

**GUIDELINES ON THE PRIVATIZATION AND DISPOSITION OF BCDA PROPERTIES -
PROCEDURES FOR ENTERING INTO JOINT VENTURE (JV) AGREEMENTS WITH PRIVATE ENTITIES**

I. RATIONALE

Section 8 of Executive Order (EO) No. 423 dated 30 April 2005 mandates the National Economic and Development Authority (NEDA) to issue guidelines to govern joint venture (JV) agreements with private entities with the objective of promoting transparency, competitiveness, and accountability in government transactions, and, where applicable, complying with the requirements of an open and competitive bidding. In compliance, NEDA issued the Guidelines and Procedures for entering into JV agreements between the government and private entities (NEDA JV Guidelines) in 2008.

The NEDA JV Guidelines was subsequently revised in 2013. The revised NEDA JV Guidelines explicitly exempts from its coverage JV activities of government corporate entities in the exercise of its primary mandate to dispose government assets and properties.

BCDA's primary mandate under Republic Act (RA) No. 7227 or the Bases Conversion and Development Act of 1992, as amended, involves the disposition and/or development of government properties and assets, particularly the lands covered under the 1947 Military Bases Agreement between the Philippines and the United States of America. Thus, BCDA is exempt from the NEDA JV Guidelines and may craft its own rules and procedures to govern joint venture agreements with private entities.

The Office of the Government Corporate Counsel (OGCC) confirmed the foregoing in its Opinion No. 145, Series of 2014, which states that BCDA may adopt its own guidelines in the development and disposition of its assets and operations of its facilities through JV arrangements, provided that principles of fairness, transparency and competitiveness are observed.

Accordingly, BCDA hereby issues these guidelines and procedures in establishing joint venture partnerships with the private sector with the aim of accelerating the development and maximizing the value of BCDA assets and properties.

These JV Guidelines, however, do not preclude BCDA from disposing or privatizing its assets, properties and facilities through other means. Pursuant to its approved Assets Disposition Plan, BCDA may dispose its lands and other assets through long-term lease or sale.

II. PRINCIPLES

BCDA may enter into a joint venture arrangement with a private sector entity (PSE) consistent with the following principles:

- 1.1 The JV activity shall be consistent with the mandate and authority of BCDA under RA No. 7227, as amended, EO No. 62 prescribing the policies and guidelines to implement R.A. 7227, EO No. 429 amending EO No. 62, and other relevant laws, Executive Orders, and rules and regulations, to the extent applicable.
- 1.2 The JV activity shall maximize the value of BCDA assets or shall be efficient or potentially efficient towards earning potential profits for BCDA while providing reasonable returns for the private sector partner;
- 1.3 The JV activity shall not result in a conflict of interest for BCDA and shall delineate its role as regulator and as JV partner; and
- 1.4 The JV activity may allow take-over by the private sector partner of the BCDA's share in the JV Activity subject to BCDA's divestment procedures and other requirements under relevant laws.

III. PURPOSE

These Guidelines are issued for the following objectives:

- 3.1 To prescribe the rules, regulations, guidelines and procedures in entering into JV Agreements with PSEs for projects/undertakings consistent with BCDA's primary mandate;
- 3.2 To maximize the value of BCDA assets, properties and facilities through the proper development, disposition, and operations thereof;
- 3.3 To encourage participation of PSEs possessing expertise and technical capabilities in property, facilities, and projects development, and in operations and management, to enter into JV agreements with BCDA;
- 3.4 To make partnership with the private sector a viable, efficient, and practical alternative in pursuing the development goals of BCDA; and
- 3.5 To ensure that all JV agreements by BCDA are entered into through fair, objective and transparent processes and procedures that promote accountability in government transactions.

IV. COVERAGE

These guidelines shall apply to all JV agreements for the development and/or disposition of BCDA properties, whether owned, administered or controlled; the operations of BCDA assets and facilities; and the privatization and assignment of BCDA's other vested rights and development projects.

V. GENERAL GUIDELINES

5.1 BCDA shall create a Joint Venture Selection Committee (JVSC), which shall have five (5) members and composed of the following:

- a. Chairperson – At least a third ranking officer of BCDA;
- b. One (1) Officer from the BCDA Legal Department;
- c. One (1) Officer knowledgeable in Finance;
- d. One (1) Officer knowledgeable in Project or Business Management and Operations; and
- e. One (1) Officer knowledgeable with the Technical Aspects/Requirements of the Project/ Business Undertaking.

The quorum in meetings of JVSC members shall consist of three (3) members. Each member is entitled to one (1) vote.

5.2 The JVSC shall be responsible for all aspects of the selection process, including the preparation of selection/tender documents, publication of the invitation to apply for eligibility and to submit a proposal, pre-qualification of prospective private sector participants, conduct of pre-selection conferences and issuance of supplemental notices, interpretation of rules regarding the selection process, conduct of the selection process, evaluation of financial and technical proposals, resolution of disputes between private sector participants, and recommendation for the acceptance of the proposal and/or the award of the contract. The JVSC shall also be responsible for the processing of unsolicited proposals, from the receipt of proposals, the initial evaluation, and all other steps until rejection or contract award.

