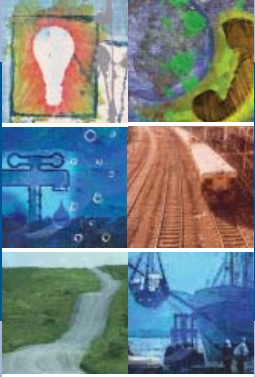


WORKING PAPER  
NO. 1



# Unsolicited Infrastructure Proposals

## How Some Countries Introduce Competition and Transparency

John T. Hodges  
Georgina Dellacha

HELPING TO ELIMINATE  
POVERTY THROUGH  
PRIVATE INVOLVEMENT  
IN INFRASTRUCTURE

WORKING PAPER NO. 1, 2007

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John T. Hodges  
Georgina Dellacha

## **Public-Private Infrastructure Advisory Facility**

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## ACKNOWLEDGMENTS

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The authors are most grateful for comments, suggestions, and invaluable input from Nazir Alli, Felix Amerasinghe, Jose Barbero, Swati Buch, Giuliana Cane, Marcus Clinch, Jeff Delmon, Claudio Donato, Alberto Germani, Hope Arandela Gerochi, Nelson Guevara, Junglim Hahm, Heung-soo Kim, Jay-Hyung Kim, James Leigland, Cledan Mandri-Perrot, Greg McDowall, Christopher Pablo, Paul Reddel, Roberto Salinas, Michael Schur, Luis Tineo, and Michael Warlters.

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## EXECUTIVE SUMMARY

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Governments worldwide have been increasingly looking to the private sector to fill the growing gap between the demand and supply of infrastructure services. As a result, private participation in infrastructure (PPI) in developing countries increased dramatically in the past fifteen years, accounting for more than \$850 billion in committed new investment between 1990 and 2005.<sup>1</sup> While the results have been mixed in some countries, many governments have recognized that the private sector can be an important mechanism for bringing technical and managerial expertise to the construction, operation, maintenance, and financing of infrastructure projects.

This paper looks at specific type of PPI projects called “unsolicited proposals.” Unsolicited proposals are not requested by a government and usually originate within the private sector. These proposals typically come from companies with ties to a particular industry—such as developers, suppliers, and financiers—that spend their own money to develop basic project specifications, then directly approach governments to get the required official approvals.

This paper focuses on unsolicited proposals that are natural monopolies or are in markets with limited or no competition (for example, water distribution concessions, toll roads, airports, and such), as opposed to projects that must compete within markets once licensed (for example, merchant power plants, cellular telecom service, and so on). PPI projects in deregulated, competitive markets generally do not require as much public sector support or oversight, and costumers have the option to turn to alternatives if a service is overpriced or quality is not satisfactory.

A major issue is that many unsolicited projects are associated with a lack of competition and transparency. Much of the controversy stems from governments granting exclusive development rights to private proponents without a transparent tendering process. Private proponents commonly argue they have intellectual property rights to project concepts, are the only developer interested in the project, or can save the government time and money by sole-source negotiating project details. Unfortunately, governments are often too easily convinced by these arguments and, as a result of being sole-sourced, the unsolicited proposals lend themselves more easily to corruption.

Another major issue is the increasing numbers of unsolicited proposals presented to governments in both developing and developed countries. While in many cases the origin of a project is not clear, the percentage of overall PPI projects that originate as unsolicited proposals is also estimated to be significant in some countries (for example, approximately 43 percent in Taiwan [China]). Because unsolicited proposals are beginning to represent a significant share of overall projects in many countries and these proposals can create negative public perceptions, many policy makers have begun to realize the need to directly address them in PPI legislation.

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<sup>1</sup> See *PPI Database*, World Bank, <http://ppi.worldbank.org/>.

Unsolicited proposals increase the burden on governments and corresponding perceptions of corruption, which leads to arguments to prohibit them altogether. For example, governments can better organize overall sector development by initiating all projects themselves and can establish public sector “buy-in” for future governments. At a minimum, a principle should be that *all unsolicited proposals are channeled into a transparent, competitive process where challengers have a fair chance of winning the tender.*

The premise of this paper is that some unsolicited proposals, when subject to competition and transparency, may contribute to the overall infrastructure goals of countries, particularly where governments have low technical and financial capacity to develop projects themselves. Based on this premise, a few governments have developed effective systems to channel unsolicited proposals into public competitive processes, thus providing more transparency and political legitimacy to private infrastructure.

In particular, this paper looks at the processes of Chile, the Republic of Korea, the Philippines, South Africa and Taiwan (China) in detail, as these governments have created institutional mechanisms that encourage the private sector to come forward with potentially beneficial project concepts, while at the same time introducing competitive forces to secure the benefits associated with a public tender. Other countries, such as Argentina and Costa Rica, have also recently developed similar policies for managing unsolicited proposals; it is expected that more countries will follow these models.

The most common systems that governments use to manage unsolicited proposals are commonly referred to as the “bonus system,” the “Swiss challenge system,” and the “best and final offer system.” Using a bonus system, the governments of Chile and Korea grant an advantage to the original project proponent in the form of a premium used in the bidding procedure. The “bonus,” usually between 5 percent and 10 percent, is credited to the original proponent’s bid in the open tender. The Swiss Challenge System—used in the Indian States of Andhra Pradesh and Gujarat, Italy, the Philippines, Taiwan, and the U.S. territory of Guam—also allows third parties to compete. However, the original proponent is granted the right to counter-match the best offer and secure the contract. The best and final offer system—used in Argentina and South Africa—is similar to the Swiss challenge in approach, but only grants the original proponent the advantage of automatically competing in the final tendering round.

The conclusions of the paper draw on the experiences of several countries. In practice, all the main systems have demonstrated to be effective in providing more transparency and competition to private infrastructure projects, and are much better than having no policy at all. However, they are only as successful as the overall PPI systems and institutions of the country where they operate. Unsolicited proposal systems are not a substitute for overall PPI governance and planning. Other major PPI policy issues must be addressed before even allowing unsolicited proposals to be considered and implementing any unsolicited proposal policy.



