



Action for Economic Reform



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## PRIVATE SECTOR PARTICIPATION IN PUBLIC INFRASTRUCTURE

### Policy Note No. 5: Results of Consultation Dialogues with Private Sector Representatives from the Information and Communications Technology (ICT) Industry<sup>1</sup>

The role of modern and efficient infrastructure in economic development and the operation of markets is vital and undisputed. These goods and services reduce transaction costs and generate significant spillover benefits which justify their traditional provision by the public sector. However, chronic fiscal deficits have compelled government to turn to private firms for the supply of public infrastructure. Republic Act 6957, better known as the Build-Operate-Transfer Law and amended by RA 7718, serves as the legal basis for these private-public partnerships.

In recent years, proposed amendments to the BOT Law and its implementing rules and regulations were drafted in order to strengthen the BOT policy framework. Amendments to the BOT Law were filed in Congress in January this year as House Bill 5002. The bill has been referred to the Committee on Public Works and Highways and is pending deliberation in Congress. Meanwhile, its co-author, Congressman Joey Salceda, has been soliciting opinions from the private sector on the proposed amendments to aid discussion of HB 5002 and ensure a responsive policy environment.

The Economic Policy Reform and Advocacy seeks to widen the discussion of these proposed

amendments by bringing together diverse stakeholders in roundtable discussions. This is in line with its objective of promoting wide ownership and support for economic reforms, and generating advocacy in the economic policy arena. Previous fora revolved around private sector participation (PSP) in the power, water, transport, port and road sectors.

On March 10, 2006, the EPRA held a roundtable discussion on

enhancing private provision of infrastructure involving information and communication technology. Aside from representatives from the ICT industry, the conference was attended by practitioners in the medical field, itself another high-tech industry; members of the legal profession, the academe and NGOs; as well as officials from the DTI-Bureau of Investment, the National Computer Center and the Land Registration Authority.

## EMERGING ISSUES IN PRIVATE SECTOR PARTICIPATION IN INFRASTRUCTURE

One question that was raised during the forum was whether tension exists between innovation in the market place and strong government regulation. A representative from telecommunications asserted that while the industry's regulatory regime has been relatively benign, it is not uncommon for private sector providers to be saddled with requirements which can hamper efficiency. The telco industry has not hidden its desire to have a light-handed regulatory regime in place.

For instance, the Service Area Scheme of the mid-nineties required telcos to deploy a quota of fixed lines to address the pressing inadequacy of connectivity in the archipelago. The Philippine Long Distance Telephone Company's zero backlog commitment, and the landline rollout for all entrants dramatically increased the number of fixed lines to the present industry capacity of 67 million. Ironically, only up to 60% of these lines is subscribed, as technology and market forces led to the development of cellular telephony and its concomitant service, text messaging. With much idle capacity imposing additional costs on telcos, representatives argue that a market-driven process would have resulted in more efficient investment decisions.

This illustrates that even well-meaning interventions can go awry, and begs the question of how to regulate an industry that is constantly reshaped

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<sup>1</sup> Prepared by Karen G. Tecson for the Economic Policy Reform and Advocacy. May 2006. This article contains the results of "How to Ensure the Success of Private Sector Participation in Public Infrastructure Development;" a roundtable discussion with multi-stakeholders held on March 10, 2006 in Ortigas Center, Pasig City.

by changes in technology. The same is true with taxation, particularly in industries that require large scale investment. It was noted that any business with significant ICT content is likely to change its technology every two to three years. A tax regime that discourages investments would hamper the adoption of new technology and compromise the survival of firms.

The participants identified challenges in coordinating with government agencies. These include:

1. Limited awareness of the BOT law in some agencies of the government. This has resulted in interference in the implementation of some projects.
2. Lack of understanding of the mandated functions of the BOT Center, with jurisdiction being unclear at times. This is

compounded by an ostensible lack of coordination among agencies, which consequently delays the approval process.

3. Non-continuity of policies brought about by change of leadership. This causes hesitation on the part of investors.

Difficulties in the implementation of IT projects were also mentioned.

1. The need to update policies, systems, and rules and regulations to be consistent with e-commerce law, particularly with regard to e-payment and web-based transactions
2. Inadequate institutional capacity (e.g., limited manpower to respond to expansion of operations, and the non-availability of technically qualified personnel due to Salary Standardization Law)
3. Inadequate infrastructure

(i.e., non-availability of telecommunications facilities, and the non-availability of a stable electrical supply in certain areas)

Finally, participants lamented the difficulties of implementing unsolicited BOT projects, a concern that had been articulated in previous fora. Unsolicited projects do not go through regular government consultative and planning procedures, and have a greater tendency to seek market guarantees. It is also difficult to mount a Swiss challenge for these projects, wherein other investors try to offer a more attractive bid than that of the original project proponent. Despite their preponderance among BOT projects, the approval of unsolicited projects is frequently delayed reportedly because government officials fear accusations of corruption from media, lawmakers, or the Ombudsman.