- 5.3 BCDA may opt to enter into a JV contractual agreement (unincorporated JV) or form a separate JV Company (incorporated JV) depending on which JV mode will provide the most efficient and viable financial arrangement for the JV partners. In either case, the JV agreement should clearly state BCDA's intent to undertake a specific activity that is responsive to national development goals and objectives, as well as consistent with the BCDA's mandate under its charter.
- 5.4 In case of an incorporated JV, the Corporation shall be formed by BCDA and the private sector partner under the following parameters:
- a. The JV Company shall be incorporated and registered as a stock corporation in accordance with the provisions of Batas Pambansa Bilang 68, otherwise known as the Corporation Code of the Philippines, as amended, and the prevailing and applicable rules and regulations promulgated by the Securities and Exchange Commission (SEC);
 - b. Ownership and nationality requirements under the Constitution and other pertinent laws shall be complied with; provided, that BCDA's equity contribution in the JV Company shall be no more than fifty percent (50%) of the outstanding capital stock of the JV Company. BCDA's contribution may be through assets (including equipment, land, utility franchise, development rights, leasehold rights, intellectual property, cash or anything of value), which shall be subject to a third party independent valuation. For as long as BCDA is involved in the JV undertaking, the private sector partner shall not sell/transfer its interest in the JV Company without the express written consent of BCDA;
 - c. BCDA shall be represented in the Board of the JV Company in proportion to its investment;
 - d. The JV Company shall be permitted to derive income from the activities authorized under the JV Agreement during the term thereof. BCDA and the private sector partner shall be entitled to receive dividends from the net profits that would constitute portion of the unrestricted retained earnings of the company in each year in accordance with the JV Agreement; and
 - e. The JV Company shall stipulate a fixed term of existence of fifty (50) years, which may be extended for another fifty (50) years, by an amendment of the articles of incorporation, pursuant to the Corporation Code of the Philippines, as amended. BCDA's continued participation in the JV Company shall be determined by the attainment of BCDA's objective in pursuing the investment. After attaining such objectives, BCDA may divest its interest in the JV Company based on existing laws, rules and regulations. Further, the withdrawal of BCDA's capital contribution before the expiration of the said period is likewise encouraged; provided, that the divestment is made through competitive selection, initial public offering, or any other means that promote competition, fairness and transparency.
 - f. In drafting the incorporation documents of the JV Company and other contracts governing the relationship between the BCDA and the private sector participant, the parties should consider the following guidelines, among others: (1) clearly defined business objectives; (2) specified degree of participation and the management roles of each party in the JV activity; (3) defined contribution of capital and ownership rights to property; (4) specified division of the profits, risks and losses; (5) identified dispute mechanism to avoid management impasses that may produce deadlock or litigation; (6) specified termination/liquidation of the JV Company and indicate buy-out provisions; (7) specified confidentiality terms; and (8) stipulated indemnification mechanisms.
- 5.5 The above parameters and other provisions pertaining to incorporated JVs shall also govern unincorporated JVs to the extent applicable.
- 5.6 In all cases, full divestment should be undertaken in accordance with all the related laws, rules and regulations, guidelines, legal issuances, as may be applicable with disposition of government assets and properties.
- 5.7 BCDA may select JV partners through either solicited or unsolicited mode. In either case, it must ensure that the process of selection, award, and approval are conducted in a transparent and competitive process that promotes accountability and efficiency through publication of the relevant terms and conditions of the competitive challenge/selection.

VI. PROCESS FOR ENTERING INTO JV AGREEMENTS

- 6.1 **Requirements/Conditions for proposed JV Activity.** The proposed JV Activities shall comply with the following requirements/conditions:
- a. The proposed JV activity is within the mandate of BCDA;
 - b. The proposed JV activity is responsive in meeting national or specific development goals and objectives;
 - c. The JV activity proposal clearly describes the proposed investment, including its total cost, activities, objectives, sources of funding, extent and nature of the proposed participation of BCDA, and the relevant terms and conditions;
 - d. The JV activity proposal establishes all the components in determining the over-all feasibility of the proposed JV activity, including the technical, financial, economic, and legal aspects. Moreover, in project risks distribution among JV partners, expertise and management track record of the JV partners in handling such risks (*i.e.*, political, governance and economic) must be considered; and
 - e. The JV activity proposal shall contain all the required approvals needed to be secured from other government agencies/offices, if applicable.
- 6.2 **Negotiated JV and Competitive Challenge Procedure.**

Unsolicited JV Proposal. For purposes of these Guidelines, an unsolicited proposal shall refer to a project proposal submitted by the private sector, not in response to a formal solicitation or request by BCDA.

When BCDA receives a proposal from the private sector for a JV activity, the JVSC shall conduct a preliminary evaluation. The preliminary evaluation shall be completed by the JVSC within thirty (30) calendar days upon submission of complete documents by the private sector proponent. The JVSC shall determine on preliminary evaluation the completeness of the proposal and whether the proposed JV activity meets the requirements of Section 6.1 hereof.

Upon completion of the preliminary evaluation, the JVSC shall recommend to the BCDA President and Chief Executive Officer (PCEO) the acceptance or non-acceptance of the proposal. The PCEO then endorses the recommendation of either acceptance or non-acceptance to the Board for approval. Acceptance of the proposal by the Board does not confer Original Proponent Status (OPS) to the proponent. OPS will only be given after the approval by both parties of the Certification of Successful Negotiation.