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## ABBREVIATIONS

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BOT	build-operate-and-transfer
BROT	build-rehabilitate-operate-and-transfer
IRR	implementing rules and regulations
LGU	local government unit
PPI	private participation in infrastructure
PPP	public-private partnership
PSC	public sector comparator
PSP	private sector participation
UNCITRAL	United Nations Commission on International Trade Law
VfM	value for money

Unless otherwise noted, all monetary denominations are U.S. dollars.

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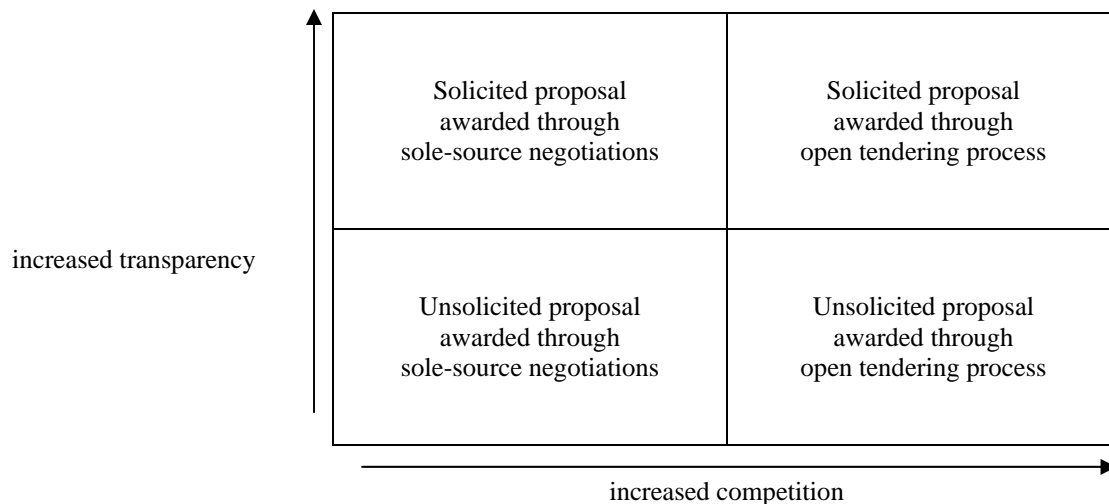
## PRIVATE SECTOR MOTIVATIONS

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The general public tends to view unsolicited projects as serving special interests or tainted with corruption. The controversial issues associated with unsolicited proposals do not stem from the project concept originating in the private sector, rather they stem from the project being exclusively negotiated with the original private sector proponent without sufficient transparency or competition.

These two features, a lack of competition and a lack of transparency, are characteristic of many unsolicited proposals. Figure 1.1 illustrates the possible origins of projects as well as the benefits generally associated with government-initiated projects and competitive tenders.

**Figure 1.1: Benefits of Proposals by Procurement Method**



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*Source:* Authors.

Private proponents often propose projects with the specific objective of avoiding a competitive process to determine the project developer. If successful in obtaining exclusivity for a particular project, the private proponent then usually directly negotiates the project details with the government behind closed doors, with, of course, as favorable terms as possible.

More specifically, some private proponents claim that special circumstances dictate the necessity to sole-source some project proposals, such as the following reasons:

- A project developer possesses **intellectual property rights** to key approaches or technologies;
- A **lack of private-sector interest** due to the small scale, remote location, or political risk of the project;
- Organizing a public tender may not be **cost efficient** for governments, bidders, or

- both;
- The **speed of project development** would be more rapid through negotiations, especially during emergencies or widespread shortages.

## **Intellectual Property Rights**

Many companies propose unsolicited projects claiming to use new techniques or technologies that cannot be sourced elsewhere, such as special engineering knowledge used to construct more durable roads, provide cleaner water, and so forth. The government, therefore, would be violating the proprietary rights of the proponent by exposing their techniques in a competitive process. The procurement laws of several countries authorize exclusive negotiation if a superior type of good or service is only available from a particular supplier or if no alternative exists.<sup>2</sup>

However, often substitutes or equivalent technologies of similar quality are available to complete the project, even though original proponents may claim that they are not. When seeking alternatives, governments can define a selection process that emphasizes the expected output of the project without stating a particular technology that must be used (see appendix B for the example in Victoria, Australia). Each bidder is then able to propose its own process or method, which is compared to the unsolicited proposal; the original proponent's proprietary rights remain secure.<sup>3</sup> In addition, if the original proponent's specific proprietary techniques are required, but the original proponent is not the desired party to develop or operate the project for other reasons, then it is still possible to set up a licensing arrangement for only the specific proprietary techniques.

Proprietary rights to techniques or engineering technologies should not be confused with the intellectual property rights of the project itself. Many countries acknowledge intellectual property rights over the project idea and recognize this in the tendering process. In Argentina, Chile, Costa Rica, and Korea, for example, the project development costs are usually included in the tender documents as an expense to be paid to the original project developer.

## **Lack of Private Sector Interest**

Another common reason for allowing unsolicited proposals to be negotiated on an exclusive basis is the belief that the characteristics of the project will not attract sufficient bidders. Many unsolicited proposals are targeted at remote areas where competition for the market is limited. In these smaller municipalities, proponents argue that a competition is not necessary because no other developers and operators are interested.

To address insufficient interest, governments may be able to use innovative methods to make the project more attractive. Options to draw in other potential bidders include

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<sup>2</sup> See *United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Privately Financed Infrastructure Projects* (2001), 93, <http://www.uncitral.org/pdf/english/texts/procurement/pfip/guide/pfip-e.pdf>.

<sup>3</sup> See *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2001), 92, <http://www.uncitral.org/pdf/english/texts/procurement/pfip/guide/pfip-e.pdf>.

pooling together smaller concessions (for example, French Water Concessions),<sup>4</sup> offering some form of additional government contribution based on performance, or including other services in the tender (such as pooling water and electricity services).