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## **FURTHERING REFORMS TO ENHANCE PSP IN PUBLIC INFRASTRUCTURE**

Dialogue on how to advance private provision of ICT infrastructure has been ongoing. In a discussion with the National Telecommunications Center on the regulation of telcos, PLDT proposed that an assessment of regulatory reforms over the past ten years be made, and that appropriate lessons be drawn. Furthermore, they stressed that changes in regulation bring benefits that exceed costs, and not create problems that are larger than those being addressed.

At the roundtable discussion, it was observed that not all government projects are suited for public-private partnerships, and that one must examine revenue streams to determine whether a project is appropriate for such an arrangement. Participants suggested that these projects be listed, and that the conditions that make a project 'BOT-able' also be identified.

There is also need to raise the awareness of the public, including government agencies, about BOT law and procedures. This would prevent interventions that may delay or compromise the completion of ongoing projects. Furthermore, it may help to market all PSP projects, resume the training of BOT personnel, and conduct roundtable discussions and consultations among relevant government agencies. Such venues for the exchange of ideas were prevalent in the late-nineties, but are sadly absent now.

Forum participants also suggested the following action points pertaining to the ICT sector.

1. Responsiveness to changes in technology. Because of rapid changes in technology, there is a greater need for interaction among the government, regulators, incentive providers and the private sector. It was indicated that the Annual Investment Priority Plan be utilized for this end. This will guarantee that mainstream revisions are made on an annual or semi-annual basis for ventures that deserve government support.
2. Ensuring Institutional Capacity. It was suggested that there be a program to allow the National Computer Center to fulfill its mandate under the E-Commerce Act. IT programs would be approved by the NCC for the Department of Budget and Management to defray expenditures. The government itself must have adequate institutional capacity and sufficient funding to promote e-commerce.

# ON THE PROPOSED AMENDMENTS TO THE BOT LAW

During the forum, former BOT Center Executive Director Rafaelito Taruc discussed salient points of House Bill 5002 that are still the subject of debate. Firstly, there is the ostensible conflict between permitting Swiss challenges for unsolicited projects and safeguarding contracts. The Department of Trade and Industry has recommended reimbursing the expenses of original project proponents that lose in a Swiss challenge. This insures proponents against massive financial losses.

Another concern is having a single agency handle both the approval and supervision of projects. The DTI envisions streamlining the approval of PSP projects by excluding the NEDA Investment Coordinating Council from the process. It is argued that PSP projects do not fall under the NEDA ICC's jurisdiction, which covers Official Development Assistance grants, and activities funded by the General

Appropriations Act. Moreover, the framework for evaluating government projects reportedly differs from that suited for PSP. The DTI recognizes, however, that this move may jeopardize check and balance.

Furthermore, while the BOT Center is mandated to coordinate, monitor and supervise PSP activities, there are presently no clear provisions to finance the center's activities. The amended BOT Law will have to provide the created BOT Authority with adequate resources.

Another salient feature of HB 5002 is the supervision of the Toll Regulatory Board by the BOT Authority, because it is anticipated that most PSP projects will involve toll ways. The bill also prohibits Government Owned and Controlled Corporations from implementing projects without BOT Center approval.

As the forum ran its course, attendants articulated their

suggested amendments to the BOT law. Firstly, to avert the obstruction of projects, participants suggested that the amended law identify all government agencies that should be involved at the very inception of PSP projects. In particular, the Commission of Audit, which has figured in the delay of PSP projects in the past, must have some role in approving proposals.

While previous fora elicited the proposal to rule out government guarantees for unsolicited proposals, it was suggested in this conference that the amended law disallow unsolicited projects altogether. Instead, all private-public partnerships would be proposed on a competitive basis with full transparency. For this to be successful, though, government line agencies' weak capabilities in developing PSP projects would first have to be addressed.

Finally, an expert stated that the existing BOT paradigm is suited for hard infrastructure projects, but may be less fitting for IT. Some provisions in the current law are not relevant to IT, and it was suggested that the law be fine-tuned to accommodate the sector.

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## Research Advocacy and Advisory Group (RAAG)

Room 205 Ateneo Center for Social Policy and Public Affairs Building  
Social Development Complex, Ateneo de Manila University, Loyola Heights, Q.C.  
Tel# (02) 929 7970 • Fax# (02) 929 7035

Room 408 Ateneo Professional Schools, Rockwell Center, Makati City  
Tel# (02) 899-4590 • 899 7691 loc. 2408

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