In case similar proposals are received after acceptance of the first proposal but before conferment of OPS, BCDA may either reject all such proposals or subject it to competitive selection/public bidding. Otherwise, the JVSC shall evaluate the proposals using a first-in time approach. Under this approach, the first complete proposal is evaluated and decided upon. The second complete proposal will only be entertained if the first one is rejected, or if there is a failure in the negotiation of the first proposal, and so on until an OPS is conferred.

A complete proposal shall contain the following documents:

1. Cover Letter indicating the basic information of the Unsolicited Proposal such as:
 - Description of the Proposed Project (Rationale, Objectives)
 - Land Area and Location of the Proposed Development
 - Project Implementation Schedule

- General Description of new technology or new concept
 - Other relevant information
2. Company Profile
 - SEC Papers or the equivalent document from the country of incorporation which includes the Articles of Incorporation and the By-Laws
 - Latest General Information Sheet (GIS)
 - Latest Tax Returns
 3. Business Case or Concept Plan and Feasibility/Pre-feasibility study
 4. Draft Contract/Term Sheet
 5. Other Documents that are needed even if proprietary in nature

6.3 **Competitive Challenge.** In case of unsolicited proposals, and in all cases where BCDA directly negotiates with a PSE for a proposed JV undertaking, the negotiated terms shall be subjected to a competitive challenge wherein other PSEs shall be invited to submit comparative proposals.

The BCDA and PSE shall negotiate on the terms and conditions of the proposed JV activity – *i.e.* legal, technical and financial components. The negotiation shall, as far as practicable, comply with the same process, requirements and conditions as in the case of solicited JV proposals. The negotiation shall be completed within sixty (60) calendar days upon acceptance by the BCDA of the proposal.

Within seven (7) days after the successful negotiation, BCDA and the authorized representative of the PSE shall issue a signed certification that an agreement has been reached and both agree to submit the proposal to competitive challenge. Said certification shall also state that BCDA has found the PSE eligible to enter into the proposed JV activity and shall confer OPS to the latter. After the award of the OPS, the selection documents for the competitive challenge, including the draft contract, are prepared. The draft contract for the JV shall be reviewed by the OGCC.

Should the parties not agree by the end of the negotiation period, BCDA shall have the option to reject the proposal by informing the PSE in writing of the grounds for rejection and thereafter accept a new proposal from another PSE, or to pursue the proposed activity through alternative routes other than JV.

6.4 **Selection/Tender Documents.** The JVSC is responsible for the preparation of the selection/tender documents appropriate for the mode of selection and the particular project. These may include:

- i. Instructions to Private Sector Participants. This contains the general description and objectives of the JV activity; proposal submission procedures and requirements; amount, form and validity period of proposal security; milestones; method, parameters and criteria for the evaluation of the proposals; minimum amount of equity required from the JV Partner; requirements of concerned regulatory bodies/agencies as may be pertinent or applicable to the JV activity; revenue sharing arrangement, dividends policy, if any; and nationality and ownership requirements as required by law;
- i. Minimum Design, Performance Standards/Specification, and other Financial and Economic Parameters. This shall include appropriate environmental standards by the Department of Environment and Natural Resources (DENR) and other standards by BCDA and other concerned regulatory agencies as may be pertinent or applicable to the JV activity. For the purpose of evaluating proposals, the following economic parameters, among others and where applicable, shall be prescribed: (i) discount rate, foreign exchange rate and inflation factor; (ii) maximum period of project construction; (iii) fixed term and price indices to be used in the adjustments of tolls/fees/rentals/charges, and (iv) minimum period of repayment;
- ii. Feasibility Study or a Business Case/Pre-feasibility Study of the Proposed Project:
- iii. Draft contract reflecting the terms and conditions in undertaking the JV activity, including the contractual obligations of the contracting parties and the ownership of the JV activity, project, or property after the termination of the JV Agreement. The draft contract shall include provisions on the following matters, as far as practicable:
 - a. Clearly defined purpose and objective/s, contractual/agreement mode (whether incorporated or unincorporated JV), term and scope of the JV;
 - b. Total cost of the JV activity, project specifications and features;
 - c. The relationship between the parties, management roles in the JV activity, and a statement that the parties are actually co-venturers for the project, whether or not the contract is in the name of all members;
 - d. The establishment of a fund by the parties to finance the work, together with the amount, type (cash, assets, etc.), and valuation of committed contributions of each party and when such contributions will be made, with the fund being deposited in a special bank account under dual control and all progress payments and other revenues being deposited in such account. If the equity/contribution of the private sector is to be borrowed, a statement that there shall be no government guarantee for said loan;
 - e. Procedure for additional capital infusions, if required, and a statement that there shall be no government guarantee for loans to be incurred by the private sector in case the additional contribution of the private sector is to be borrowed;
 - f. A declaration of the participation of the parties and percentage in which profits and losses are shared, in proportion to the contributions of the party to the working fund. The amount of contribution of funds by the parties can be increased or decreased, depending on the contributions of equipment or expertise;
 - g. Specified termination/liquidation of the JV Company, buy-out provisions, and details on the transfer of ownership of the JV activity/facility including provisions on what happens to the JV's assets after the expiration of the JV agreement or end of the JV period. If equity other than cash is to be contributed, a statement as to how the property will be appraised and valued during and after the effectivity of the JV Agreement;
 - h. Implementation milestones, regular meeting schedules, financial and periodic JV and progress reporting procedure;
 - i. Definition of items which are to be considered as costs to the JV for the purpose of determining profit or loss and a description of items which are not reimbursable to members of the JV, and specified division of the profits and risks and losses;
 - j. Performance security requirements of the project and the bonding obligations of the co-venturers;
 - k. Undivided pro-rata interests held by the co-venturers on all assets of the JV;
 - l. Restriction regarding assignment of private sector participant's undivided pro-rata interests in assets of the JV;
 - m. Cost recovery scheme, including payment to the government of royalties/rights, the form/description and amount of earnings (cash, asset, etc.), whether they are in absolute amounts or variable, and the period and timing such earnings or payment shall be received. In case of non-cash payment or payment in form of asset, a statement/provision on how it will be valued, the minimum value of the asset, and the determination/selection of asset such as how and who will determine/select the asset;
 - n. Indemnification and liquidated damages; performance and warranty bonds; minimum insurance coverage; acceptance tests and procedures; validity of the performance security, warranty period and procedures;
 - o. Grounds for and effects of contract termination/default including modes for settling disputes, procedure for handling guarantees, defects and insurance after termination, and threshold (in terms of amount, time/period, or both) for which non-payment or delay in payment and delay in starting the project/s shall be grounds for termination/rescission of the JV contract/agreement;
 - p. The manner and procedures for the resolution of warranty against corruption;
 - q. Compliance with all other laws, rules and regulations;
 - r. Procedure and/or period for withdrawal by the government entity of its contribution to the JV, or exit divestment by the government entity of its interest in the JV, and substitution or addition of parties;
 - s. Payout of funds; and
 - t. Disputes arbitration clause.
- iv. Selection Form reflecting the required information to properly evaluate the technical and financial proposal;