Even with only one bidder, staging a tender process may still provide benefits. Awarding projects to unsolicited proponents without competitive bidding often creates public doubts of the project's legitimacy because corruption can be concealed more easily when the awarding process is not sufficiently transparent. In some cases, corruption might not even exist, but the lack of transparency will render projects vulnerable to accusations by political opponents. An open tender, even with only the original proponent, might at least evidence a government's commitment to transparency and process, as well as demonstrate that there was only one interested bidder, which otherwise might only have been speculation.

### **Cost Efficiency**

Private proponents argue that governments can avoid unnecessary expenses by skipping a tendering process when they are confident the original proponent will win anyway or their will not be any other proposals. Directly negotiating unsolicited proposals theoretically could help save the government money. But the cost implications of putting together a quick tender process (for example, failing to consider risks) might outweigh, in the long run, the cost benefits of rapid project procurement, especially if the project is going to be given in concession for several decades.

Through a competitive bidding process, a government will be able to define sector development objectives and other standards (such as environmental and regulatory) by establishing conditions in the tender documents for the long term. With negotiated unsolicited proposals, private proponents will use their negotiation talents to establish criteria without regard for the long-term strategy of the government. As a consequence, the exclusively negotiated unsolicited project might actually lead to long-term bottlenecks in overall infrastructure development, especially in the case of network infrastructure.

Hidden costs are another major issue. Contingent liabilities often become part of sole-source negotiated, unsolicited proposal agreements. In Malaysia, for example, the government signed a build-rehabilitate-operate-and-transfer (BROT) concession agreement for improvements to Kuala Lumpur's sewerage system, with subsequent expansion to the national system. In order to get the project finalized, the government also gave soft loans totaling almost \$200 million and a guaranteed post-tax return to the investors.<sup>5</sup>

The government has potential financial benefits with a competitive process even if the original proponent wins with the original conditions. For example, if other bidders

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<sup>4</sup> Michael Klein, "Infrastructure Concessions—To Auction or Not to Auction?" *Public Policy for the Private Sector* 159 (Washington, DC: World Bank, 1998): 2, <http://rru.worldbank.org/Documents/PublicPolicyJournal/159klein.pdf>.

<sup>5</sup> Berhad, "Discount for Three Years," *Business Times Malaysia*, August 4, 1995.

participate, then the government will have more leverage because it has a fallback option if the original proponent is unable to reach financial closure, complete the project, or violates the agreed terms.<sup>6</sup> The original proponent will also be less likely to begin the project then demand a higher tariff or longer concession period due to cost overruns, which is common.

As for other potential bidders, many will not want to risk money on bid preparation when the private proponent has already invested considerable time and effort. One option is to have the public share the bidding costs upfront. Project development costs of the unsolicited project proponent will most likely be passed on to the consumers indirectly in any case, because costs are often included as a project development expense. Another option is to also offer reimbursement of proposal development costs, at least to the second best evaluated offer.

### **Speed of Project Development**

Under special conditions, governments justify some directly negotiated unsolicited proposals as fulfilling urgent requirements. However, the experiences of several countries have shown that sole-source negotiations usually take much more time than originally expected and often end up delaying the project by several years.

In Indonesia, for example, many unsolicited proposals have taken several years to negotiate, often not resulting in financial closure because final agreements could not be reached. The Bangkok Elevated Road and Train System (BERTS) in Thailand and the Dabhol Power Plant in India were each continually negotiated for almost a decade because the projects were cancelled and then restructured under new governments.

Additionally, while it is true that initial design and implementation of a well-organized competitive bidding process may require some time to develop, the experiences of several countries have shown that once the process is systematized, future projects may be moved through the system more quickly and with more efficiency. Perspective bidders will also understand the systems better after they have gone through them.

Given the several common arguments for exclusive negotiations stated above, some governments might choose to avoid the issue altogether by refusing to consider unsolicited proposals. Deciding to allow unsolicited proposals is one of the most important PPI policy decisions a government can make; it should take the development of a corresponding policy very seriously.

If a government chooses to allow unsolicited proposals, the key challenge will be how to harness and promote private sector participation during the project conceptualization stage without losing the benefits of increased transparency and efficiency associated with a competitive tendering process. As described in section 2, the governments of Argentina, Chile, Korea, the Philippines, South Africa, and Taiwan have been experimenting with various mechanisms for accomplishing this objective.

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<sup>6</sup> Klein, 1.

## CURRENT SYSTEMS

There is no international standard for managing unsolicited PPI proposals.<sup>7</sup> Some governments have found it easiest to not allow them at all. Most governments allow unsolicited proposals, but do not have special processes for managing them and directly negotiate the terms of the project through informal procedures that might involve several agencies or ministries. The best approach, when allowing them, is for governments to have a clearly articulated rationale for unsolicited proposals and for corresponding publicly available procedures for their management. Proponents should know the following:

- where to present their proposals,
- what information is required, and
- the steps and timeframe for decisions to be made.

The management process for unsolicited proposals in countries that have a formal system in place can be divided in two major stages.

1. The first stage is similar in most cases and takes place from the time the proponent presents the project to the government until all internal assessments and approvals are finished and the project is ready to be publicly tendered.
2. The second stage involves a competitive tender process; approaches tend to differ in incentives or benefits to the original proponent of the project.

### Stage 1: Approving Unsolicited Proposals

The countries studied in this paper with advanced systems for managing unsolicited proposals follow specific procedures during the first stage (see figure 2.1):

- Step 1: The private proponent first submits a preliminary description of the project to the appropriate agency or ministry, which in some countries only contains general concepts (for example, Argentina, Chile, Costa Rica) and in others has detailed information (for example, Korea, South Africa).
- Step 2: After a stipulated review period, the agency or ministry gives a preliminary response, usually assessing whether the project serves a “public interest” or fits within the strategic infrastructure plan of the federal, state, or provincial government. During this review period, the agency or ministry may also request additional legal, financial, and environmental studies that the proponent will be required to conduct at its own cost.

