

[NIA MEMORANDUM CIRCULAR NO. 46, June 21, 1991]

Attached (*see below*) is a copy of the implementing rules and regulations for Republic Act (R.A.) No. 6957. Included for your reference is the list of projects for the Build-Operate-and-Transfer and Build-and-Transfer Schemes which was submitted to the Secretary of Public Works and Highways. Most of these projects are in the Medium Term Public Investment Program (1990-1994) while the others are for later consideration. The mini-hydro projects have been indorsed for implementation by the Executive Secretary to Congress. For your information and guidance.

Adopted: 25 June 1991

(SGD.) JOSE B. DEL ROSARIO, JR.
Administrator

IMPLEMENTING RULES AND REGULATIONS
FOR R.A. NO. 6957, "AN ACT AUTHORIZING
THE FINANCING, CONSTRUCTION, OPERATION
AND MAINTENANCE OF INFRASTRUCTURE PROJECTS
BY THE PRIVATE SECTOR AND FOR THE OTHER
PURPOSES" (BUILD-OPERATE-AND-TRANSFER
AND BUILD-AND-TRANSFER SCHEMES)

Pursuant to Section 10 of Republic Act (R.A.) No. 6957, which was approved on 9 July 1990, the following Implementing Rules and Regulations (IRR) are hereby prescribed to carry out the provisions of the said Act.*

1. *Definition of BOT and BT Schemes*

1.1 Build-operate-and-transfer (BOT) scheme. This is "a contractual arrangement whereby the contractor undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The contractor operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges sufficient to enable the contractor to recover its operating and maintenance expenses and its investment in the project plus a reasonable rate of return thereon. The contractor transfers the facility to the government agency or local government unit (LGU) concerned at the end of the fixed term which shall not exceed fifty (50) years."

"For the construction stage, the contractor may obtain financing from foreign and/or domestic sources and/or engage the services of a foreign and/or Filipino constructor."

"The ownership structure stage, the contractor of an infrastructure whose operation requires a public utility franchise must be in accordance with the constitution."

"In the case of corporate investors in the build-operate-and-transfer corporation, the citizenship of each stockholder in the corporate investors shall be the basis for the computation of Filipino equity in the said corporation."

"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." The use of Filipino labor shall also apply to Filipino contractors.

"The financing of a foreign or foreign-controlled contractor from Philippine government institutions shall not exceed twenty percent (20%) of the total cost of the infrastructure facility or project."

"Financing from foreign sources shall not require a guarantee by the Government or government-owned or controlled corporations."

"The build-operate-and-transfer scheme 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."

1.2 Build-and-transfer (BT) scheme. This is "a contractual arrangement whereby the contractor undertakes the construction, including financing, of a given infrastructure facility, and its turnover after completion to the government agency or LGU concerned which shall pay the contractor its total investment expended on the project, plus a reasonable rate of return thereon." The BT scheme shall be adopted for financially viable infrastructure projects, i.e., the project cost should be recovered from tolls, fees, rentals and other charges on the facility users, as well as other related income of the Agency/LGU concerned. The agency/LGU shall pay the contractor based on an agreed amortization schedule.

"This arrangement may be employed in the construction of any infrastructure project, including critical facilities which, for security or strategic reasons, must be operated directly by the Government."

2. Authorized Contracting Government Agencies/Units – The following Government entities are authorized to enter into contract for BOT or BT projects under the provisions of R.A. No. 6957:

2.1 Government infrastructure agencies, including government-owned and controlled corporations (hereinafter referred to as Agency/ies). These include the Department of Public Works and Highways (DPWH), Department of Transportation and Communications, National Irrigation Administration, Metropolitan Waterworks and Sewerage System, Local Water Utilities Administration, Philippine National Railways, Light Rail Transit Authority, Philippine Ports Authority, Manila International Airport Authority, National Power Corporation, National Electrification Administration, Philippine National Oil Company, Export Processing Zone Authority, and Public Estates Authority, among others.

2.2 Local Government Units (LGUs)

3. *Eligible Infrastructure Projects* – Infrastructure projects which are financially viable and meet the other provisions of these IRR may be undertaken through BOT or BT schemes under R.A. No. 6957, including but not limited to the construction, which includes engineering, rehabilitation, improvement, expansion, and modernization, supply of equipment and machineries, operation and maintenance of the following:

- 3.1 Highways, including expressways, roads, bridges, interchanges, tunnels, and related facilities
- 3.2 Rail-based projects packaged with commercial development opportunities, e.g. use of government facilities
- 3.3 Non-rail based mass transit facilities, navigable inland waterways and related facilities
- 3.4 Port infrastructure like piers, wharves, quays, storage, handling, ferry services, and related facilities
- 3.5 Airports, air navigation, and related facilities
- 3.6 Power generation, distribution electrification, and related facilities
- 3.7 Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities
- 3.8 Irrigation and related facilities
- 3.9 Water supply, sewerage, drainage, and related facilities
- 3.10 Educational and health infrastructure
- 3.11 Land reclamation, dredging and other related development facilities
- 3.12 Industrial estates, including infrastructure facilities and utilities
- 3.13 Markets, slaughterhouses, and related facilities
- 3.14 Warehouses and post-harvest facilities
- 3.15 Public fishports and fishponds, including storage and processing facilities
- 3.16 Environmental and solid waste management related facilities such as collection equipment, composting plants, incinerators, landfill and tidal barriers, among others.