- v. Forms of technical and financial proposals and performance securities; and
- vi. Other documents as may be required by the JVSC and other requirements of concerned regulatory agencies as may be pertinent or applicable to the JV activity.
- 6.5 **Publication of Invitation to Apply for Eligibility and to Submit a Proposal (IAESP).** The IAESP shall be advertised at least once in a newspaper of general nationwide circulation, and posted continuously at the website of BCDA. Interested PSEs shall be given at least thirty (30) calendar days from the last date of publication of the IAESP to apply for eligibility and to submit a proposal. Notwithstanding, BCDA may adjust said period as may be appropriate for the nature, scope, size and complexity of the proposed JV activity; provided, that the principles of transparency, competition and accountability are observed.

6.6 **Qualification of Private Sector Participants.** Any individual, partnership, corporation, firm, or consortium, whether local or foreign, may participate subject to the limits set herein:

- a. Legal Capacity. The prospective private sector participant must meet the nationality and ownership requirements under the Constitution and other applicable laws and issuances. In case of a corporation or partnership, it must be duly incorporated or established under the laws of the jurisdiction of its incorporation or establishment.
- b. Technical Capability. The prospective JV Partner, by itself or through member-firm/s in case of a consortium, or through consultant(s)/contractor(s) which the prospective JV Partner may engage for the project, must have successfully undertaken project(s) similar or related to the JV activity being proposed or bidded out. The cost and the relevant period in which the similar projects were undertaken shall be determined by the JVSC depending on the scope and value of the proposed Project or JV Activity. The individual firms and/or its consultant(s)/contractor(s) may individually specialize on any or several phases of the project(s). A consortium proponent shall be evaluated based on the individual or collective experience of the member-firms and of the consultant(s)/contractor(s) that it has engaged for the project.
- c. Financial capability eligibility requirements. The JVSC shall determine before evaluation of eligibility, the minimum amount of equity needed for the JV activity.

Financial capability shall be measured in terms of the ability of the prospective JV Partner to provide a minimum amount of equity to the JV activity, which shall be determined by the JVSC depending on the scope and value of the proposed project. The minimum equity shall be measured in terms of proof of the ability of the prospective Project Proponent and/or consortium to provide:

Equity

- a minimum amount of equity to the project measured in terms of the net worth of the company, or in the case of a consortium, the net worth of the lead member or the combined net worth of members,
- Set-aside deposit equivalent to the minimum equity required, or

Debt

- A notarized statement/certification from a domestic universal/commercial bank or any international bank recognized by the Bangko Sentral ng Pilipinas attesting that the prospective Project Proponent and/or members of the consortium are banking with them, and that they are in good financial standing and/or are qualified to obtain credit accommodations from such banks to finance the project.

For this purpose, the prospective JV Partner must submit Audited Financial Statements for the period/s as may be required by the JVSC, to prove its financial capability.