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<sup>7</sup> Of the multinational organizations, UNCITRAL maintains guidelines for managing unsolicited proposals through its *Legislative Guide on Privately Financed Infrastructure Projects*. The *UNCITRAL Guide* specifically addresses the issue of unsolicited proposals (Section II.E). However, the *UNCITRAL Guide* does not provide an extensive framework for channeling unsolicited proposals into a competitive process, rather it only offers general suggestions. The World Bank’s *Guidelines: Procurement under IBRD Loans and IDA Credits* mandates national and international competitive bidding procedures for outsourced project components. However, the document does not specifically address unsolicited proposals and allows direct contracting in a few unique circumstances, such as (a) extending existing contracts, (b) standardizing new equipment with original equipment, (c) proprietary rights to required equipment, (d) if only one source can meet design specifics, or (e) natural disasters (Section 3.7).

Step 3: If the preliminary project description is accepted, then the proponent usually receives formal recognition for the project concept and finalizes the preliminary proposal.<sup>8</sup> At this point, the designated agency or ministry should have information on (a) the applicant's role in the concessionaire company and its ability to construct and/or operate the project, (b) a technical feasibility study, (c) an estimated total project cost and financing plan, (d) an income and expenditure plan for operation such as user fee revenue, (e) the justification of project need, and (f) environmental or other social impact studies. Estimates for future reimbursement of proposal development costs are usually carried out at this stage in cases where the system allows them (for example, Chile, Costa Rica, and South Africa). Submission of a bid bond in order to guarantee the seriousness of the proposal might also be required at this time.<sup>9</sup>

Step 4: The detailed proposal is then reviewed, often through modified negotiations between the proponent and the appropriate agency or ministry to solidify project characteristics (for example, South Africa, Taiwan).<sup>10</sup> Some agencies or ministries may require additional approval from another government agency as well (for example, Korea, Philippines). At the end of the stipulated period, the project may be approved for a competitive process or rejected. If the project is rejected, then the project proponent may resubmit a modified version in some countries or the government may use the concept in a public bid after a stipulated period (for example, three years in Chile, two years in Argentina).

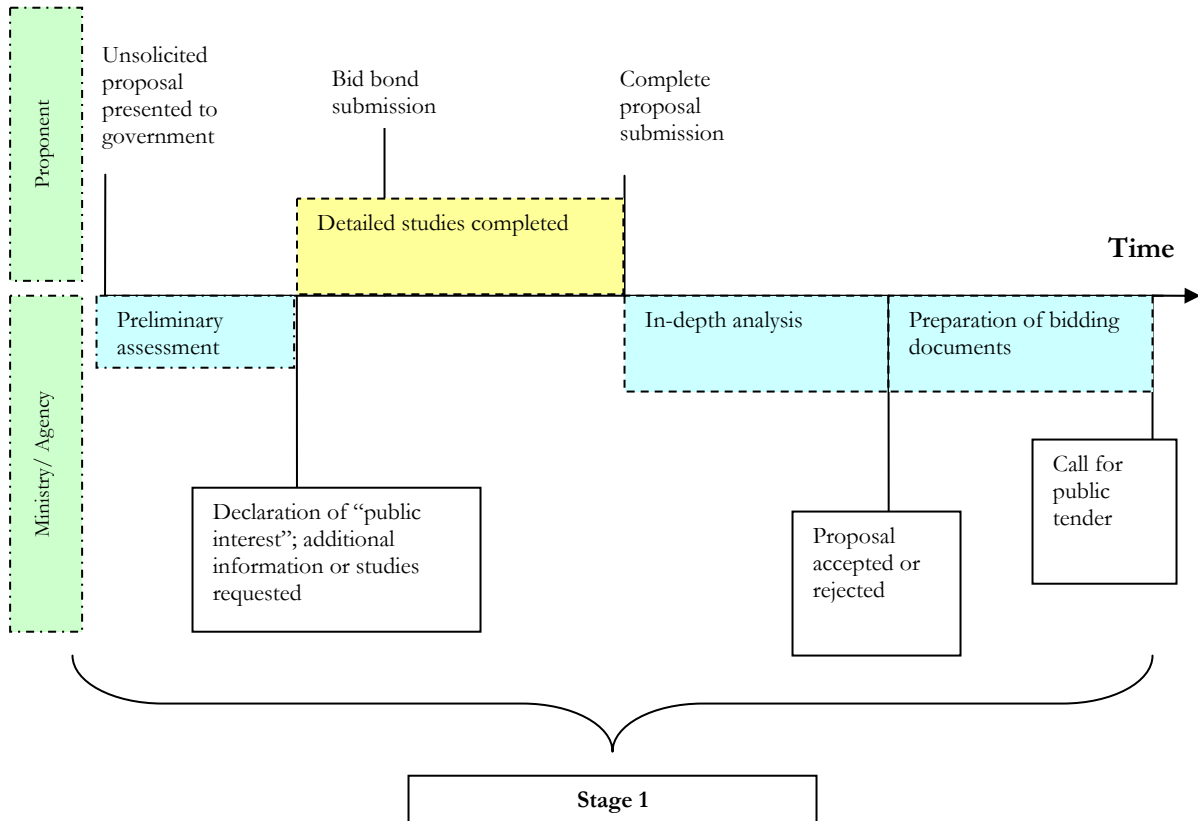
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<sup>8</sup> In Chile, the proponent is required to submit a detailed proposal within 180 days.

<sup>9</sup> Bid bond amounts are associated to estimated project cost. Argentina requires a bid bond equivalent to approximately 0.5 percent of project value; in Costa Rica, it cannot exceed more than 1 percent of project value.

<sup>10</sup> The detailed project review period is 90 days in the Philippines, 120 days in Korea, 9 months in South Africa, and 1 year in Chile. In actuality, further delays are often allowed (for example, in the Philippines) and additional time is allowed for the government to prepare the tender documents (3 more months in South Africa, 1 more year in Chile).

**Figure 2.1: Approval Steps for Unsolicited Proposals (Stage 1)**



*Source:* Authors.

