cases where investigation is warranted by circumstances indicated and proposed in this bill.

For the foregoing reasons, the early passage of this bill is earnestly sought.


ATTY. ROMEO M. ACOR, MNSA



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House Bill No. 5238

Introduced by **HON. ROMEO M. ACOP**

AN ACT
STRENGTHENING PUBLIC-PRIVATE PARTNERSHIP (PPP) IN INFRASTRUCTURE
AND DEVELOPMENT PROJECTS, FURTHER AMENDING FOR THE PURPOSE
REPUBLIC ACT NO. 6957 AS AMENDED BY REPUBLIC ACT NO. 7718,
OTHERWISE KNOWN AS 'AN ACT AUTHORIZING THE FINANCING,
CONSTRUCTION, OPERATION AND MAINTENANCE OF INFRASTRUCTURE
PROJECTS BY THE PRIVATE SECTOR'

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

SECTION 1. Section 1 of Republic Act No. 6957, as amended by Republic Act No. 7718, is hereby further 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 **AND SUPPORT** 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 **ALLOWING A REASONABLE RATE OF RETURN ON ITS INVESTMENTS, MITIGATION OF**

RISKS BY ENSURING THAT THE VALIDITY AND ENFORCEABILITY OF CONTRACTS ARE RESPECTED THROUGH DUE PROCESS OF LAW, AND providing a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector. IT SHALL ALSO BE THE POLICY OF THE GOVERNMENT TO SECURE PRIVATE INVESTMENTS THROUGH TRANSPARENT AND COMPETITIVE SELECTION PROCESSES AND BIDDING PROCEDURES: *PROVIDED*, THAT NON-COMPETITIVE PROCEDURES SHALL ONLY BE PERMITTED IN EXCEPTIONAL CIRCUMSTANCES AS ALLOWED UNDER THIS ACT.

SECTION 2. Section 2, paragraph (o) of the same Act is hereby further amended to read as follows :

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

(a) xxx

xxx

(o) ***Reasonable rate of return on investments and operating and maintenance costs*** - The rate of return that reflects the prevailing **WEIGHTED AVERAGE** cost of capital **FOR INVESTMENTS OF EQUIVALENT RISKS** 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 percentum (12%).

SECTION 3. Section 4 of the same Act is hereby amended to read as follows :

SECTION 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 (P 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 (P 300,000,00). 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.

THE CONFIRMATION OF THE PROJECT BY THE LOCAL DEVELOPMENT COUNCIL CONCERNED SHALL BE BASED ON A REVIEW OF THE PROJECT DOCUMENTS SUBMITTED TO IT BY THE LOCAL GOVERNMENT UNIT CONCERNED, WHICH, IN PARTICULAR, SHALL INCLUDE BUT NOT LIMITED TO THE FEASIBILITY STUDY AND THE DRAFT CONTRACT ON THE PROJECT, AND SHALL ENSURE THAT SUCH PROJECT DOCUMENTS UNDER THIS ACT AND ITS IMPLEMENTING RULES AND REGULATIONS. ANY CONCERNED REVIEWING OFFICER/S FOUND IN VIOLATION OF THIS PROVISION SHALL BE ADMINISTRATIVELY LIABLE WITH GRAVE NEGLIGENCE OF DUTY AND SHALL BE DEALT WITH IN ACCORDANCE WITH EXISTING LAWS.

FURTHERMORE, ANY ACT ON THE PART OF THE LOCAL GOVERNMENT UNIT CONCERNED AND ITS RESPONSIBLE OFFICIALS, OR CONCERNED OFFICERS OF THE PRIVATE PROJECT PROPONENT, WHICH RESULT TO OR IS AIMED AT DOWNGRADING THE CATEGORY OF THE PROJECT BASED ON ITS TOTAL COST UNDER THIS SECTION FOR THE PURPOSE OF EVADING REQUIREMENTS FOR APPROVAL UNDER THE APPROPRIATE CATEGORY SHALL BE DEALT WITH CRIMINALLY AND ADMINISTRATIVELY UNDER EXISTING LAWS: PROVIDED THAT, SUCH ACTS COMMITTED BY ANY PRIVATE PROJECT PROPONENT AND ITS CONCERNED OFFICERS SHALL CAUSE THE REVOCATION OF ITS CONTRACT FOR THE SAID PROJECT WITHOUT COMPENSATION AND SHALL BE PERPETUALLY DISQUALIFIED FROM PARTICIPATING IN ANY BIDDING, OR OTHER CONTRACTUAL ARRANGEMENT, FOR ANY GOVERNMENT PROJECT.

SECTION 4. Section 6 of the same Act is hereby amended to read as follows :

SECTION 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 the 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 instruction 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.

IN NO CASE SHALL THE NATIONAL GOVERNMENT AGENCY OR LOCAL GOVERNMENT UNIT CONCERNED GUARANTEE AND COMPENSATE OR SUBSIDIZE ANY LOSS OR SHORTFALL IN THE PROJECTED REVENUES OR INCOME OF THE PROPONENT AS INDICATED IN THE APPROVED CONTRACT OR AS ADJUSTED IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT.

SECTION 5. A new section to be numbered as Section 13 is hereby added to read as follows :

SECTION 13. PENAL PROVISIONS - ANY PERSON WHO COMMITS ANY OF THE ACTS HEREUNDER PROSCRIBED SHALL BE PUNISHED WITH IMPRISONMENT FROM A MINIMUM OF THREE (3) YEARS TO A MAXIMUM OF SIX (6) YEARS :

- 1) REPRESENTATION IN BEHALF OF A PROJECT PROPONENT THAT IT HAS THE NECESSARY CAPITALIZATION TO COMMENCE, COMPLETE AND IMPLEMENT THE PROJECT WHEN THE SAME IS FALSE IN MATERIAL RESPECTS;
- 2) FALSIFICATION OR INSERTION OF CERTAIN PROVISIONS IN THE FINAL CONTRACT WHICH ARE MATERIALLY AND SUBSTANTIALLY DIFFERENT FROM THE APPROVED DRAFT CONTRACT WHICH FORM PART OF THE AGENCY'S / LGU'S REQUEST FOR CONFIRMATION.

SECTION 6. Sections 13, 14 and 15 of the same Act are hereby renumbered Sections 14, 15 and 16 respectively.

SECTION 7. *Seperability Clause* - If any provision of this Act is held invalid, the other provisions not affected thereby shall remain valid and effective.

SECTION 8. *Repealing Clause* - All laws or parts of any law inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SECTION 9. *Effectivity Clause* - This Act shall take effect fifteen (15) days after its publication in at least two (2) newspapers of general circulation.

APPROVED.