- d. Acceptance of Criteria and Waiver of Rights to Enjoin JV Activity. In addition to the above, all prospective private sector participants shall be required to submit, as part of their qualification documents, a statement stipulating that the private sector participant: (i) has accepted the qualification criteria established by the JVSC of BCDA; and (ii) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against BCDA or its JVSC to prevent or restrain the qualification proceedings related thereto, the award of the contract to a successful private sector participant, and the carrying out of the awarded contract.
- e. If the private sector participant is a consortium, it must also submit a copy of the Consortium Agreement, which shall include the following information:
- brief description of the consortium, the individual members of the consortium and the nature and extent of the participation (capital of each member in relation to the whole capital);
 - the lead member of the consortium, who is authorized by all the members to represent and sign any and all documents related to this bidding including the joint venture agreement with BCDA; and
 - agreement of all members to be jointly and severally liable for the obligations of the consortium under the award/contract.

Each consortium participant should submit the required eligibility documents.

6.7 **Eligible and Ineligible.** BCDA, through its JVSC, shall, within a period of fifteen (15) calendar days after the deadline for submission of eligibility documents, complete the evaluation of the eligibility documents of the prospective JV Partners and determine which among them are "eligible" and "ineligible". Within seven (7) calendar days after such determination, the JVSC shall duly inform the prospective JV partners in writing of their eligibility or ineligibility. In case of the latter, the grounds for ineligibility must be stated in the notice.

6.8 **Issuance of Tender Documents.** BCDA shall make available the related competitive selection documents to all eligible private sector participants as soon as practicable to provide them ample time to examine the same and to prepare their respective proposals prior to the date of opening of the proposals. The time period from the last day of the issuance of tender documents to the date of opening of the proposal shall not exceed sixty (60) calendar days.

The proposal parameters for the proposed JV activity should be transparent and fair. It should not, in any way, be tailor-made for or be meant to favor or give advantage to a particular private sector participant.

6.9 **Supplemental Competitive Selection Bulletins and Pre-Selection Conferences.**

- a. Responsibility of the Private Sector Participant. The prospective private sector participant shall be solely responsible for examining and understanding the requirements and terms and conditions of the selection documents with respect to the cost, duration and execution/operation of the project as it affects the preparation and submission of its proposal. BCDA shall not assume any responsibility regarding erroneous interpretations or conclusions by the prospective private sector participant from information furnished or indicated in the competitive selection documents.
- b. Supplemental Notices. On or before the pre-selection conference, a prospective private sector participant may submit to BCDA a written request for clarification as to any data or requirements or any part of the selection documents. Any substantive interpretation given by BCDA shall be issued in the form of a Supplemental Notice, and be furnished to all prospective private sector participants. BCDA may also issue Supplemental Notices to all prospective private sector participants at any time for purposes of clarifying any provisions of the selection documents, provided that the same are issued within a reasonable period to allow all private sector participants to consider the same in the preparation of their proposals.

- c. Pre-Selection Conference. BCDA shall conduct a pre-selection conference at least thirty (30) calendar days before the deadline for the submission of proposals. Notwithstanding, BCDA may adjust said period as may be appropriate for the nature, scope, size, and complexity of the proposed JV activity; provided, that the principles of fairness, transparency, competition and accountability are observed.

6.10 **Submission and Receipt of Proposals**. Private sector participants shall be required to submit their proposals on or before the deadline stipulated in the "Instructions to Participants". For eligible participants, proposals shall be submitted in two (2) separate sealed envelopes, the first being the technical proposal and the second the financial proposal.

- a. The Technical Proposal shall contain the following, as applicable:
- i. Compliance statements with regard to the technical parameters as stated in the tender documents;
 - ii. Operational feasibility;
 - iii. Technical soundness, including proposed project timeline;
 - iv. Preliminary environmental assessment
 - v. Cost and financing plan of the JV activity
 - vi. Proposal Security in the amount to be determined by BCDA, but which shall not be more than ten percent (10%) of the cost of the JV activity subject of the selection process. The Proposal Security shall be in the form of a bank manager's check or cashier's check issued by a universal or commercial bank.

In the case of an Original Proponent of an unsolicited proposal, the Original Proponent shall post the Proposal Security on the first day of the publication of the Invitation to Apply for Eligibility and to Submit a Comparative Proposal in the amount and form stated in the tender documents.

- vii. Other documents to support the private sector participant's technical proposal, as may be required by BCDA.
- b. The Financial Proposal shall contain the following, as the case may be:
- i. Compliance statements with regard to the financial parameters stated in the tender documents;
 - ii. Proposed cost of the JV activity, operation and maintenance cost, the amount of equity to be infused and debt to be obtained for the project, sources of financing, and all other related costs; and
 - iii. Financial proposal corresponding to the parameters set by BCDA.

- c. BCDA is not precluded from specifying other requirements for the technical and financial proposals that are best suited for the specific JV activity.

6.11 **Submission of late proposals**. Proposals submitted after the deadline for submission prescribed in the "Instructions to Private Sector Participants" shall be considered late and shall be stamped with the date and time received and be returned unopened.