## Stage 2: Tendering Unsolicited Proposals

If accepted, the project moves on to Stage 2 where a competitive process will be carried out, typically under one of three systems: bonus, Swiss challenge, or a best and final offer system.

### Bonus System

The governments of Chile and Korea use a system to promote unsolicited proposals that awards a bonus in the formalized bidding procedure to the original project proponent. This bonus can take many forms, but most commonly it is an additional theoretical value applied to the original proponent's technical or financial offer for bidding purposes only. In these cases, the original proponent's offer is selected if it is within a stipulated percentage of the best offer in the competitive process. In other cases, the bonus translates into additional points in the total score when evaluating the proposal.<sup>11</sup>

<sup>11</sup> In Korea, bonus points awarded have been within 0–4 percent out of a total 1,000 evaluation points, which means the original proponent received 20–40 points more than a third party. Furthermore, when an original proponent submits a modified proposal in the process of inviting alternative proposals, then it loses the right to receive the bonus points.



After the review process of Stage 1 is completed, the following procedure takes place under a bonus system:

- Step 5: Once the project is formally approved, the original project proponent is officially awarded the bonus. The value of the bonus is determined by the agency or ministry within a maximum (10 percent in Chile and Korea).
- Step 6: The project is announced in an official register or gazette and opened to public bid under the normal tendering processes outlined in the tender documents, as well as in general framework laws (for example, PPI laws, build-operate-and-transfer (BOT) laws, concessions laws, and so on). The announcement must include the value of the bonus awarded to the original proponent and the estimated reimbursable costs for proposal development. Competitors are allowed to submit competing bids for a designated time.<sup>12</sup>
- Step 7: During the public bidding phase, the project proponent may bid on the project or concession using the bonus or choose not to bid. In Chile, the original proponent may also sell the bonus to another bidder. If the original project proponent loses the bid or chooses not to bid, then the winning bidder might also have to compensate the proponent for project development costs, which were stipulated in the public bid documents (for example, Chile). Obviously, the original proponent is awarded the project if it is the only bidder.

For example, a proponent of the unsolicited proposal is awarded a bonus of 10 percent after it proposed a new toll road to the appropriate agency or ministry and went through the required approval procedures. In exchange for this bonus, the government has the right to make adjustments to the toll road proposal and call for an open tendering process. In an open tendering process the participant who bids the lowest tariff per kilometer wins. Hypothetically, the original proponent would be awarded the toll road project if it bid \$0.20 per kilometer and the lowest bidding opponent offered \$0.19 per kilometer, because the original proponent is within 10 percent of the lowest bid.

### **Swiss Challenge System**

A common system for introducing unsolicited PPI proposals into a competitive process is the Swiss challenge. This procedure—most well known in the Philippines, and also used in India (the states of Andhra Pradesh and Gujarat), Italy, Taiwan, and the U.S territory of Guam— is similar to the bonus system in that it allows a third party to bid on the project during a designated time. Instead of providing a pre-determined advantage, however, the original proponent has the right to counter-match any superior offers.

After the first stage of the process is completed (see *Stage 1: Approving Unsolicited Proposals*, steps 1–4, described in section 2), the following procedure takes place:

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<sup>12</sup> The closing date to receive bids is specified in the tender documents, usually not before a minimum of 2 months in Chile or Korea.

- Step 5: The project is announced in an official register or gazette and opened to public bid under the normal tendering processes, which are outlined in the tender documents.
- Step 6: In the Philippines, the original project proponent must also submit a bid bond during this period equivalent to that required in the tender documents for a potential challenger. This bid bond is intended to verify that the original proponent has means to fulfill the project. The agency or ministry involved has the discretion to publish information regarding the original proposal (such as original project pricing and specifications) or to conduct a blind challenge.
- Step 7: In the Philippines and Guam, when a lower price proposal is submitted and approved, the original project proponent will have 30 working days to match the price. The Enabling Act in Andhra Pradesh does not specify a timeframe for the proponent to match the best bid.
- Step 8: If the original project proponent does not match the price, then the project is awarded to the lower price project proponent of the Swiss challenge. In the Philippines, the project will be immediately awarded to the original project proponent if the price is matched.<sup>13</sup> In Guam, when another proponent submits a lower price proposal and the original proponent matches that price within 30 working days, then the BOT committee will identify which proposal has greater technical merit and submit its recommendations to the board of directors for disposition. In Gujarat, the original proponent is also given 30 days to match the best offer.

### **Best and Final Offer System**

Recently, variations of the bonus and Swiss challenge systems have been developed in several countries. The key element of many of these is multiple rounds of tendering, in which the original proponent is given the advantage of automatically participating in the final round. South Africa uses this best and final offer system, which is somewhat similar to the Swiss challenge system. Argentina's approach contains elements of a bonus (approximately 5 percent) and the Swiss challenge system. Costa Rica uses a simpler approach with few advantages, but mandates an open competition for all projects in which the original proponent can participate. In many cases, similar to the process in Chile, the winning bidder must also compensate the original proponent for project development costs, which are stipulated in the public bid documents (for example, Argentina and Costa Rica).

In general, some of these newer hybrid models follow a similar approach that allows for a best and final offer. Once the project proposal completes the initial assessment (see *Stage 1: Approving Unsolicited Proposals*, Steps 1–4 described in section 2) and the tender documents are ready, the government will invite competing proposals from other developers. The procedure continues as follows:

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<sup>13</sup> See Law Annex No. 2, Republic Act No. 6957, later amended by Republic Act No. 7718, <http://www.botcenter.gov.ph/botlaw/index.htm>.