In the case of highway projects, the concerned Agencies/LGUs shall, prior to the call for bids for their implementation, secure from the DPWH, its clearance, on a non-

objection basis, of their plans for BOT and BT projects in order to avoid undue proliferation and unwieldy operation of the same (e.g., a series of toll road stations along a given route separately managed by numerous private operators which would greatly hamper the flow of traffic and inconvenience the public).

4. Inclusion of Proposed BOT and BT Projects in Agency/LGU Infrastructure Programs

4.1 In accordance with Section 4 of R.A. No. 6957, the concerned Agencies/LGUs "shall include in their infrastructure programs those priority projects that may be financed, constructed, operated and maintained by the private sector" through the BOT or BT schemes "under the provisions of this Act."

4.2 The Agency/LGU shall "give wide publicity to all such projects. In the case of a national agency, once every six (6) months, it shall publish the list of such projects in at least two (2) newspaper of general national circulation. In the case of an LGU, the publication must be made in at least one (1) newspaper of local/national general circulation." The agency/LGU must also give written "official notification to the contractors registered with them," including the concerned chapters of the Philippine Constructors Association, the National Confederation of Constructors Associations of the Philippines and the Philippine Chamber of Commerce and Industry, of the list of such projects at least once every six (6) months.

5. Approval of Proposed BOT and BT Projects

5.1 The head of the concerned Agency shall, in accordance with Section 4 of R.A. No. 6957, see to it that "the lists of all such national projects (proposed for BOT or BT schemes) must be part of the medium-term infrastructure programs of the agencies concerned and must be duly approved by Congress" prior to the call for bids for their implementation. For this purpose, the Agency shall submit such list to Congress as the need for a BOT or BT projects arises, but preferable once every six (6) months.

5.2 "Local projects (traditionally) funded and implemented by the local government units concerned," are to be "submitted to the local development councils for approval or confirmation." This means that the concerned Municipal Mayor shall submit municipal-level projects (e.g., market) to the Municipal Development Council, the City Mayor shall submit city-level projects (e.g., waterworks) to the City Development Council, and the Provincial Governor shall submit province-level projects (e.g., provincial expressways) to the Provincial Development Council for appropriate action. Then the projects are transmitted to the respective local sanggunians for approval prior to the call for bids for their implementation. For this purpose, the LGU shall submit the list to the Local Development Council concerned as the need for BOT or BT arises, but preferably once every six (6) months.

6. *Minimum Standards and Basic Parameters* – The Agency/LGU shall lay down the minimum design and performance standards and specifications, as well as economic parameters, which shall be observed by the bidder/contractor in preparing its bid and, if successful, in building and operating the facility. These shall also be used by the Agency/LGU in comparatively evaluating the bids and in supervising and monitoring the project construction and operation.

6.1 Minimum output standards and Specifications. The contractor shall build and operate the subject infrastructure facility which shall comply with the minimum design and performance standards and specifications prescribed by the Agency/LGU. These standards and specifications shall refer more to the desired quantity and quality of the outputs of the facility, i.e., goods and services to be produced, than to the inputs of funds and resources to produce the outputs. (Example – Toll Expressway Project: Provide a fully access-controlled expressway between points A and B, with a design speed of 100 kph and at least Service Level “B” within 29 years, per AASHTO specifications; entries/exits at points C, D, and E; drainage for 100-year frequency floods; etc.)

6.2 Economic parameters. To provide a uniform basis for the preparation by the contractors of their bids and the comparison by the tendering Agency/LGU of the bids on a “present value” basis, the Agency/LGU shall prescribe the following economic parameters:

- a. Inflation and discounting rates
- b. Foreign exchange rates
- c. Maximum period of project construction
- d. Fixed term for project operation and collection of tolls / fees / rentals / charges, in the case of BOT projects.
- e. Formulae and price indices to be used in adjustment of tolls / fees / rentals / charges, in the case of BOT projects
- f. Minimum period of repayment, in the case of BT projects

6.3 Facilities to be provided by the government. The Agency/LGU shall indicate the facilities associated with the subject project which are to be provided by the government. The cost of the same may be partly or wholly be financed and/or shouldered by the contractor as part of its bid and cost-recovery scheme. These facilities may include, but not limited to the following:

- a. Right-of-way
- b. Part of the structure, e.g., carriageway and stations for a rail transit project

7. Prequalification, Bids, and Awards Committee – The head of the concerned Agency/LGU shall create a Pre-qualification, Bids, and Awards Committee (PBAC) for the BOT or BT projects to be bid. The PBAC shall have the following minimum composition:

- a. At least a second ranking officer of the Agency/LGU
Chairman
- b. A legal officer Member-Secretary
- c. A technical officer knowledgeable on the project
Member