6.12 **Opening and Evaluation of Proposals**

- a. Opening of the Envelope for the Technical Proposal. At the date and time of the proposal opening stipulated in the "Instructions to Private Sector Participants", the JVSC shall open only the first envelope containing the technical proposal and ascertain: (a) whether the same is complete in terms of the data/information required; and (b) whether the same is accompanied by the required Proposal Security in the prescribed form, amount, and period of validity. All private sector participants or their representatives present at the opening of the envelopes containing the Technical Proposal shall sign a register of the proposal opening.
- b. Evaluation of the Technical Proposal. The evaluation of the first envelope containing the Technical Proposal shall involve the assessment of the technical, operational, environmental, and financing viability of the proposal, vis-à-vis the prescribed requirements and criteria/minimum standards, and basic parameters prescribed in the competitive selection documents. The JVSC shall complete the evaluation of the Technical Proposal within thirty (30) calendar days from the date the proposals are opened. Only those proposals that have positively passed the evaluation of the Technical Proposal shall be qualified and considered for the evaluation of the Financial Proposal.
- c. Opening of the Envelope for the Financial Proposal. Only the Financial Proposals of private sector participants who passed the technical proposal evaluation shall be opened for further evaluation. The financial proposals tendered by private sector participants who failed the technical proposal evaluation shall not be considered further, and shall be returned unopened, together with a notice stating the reasons for disqualification. The JVSC shall notify the private sector participants qualifying for the second stage of evaluation of the date, time and place of the opening of the envelopes for the financial proposal. The opening thereof shall follow the same procedure prescribed for the opening of the envelopes containing Technical Proposals.
- d. Evaluation of the Financial Proposal. The evaluation of the Financial Proposal shall involve the assessment and comparison of the Financial Proposals against the financial parameters stated in the tender documents and proposal parameters set by BCDA. The proposed financing plan must show that the same adequately meets the costs relative to the JV activity. The evaluation of Financial Proposals shall be completed by the JVSC within fifteen (15) calendar days.
- e. Simultaneous Evaluation of the Technical and Financial Proposals. Simultaneous evaluation of the Technical and Financial proposals may be resorted to if the JVSC determines that the nature of the JV activity requires the appreciation of both the Technical and Financial Proposals as a whole in order to determine the best proposal. In such case, the proposal documents shall explicitly state the evaluation procedure. Simultaneous evaluation of the Technical and Financial proposals shall be completed within thirty (30) calendar days from the date the proposals are opened.
- f. Prescriptive Periods. The periods stated for the evaluation of the Technical and Financial Proposals are prescriptive. The JVSC may adjust said periods as may be appropriate for the nature, scope, size, and complexity of the proposed JV activity. Provided, that the principles of fairness, transparency, competition and accountability are observed.
- g. Rejection of Proposals. Non-compliance to the information required on either the first or second envelope shall be grounds for rejection of proposals.
- h. Withdrawal and/or Modification of Proposals. Withdrawal and/or modification of proposals may be allowed upon written notice by the private sector participant concerned to the JVSC prior to the time and date set for the opening of the envelope containing the Technical Proposal as specified in the "Instructions to Private Sector Participants". No proposals shall thereafter be modified or withdrawn. Proposal modifications received after said period shall be considered late and will be returned unopened. Withdrawal of proposals after the proposal opening date shall cause the forfeiture of the private sector participant's Proposal Security.
- i. Right to Reject All Proposals. BCDA reserves the right to reject any or all proposals, waive any minor defects therein and accept the offer it deems most advantageous to the government.
- j. Breaking Tie Bids. In case tie bids occur under competitive selection or competitive challenge, the procedure for breaking tie bids shall be done through drawing of lots or similar methods that are non-discretionary and non-discriminatory such that it is based on sheer luck or chance.
- k. Right to Outbid.

The Right to Outbid provision is not an automatic right bestowed upon the original private sector proponent. This right shall only be applicable in the following cases:

- i. When the proposed JV Activity involves the development and/or privatization of a property which is subject of an on-going legal case or ownership claims, and the original private sector proponent is willing to assume any and all legal risks appurtenant to the property or facility subject of the proposed JV Activity;
- ii. When the proposed JV Activity involves the development and/or privatization of a property which requires the clearing and/or relocation of informal settlers and/or replication of military structures and facilities, the cost of which shall be for the account of the original private sector proponent;
- iii. When the proposed JV Activity involves the development and/or privatization, or management and operation of utilities and facilities within the BCDA-administered economic zones; and
- iv. When the proposed JV Activity involves a new or pioneering concept and/or innovative technology or method.

If BCDA determines in the foregoing cases that an offer made by a comparative private sector participant (challenger) other than the original proponent is superior or more advantageous to the government than the original proposal, the original proponent shall be given the right to outbid the better offer of the challenger. Outbidding by the original proponent of the challenger's offer shall be subject to terms and parameters to be approved by the BCDA Board. The outbidding shall be within thirty (30) calendar days from receipt of notification from the BCDA of the results of the competitive challenge. If the original proponent submits a better offer than the one submitted by the challenger within the prescribed period, the JV activity shall be awarded to the original proponent. However, should there be no better offer received from the original proponent within the prescribed period, the JV activity shall be awarded to the challenger submitting the most advantageous proposal. In case, however, that no comparative proposal is received by the BCDA challenging the original proposal, the JV activity shall immediately be awarded to the original proponent.