- Step 5: The project is publicized in the official register or gazette inviting proposals from third parties. Information about the bid price is not disclosed to the other bidders and the proponent has to resubmit a formal bid.
- Step 6: Bids are received, evaluated, and ranked. In South Africa, the two most advantageous bids are selected in the first round, from which a final round of bidding will take place. If the original proponent is not one of these two selected, it will then automatically be allowed to compete in the final round as well. In Argentina, if the original proponent's offer is within 5 percent of the best offer, then the original proponent's offer will be selected (it works in practice as an automatic 5 percent bonus). However, if the difference between the best bid and the original proponent's offer is more than 5 percent but less than 20 percent, then the two bidders will be invited to submit their best and final offers in a second round.
- Step 7: The second round takes place where best and final offers are requested only from those selected in the first round. Information about bid prices is not disclosed. The preferred bid will only be selected in the second and final round. In Argentina, if the original proponent's offer is not selected in this final round, the selected bidder will then reimburse proposal development costs equivalent to 1 percent of the estimated project cost, according to the bidding documents. In South Africa, the winning bidder is also required to compensate the proponent for project development costs, which are stipulated in the public bid documents.

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## POLICY CHOICES

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If a government intends to actively pursue a PPI program, then the private sector most likely will come forward with its own ideas. The respective results to date with regards to overall number of unsolicited proposals presented for certain countries are listed in table

**Table 3.1: Results of Unsolicited Proposals in Selected Countries**

Country	Period	Presented	Accepted	Under review	Rejected	Tendered or completed
Chile	1995–March 2006	200+	26	38	140+	12
Korea (Rep. of)	July 1999–April 2006	141	101	7	33	65
South Africa	1999–2006	4	0	3	1	0
Taiwan (China)	March 2002–May 2006	193	29	22	142	29

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*Source:* Authors.

Though under no obligation to accept unsolicited proposals, governments will be pressured by special interests to consider some of them. The experiences reviewed demonstrate that a government is better equipped to handle these pressures if a transparent system for unsolicited proposal management is already in place.

Importantly, a competitive mechanism to determine the final project developer is also fundamental to successfully managing unsolicited proposals. Though a few exceptional circumstances may justify sole-source negotiation with the original proponent (such as natural disasters), a predefined competitive mechanism will help policy makers to safeguard against the common arguments for exclusivity often presented by private developers.

Developing an effective system to manage unsolicited proposals is not easy, however. Governments are faced with many trade-offs. Policy makers must address questions such as the amount of reimbursement (if any) for project development costs to the original proponent, any time constraints during the approval and challenging processes, coordinating among various agencies, effectively planning for sectorwide development, and finding the appropriate incentives for the private sector to initiate projects.

### **Reimbursing for Project Development Costs**

If the original project proponent is unsuccessful in the bidding process, it might expect reimbursement of development costs from the government, the winning bidder, or both. Proponents invest time and money into the projects and claim that they should be compensated for their efforts. However, determining the true value for the project concept and development is not always easy and the original proponents will logically want the highest appraisal possible. Furthermore, overly generous compensation may induce proponents to come forward with unnecessary projects.

Surprisingly, some countries that offer reimbursement costs—such as Argentina, Chile, Italy, and South Africa—have not approved many unsolicited projects. Korea, Taiwan, and the Philippines, which do not offer reimbursement, have approved substantially more projects and have a higher percentage of unsolicited projects. Therefore, the reimbursement of development costs has not necessarily attracted more unsolicited projects in these countries.

Table 3.2 lists some issues to consider when deciding the amount (if any) of project development costs to be reimbursed in the tender documents.

**Table 3.2: Advantages and Disadvantages of Offering Reimbursement for Development Costs**

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Legal respect for intellectual property rights are essential to sustainable private sector development</li> <li>• Reimbursement maintains private sector interest in the project development phase</li> <li>• PPI ideas will not be limited only to large companies or developers who have deep pockets</li> <li>• The amount of financial compensation for project development costs can be determined through the estimated market value for the project proposal or an independent audit</li> <li>• Developers will allocate the necessary resources to make sure that the project is developed professionally</li> <li>• Reimbursement encourages innovation</li> </ul>	<ul style="list-style-type: none"> <li>• The number of frivolous projects may increase because developers might not intend to bid in the tender process, but only to profit from a project concept</li> <li>• Original project proponents may exaggerate project development costs to discourage challengers once a project is given formal approval</li> <li>• Challengers are at a financial disadvantage because reimbursement adds extra project finance expenses into calculation of tariff</li> <li>• Government will have to allocate additional resources to determine if requested reimbursement is accurate</li> </ul>

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*Source:* Authors.

### **Establishing Time Constraints**

In many countries, the government specifies the time allotted to complete certain stages of the approval and bidding phases. The PPI laws usually specify a time limit for preliminary approval for the project, reaching a finalized project, putting the project out to public bid, and a closing date for challengers to submit counter-proposals.

**Table 3.3: Time Allocations for Bidding and Approval**

	Preliminary approval	Final approval	Call for open tenders	Challenge or counter	Additional time	Total time
<b>Argentina</b>	90 days		60 days	Undetermined	n.a.	n.a.
<b>Chile</b>	45 days	12 months	12 months	Approximately 2–4 months	n.a.	33–35 months
<b>Costa Rica</b>	45 days	4 months	12 months	Not applicable	n.a.	17+ months
<b>Guam (U.S. territory)</b>	Undetermined	Undetermined	Undetermined	60 days	n.a.	n.a.
<b>Italy</b>	4 months	2 months	3 months	n.a.	n.a.	n.a.
<b>Korea, Rep. of</b>	15 days	4 months	Undetermined	Approximately 2–4 months	n.a.	6.5–8.5+ months
<b>Philippines</b>	2 months	3 months	Undetermined	2 months	1 month to counter match	8+ months
<b>South Africa</b>	1 month	9 months	3 months	2 months	2 months to evaluate	17 months

*Source:* Authors, based on laws and regulations (see appendix C).

*Note:* n.a. = not applicable.

The original project proponent has an obvious competitive advantage with time constraints for counter-proposals. The proponent has spent considerable time and effort preparing the project and subsequently is much more familiar with the project characteristics. An opponent, however, is usually given only a short time to challenge the project, as little as 60 days (for example, in Guam and the Philippines). Many potential challengers may not be willing to compete without sufficient time to prepare.