6.13 Award and Approval of Contract

- a. Recommendation to Award. Within fifteen (15) calendar days from the completion of the evaluation procedure by the JVSC, the JVSC shall endorse its evaluation/assessment of the proposals to the PCEO. Within seven (7) calendar days from the endorsement of the evaluation/assessment of the proposals by the JVSC, the PCEO shall recommend to the BCDA Board the approval of the award to the Winning Private Sector Participant. The PCEO's Memorandum to the Board recommending the award should contain the JVSC recommendation, including minutes of negotiation meetings duly signed by all its members, and the JVSC evaluation/assessment report on the proposals explaining in clear terms the basis of its recommendations.
- b. Decision to Award. Within seven (7) calendar days from the submission by the PCEO of the recommendation to award, the BCDA Board shall approve or reject the same. The approval shall be manifested by signing and issuing the "Notice of Award" to the Winning Private Sector Participant within seven (7) calendar days from approval thereof. BCDA shall post a corresponding "Notice" on its website declaring the award of the contract/JV undertaking to the Winning Private Sector Participant.
- c. Notice of Award. The "Notice of Award" to be issued by the BCDA shall contain, among others, an instruction to the Winning Private Sector Participant to comply with conditions precedent for the execution of the JV Agreement and to submit compliance statements with regard thereto, within thirty (30) calendar days from receipt of the "Notice of Award" unless otherwise specified or extended by BCDA.
- d. Performance Security. Conditions precedent for the execution of the contract shall include the posting of a Performance Security in favor of BCDA. The JVSC shall determine which form of Performance Security it will require, which may be in the form of cash, bank draft or guarantee confirmed by a local bank (in the case of foreign bidders bonded by a foreign bank), letter of credit issued by a reputable bank, surety bond callable on demand issued by Government Service Insurance System (GSIS) or by a surety or insurance companies duly accredited by the Insurance Commission as follows:
 - i. Cash, manager's check, irrevocable letter of credit, bank draft — a minimum of two percent (2%) of the private sector participant's contribution to the JV activity;
 - ii. Bank Guarantee — a minimum of five percent (5%) of the private sector participant's contribution to the JV activity;
 - iii. Surety Bond — a minimum of ten percent (10%) of the private sector participant's contribution to the JV activity.

Failure to comply with the conditions precedent for the execution of the contract within the prescribed thirty (30)-calendar day period or as specified or extended by BCDA will result in confiscation of the Performance Security. Within seven (7) calendar days from receipt of the compliance statements from the winning private sector participant, BCDA shall determine the sufficiency of the same, and notify the winning private sector participant accordingly.
- e. Validity and Return of Proposal and Performance Securities. The execution of the JV Agreement shall be made within the period of the validity of the Proposal Security. The required Proposal Security shall be valid for a reasonable period, but in no case beyond one hundred eighty (180) calendar days following the opening of the proposals. Unless earlier forfeited, Proposal Securities shall be returned to all private sector participants upon signing of the JV Agreement by the winning private sector participant.

The Performance Security shall be valid within the period of one (1) year after the expiration of the JV agreement or end of the JV period, or as may be stipulated in the JV agreement. Upon certification by BCDA that there are no claims filed against the Winning Private Sector Participant after the expiration of the JV agreement or end of the JV period, the Performance Security shall be released by the former. As may be agreed upon in the JV agreement, a portion of the Performance Security shall be released upon compliance with corresponding milestones.

Extension of Validity of Proposals. When an extension of validity of proposals is considered necessary, those who submitted proposals shall be requested in writing to extend the validity of their proposals before the expiration date of the same. However, private sector participants shall not be allowed to modify or revise the price or other substantial aspect of their proposals. Further, private sector participants must correspondingly extend the validity of their Proposal Security as a condition for the extension of the validity of their proposals.

Private sector participants shall not refuse such request for extension except on the following grounds: (1) loss of interest in the Project, and (2) unforeseen financial meltdown/crisis. Private sector participants who refuse the request based on these grounds shall not forfeit their Proposal Security; provided that, in case of refusal based on unforeseen financial meltdown/crisis, private sector participant must submit an affidavit attesting to the facts alleged, and other specific documents proving the same.

- f. Single Responsive Bid. A single and responsive bid shall be considered for award if it falls under any of the following circumstances:
 - i. If, after advertisement, only one PSE submits eligibility documents within the deadline stipulated in the IAESP, and such PSE meets the eligibility requirements and submits a bid which is responsive to the technical and financial requirements;
 - ii. If, after advertisement, multiple PSEs submit eligibility documents in accordance with the provisions of these Guidelines, but only one meets the eligibility requirements and such eligible PSE submits a bid which is responsive to the technical and financial requirements;
 - iii. If, after the eligibility check, multiple PSEs meet the eligibility requirements but only one submits a bid, and its bid is found to be responsive to the technical and financial requirements; or

- iv. If, after qualification/evaluation of proposals, only one PSE meets the technical requirements but is not able to comply with financial requirements, and a negotiation on the financial terms/proposal in accordance with Section 6.13 (i) hereof is conducted and is successful.

- g. Prospective Bidder/s Compliant with the Technical Requirements. In case no technically qualified prospective bidder is able to comply with financial requirements, BCDA may conduct negotiation on the financial terms/proposal in accordance with Section 6.13 (i) hereof.

- h. Negotiation on the Financial Terms/Proposal under the Competitive Selection Process. In case the private sector participants, whose Technical Proposals are rated "passed", are not able to comply with the financial requirements, BCDA shall request said participants to submit new Financial Proposals. Thereafter, the JVSC shall notify and negotiate with the proponent with the most advantageous Financial Proposal. The Technical Proposal shall remain valid and binding. In the event the JVSC fails to successfully negotiate with said proponent within thirty (30) calendar days reckoned from the date of notification, the JVSC shall negotiate with the next ranked most advantageous financial proposal, and so on and so forth, until a successful negotiation has been concluded.

In case of a single technically qualified participant, BCDA may conduct negotiations on the financial terms or on the Financial Proposal and shall conclude said negotiation within thirty (30) calendar days. The Technical Proposal shall remain valid and binding.

If there is no successful negotiation, BCDA shall conduct another competitive selection. In case of a second failure of competitive selection, BCDA may resort to Negotiated JV.

- i. Failure of Competitive Selection. There shall be a failure of competitive selection in any of the following instances:

- i. No prospective bidder/s is/are eligible;
- ii. No bids or proposals are received;
- iii. No prospective bidder/s is/are able to comply with technical requirements; or
- iv. No successful negotiation on the financial terms/proposal as provided under Section 6.13 (i) hereof.

In the event of a failed competitive selection brought about by instances stipulated above, the JVSC shall review the Terms of Reference (TOR)/bidding documents and conduct another competitive selection. In case of second failure of competitive selection, BCDA may resort to Negotiated JV.

- j. Execution/Approval of the JV Agreement. The authorized signatory(ies) of the Winning Private Sector Participant and BCDA, shall execute and sign the JV Agreement, within seven (7) calendar days after BCDA notifies the Winning Private Sector Participant of its compliance to the conditions or requirements precedent to the execution of the contract.

In the event of refusal, inability or failure of the Winning Private Sector Participant to enter into contract with BCDA within the time provided therefore, BCDA shall forfeit its Proposal Security. In such event, BCDA shall consider the private sector participant with the next ranked complying proposal as the Winning Private Sector Participant, and notify said private sector participant accordingly. If the next ranked complying private sector participant shall likewise refuse or fail to enter into contract with BCDA, its Proposal Security shall likewise be forfeited and BCDA shall consider the next ranked complying proposal, and so on, until a contract shall have been entered into. In the event that BCDA is unable to execute the contract with any of the complying private sector participants, a failure of competitive selection will be declared and the JV may be subjected to a competitive selection again.

- k. Deviations and Amendments to the JV Agreement. BCDA shall not proceed with the award and signing of the contract if there are material deviations from the parameters, terms and conditions set forth in the proposal/tender documents that tend to increase the financial exposure, government liabilities and risks or any other factor that would cause disadvantage to government and any deviation that will cause prejudice to losing private sector participants. Violation of this provision shall render the award and/or the signed JV Agreement invalid.

- l. Other Approvals for Contract. The entity tasked under the JV Agreement shall, as may be required under existing laws, rules and regulations, secure any and all other approvals for the contract, or the implementation thereof, from government agencies or bodies including the regulator, in the case of public utility projects. BCDA may provide the necessary assistance to its JV Partner in securing all the required clearances. The contract shall provide milestones in securing such other approvals required for the implementation of the contract. In case of unsolicited JV projects, BCDA will ensure that required approvals under existing laws shall be complied with as condition precedents prior to contract effectivity.

Prior to the execution of the JV Agreement, the OGCC as the statutory counsel of BCDA, shall issue the corresponding Counsel's Opinion.

- m. Contract Effectivity. The contract shall be effective upon signing thereof by the President of BCDA unless another date is stipulated therein.

6.14 **Process Flow.** Proposals shall be processed following the flowchart in Annex A of these Guidelines, which indicates the basic activities in the evaluation of proposals and the minimum number of days by which proposals are processed.

6.15 **Appeals Mechanism.** Decisions of the JVSC may be appealed in writing to the BCDA Board: Provided, however, that the appellant has filed a prior motion for reconsideration and the same has been resolved by the JVSC. The appeal must be filed within seven (7) calendar days from receipt by the appellant of the resolution of the JVSC denying its motion for reconsideration. An appeal may be made by filing a verified position paper with the BCDA Board, accompanied by the payment of a non-refundable appeal fee, which shall not be less than one-half (1/2) of one percent (1%) of the project cost.

The BCDA Board, or its authorized representative, shall act on the appeal within thirty (30)-calendar days. The decision of the BCDA Board, or its authorized representative, on the appeal shall be final and immediately executory. If the appeal is not resolved within said period, the appeal is deemed denied.

6.16 **Amendments.** These Guidelines may be amended and/or modified from time to time by BCDA, in consultation with the Office of the Government Corporate Counsel.

6.17 **Separability.** If any provision of these Guidelines is held or declared void or unenforceable by final judgment of a court of competent jurisdiction, the other provisions unaffected thereby shall remain in full force and effect.

6.18 **Effectivity.** These Guidelines and any subsequent amendment or modification thereto shall take effect immediately after publication.

APPROVED by the Board of Directors of the BCDA during its 6 September 2017 meeting.