Table 3.4 lists some issues to consider when determining time constraints.

**Table 3.4: Time Allocation Considerations**

Process	Issues
Approve preliminary Proposal	<ul style="list-style-type: none"> <li>• Governments typically use a short initial period to screen out unnecessary proposals</li> <li>• The process allows proponents to test concepts without dedicating extensive resources to project development</li> </ul>
Negotiate and finalize project	<ul style="list-style-type: none"> <li>• The government may require new information and consultations with outside experts to improve the project</li> <li>• A reasonable amount of time is required to repackage unsolicited proposal as a government-managed, solicited public tender (for example, Chile, Costa Rica)</li> <li>• Without final project approval times specified, some projects are negotiated over several years without threat of a looming deadline</li> <li>• A proponent often needs to obtain permits or licenses in other departments</li> </ul>
Put out to bid	<ul style="list-style-type: none"> <li>• Delays allow original proponent additional preparation time to that is not challengers</li> <li>• An unspecified deadline causes some projects to remain inactive for indefinite periods</li> <li>• Government inactivity may lock up proponent's financial resources such as guarantees and bid bonds</li> </ul>
Submit counter proposals	<ul style="list-style-type: none"> <li>• A common complaint is that the challenge period (for example, 60 days in Philippines) is not sufficient to conduct technical due diligence and to develop the business plan, financial model, and economic bid</li> <li>• Challengers may need substantial time to raise financing</li> </ul>

*Source:* Authors.

## **Coordinating Among Agencies or Ministries**

In most countries, the planning and coordination of major infrastructure projects (such as energy or transportation) fall within the competence of different government agencies and ministries. Local and state governments will also be involved if the project falls within their jurisdiction. This can be a heavy burden for proponents of unsolicited proposals if coordination and communication are lacking between the relevant government entities.

In Taiwan, foreign companies and chambers of commerce have raised this lack of coordination and communication as a practical concern and hurdle to further foreign participation. In the Philippines, amendments to the BOT law are being proposed to create a single BOT authority to rationalize the implementation of the BOT program and to be the sole and exclusive approving authority for BOT/private sector participation (PSP) projects for national government agencies.

## **Effective Sector Planning**

Allowing the private sector to present proposals in sectors that are part of network infrastructure could be cause for concern. In theory, the private sector's only concern is making a return on its investment without consideration for the general welfare or overall economic benefit of the country. For example, a private developer would have little concern if by proposing a new tourist recreational area it is diminishing the country/state's port expansion capacity in the medium or long term.

In order to address such concerns, countries such as Chile, Costa Rica, and Italy only allow unsolicited proposals for projects that are part of its strategic infrastructure investment plan. In these cases, the government periodically defines the priorities in the different sectors in broad terms, leaving project details to be developed by interested parties. For example, the government determines the need for connecting two cities with a paved road, but will leave it to project developers to estimate traffic flows, determine number of lanes needed, allow for commercial facilities to be developed along the route, and so on.

## **Finding Appropriate Incentives**

It is not easy to find the right balance between incentives for the private sector to propose beneficial projects and a sufficient probability of successful challenges so that third parties will actually submit counter-proposals. The challenger's perceived chances of winning theoretically would influence the number of overall unsolicited projects.

If a challenger has almost an equal chance of winning, then the private sector will be reluctant to come forward with many unsolicited proposals knowing they may be easily defeated. If challengers do not perceive a real chance of winning, then they will be less likely to offer counter-proposals and original proponents will feel better about their chances, thus offering more unsolicited proposals.

In theory, both the bonus and Swiss challenge systems provide challengers with a reasonable chance of winning. In actuality, challengers are rarely successful in some countries, as demonstrated by the small number of challenges and subsequent victorious counter-proposals to date in Korea, the Philippines, and Taiwan. However, some systems might not have a significant competitive advantage for the original project proponent because challenges are regularly successful (for example, Chile).

Table 3.5 lists several factors that influence the challenger’s perceived chances of winning.

**Table 3.5: Considerations for Potential Challengers**

<b>Influencing factor</b>	<b>Issues</b>
Value of bonus (under bonus system)	<ul style="list-style-type: none"> <li>• A large bonus will discourage potential challengers, a low bonus will discourage submitting unsolicited proposals</li> <li>• A bonus may be used for a technical score (Korea) or economic score (Argentina, Chile)</li> </ul>
Ability to match price (under Swiss challenge)	<ul style="list-style-type: none"> <li>• Many challengers are reluctant to allocate resources for counter-proposals because they can be matched</li> <li>• Sufficient time is required to develop counter-proposals</li> </ul>
Amount and timing of information disclosed	<ul style="list-style-type: none"> <li>• Information on the original proponent’s economic offer may entice challengers to offer counter-proposals, especially if tariff is very high</li> <li>• If the original proponent’s bid is not disclosed, then it is more likely that challengers will present their best offers. The sooner that vital information is available to challengers, the lower the advantage to the original proponent will be in project preparation</li> </ul>
Process transparency	<ul style="list-style-type: none"> <li>• If challengers feel that information is withheld or that the process is corrupt, they will be less likely to challenge</li> <li>• Transparency will assist challengers in their efforts to raise international financing and partners</li> </ul>

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*Source:* Authors.



## APPENDIX A

**Table A.1: Proposal Systems by Country or State**

Country or State	Legal Framework	Type of system	Reimbursement of development costs?	Bid bond required?	Intellectual property rights
Andhra Pradesh (India)	AP Infrastructure Development Enabling Act No. 36, 2001	Swiss challenge	Yes, by government	No	After reimbursement proposal becomes property of government
Argentina	Presidential Decree 966, 2005	Bonus and best and final offer	Yes, by the winning bidder 1% of estimated project cost	Yes, 0.05% of estimated project cost	After 2 years proposal becomes property of government
Chile	Supreme Decree 956, 1999	Bonus	Yes, by winning bidder reimbursement costs approved at the initial stage	Yes, according to project value	*
Costa Rica	Decree 31836, July 2004	None	Yes, by winning bidder reimbursement costs approved at the initial stage	Yes, not higher than 1% of estimated project cost	After reimbursement proposal becomes property of government
Guam (U.S. territory)	Public Law 24-294 1998	Swiss challenge	No	No	*
Gujarat (India)	Gujarat Infrastructure Development Act No. 11, 1999	Swiss challenge	Yes, by government	No	After reimbursement proposal becomes property of government
Indonesia	Presidential Regulation No. 67, 2005	Bonus or purchase of proposal	Yes, when bonus is not granted. Costs paid by government or by winning bidder.	*	*
Korea, Rep. of	Act on private participation in infrastructure	Bonus	No	No	*
The Philippines	BOT law	Swiss challenge	No	*	*
South Africa	Policy of SANRAL in respect of unsolicited proposals	Best and final offers	Yes, by winning bidder reimbursement costs approved at the initial stage	*	*
Sri Lanka	Guidelines on private sector infrastructure	Same as solicited projects	No	*	No
Taiwan (China)	Guidelines for Evaluation of Unsolicited Proposals, March 2002	Combined bonus and Swiss challenge	No	*	*
Virginia (United States)	Public-Private Transportation Act of 1995. Va. Code Ann. §§56-560	Same as solicited projects	No	No	Public entity shall take appropriate action to protect confidential and proprietary information

*Source:* Authors.

*Note:* SANRAL = South African National Roads Agency Limited.

\*Not specific to these laws or regulations.

## **APPENDIX B**

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### **PROCEDURES FOR UNSOLICITED PROPOSALS: SUMMARIES BY COUNTRY AND STATE**

#### **ARGENTINA**

Presidential Decree 966 (2005) regulates the process for unsolicited proposals submitted by private parties seeking contracts related to public works, services, and concessions. Like other country systems described in this paper, unsolicited project presentations need to fulfill minimum requirements to be considered by the government. The Argentine system requires an up-front bid bond together with the project details, feasibility studies, estimated investment amounts, proponent references, and financing sources that should only be private. Unsolicited proposals will not be considered if public financing is required to develop the project.

All unsolicited proposals are preliminarily assessed by an ad-hoc commission created to evaluate unsolicited proposals jointly integrated by the Ministry of Federal Planning and the Ministry of Finance. Other line ministries will also be required to intervene if the nature of the project falls under their competence.

Within 60 days, the administration should conduct the initial assessment; if there is interest in the proposal and the project serves a public interest, then the proponent is invited to present a full detailed proposal. At this stage, the administration will list all legal, financial, and environmental studies that the proponent will be required to conduct. The administration will also estimate reimbursement of proposal development costs (an amount that should not exceed 1 percent of project's value). Such costs will only be reimbursed at the end of the process if a party different than the original proponent is awarded the contract. The proponent will not be entitled to reimbursement of expenses if its proposal is not declared admissible during the evaluation process.

The advantages granted to the original proponent are a mixture of the bonus and the best and final offer systems as follows:

- If the difference between the best bid and the original proponent's bid is less than 5 percent, then the original proponent's bid is selected. Basically, a fixed pre-determined 5 percent bonus is implicit in favor of the project proponent.
- If the difference between the best bid and the original proponent's bid is more than 5 percent but less than 20 percent, then the best bidder and the original proponent will be invited to re-submit best and final offers. In this last final round, the 5 percent bonus does not apply.

## AUSTRALIA

### *New South Wales*

The current guidelines for managing privately financed projects and unsolicited proposals are titled, *Working with Government Guidelines for Privately Financed Projects* (November 2001).<sup>14</sup> Most unsolicited proposals also involve a request for direct negotiations with the government. The New South Wales (NSW) Independent Commission against Corruption issued *Guidelines for Direct Negotiations in Procurement and Disposals*.<sup>15</sup>

Unsolicited proposals are received and assessed for strategic priority, value for money, public interest, and justification for direct negotiations. This assessment is extremely rigorous; it has proven difficult for proponents to achieve success. The NSW government's aim is not to find new sources of capital investment, but to employ privately financed projects only where they provide real value for money through innovation, effective risk transfer, and efficient management of infrastructure and delivery of associated services.

The focus of *Working with Government Guidelines for Privately Financed Projects* is on intellectual property as grounds for direct negotiations, but in practice, this protection has been difficult to justify. The NSW government can always open the competition by requiring outcome-based terms. Since the publication of these *Guidelines*, 10 unsolicited proposals have been formally submitted and assessed. About twice that many potential projects have been discussed, which, following initial consideration and discussions with proponents, have not been formally submitted. Early consultation is encouraged so that proposals with little chance of success are identified and eliminated before excessive private and public sector resources are committed to project development.

Of the 10 unsolicited proposals that have been formally submitted and assessed, the NSW government accepted only one and it has now been delivered. The project had a relatively low value (approximately \$15 million) and it relied on real property rather than intellectual property as the grounds for direct negotiations (the developer owned adjoining land to a public site) so the project was not subject to public tender.

### *Queensland*

In September 2001, the Queensland government released its policy on public-private partnerships (PPPs). The *Guidance Material* sets out a comprehensive framework for analyzing and delivering all major infrastructure projects that support the government's strategic objectives.

According to the *Guidance Material*, if an agency receives an unsolicited proposal from a private party addressing a service requirement identified by that party, then the proposal must first be assessed for priority against the relevant agency's strategic plan and the state

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<sup>14</sup> See <http://www.treasury.nsw.gov.au/wwg/pdf/wwguidelines.pdf>.

<sup>15</sup> See [http://www.icac.nsw.gov.au/files/pdf/pub2\\_26cp.pdf](http://www.icac.nsw.gov.au/files/pdf/pub2_26cp.pdf).

infrastructure plan. If the agency considers the proposal to be a priority, then the proposal can follow one of two courses of action:

- It can be treated in the same manner as agency-generated outputs (solicited project), or
- It can be awarded an exclusive mandate, which gives the private party the right to fully develop its proposal without competition.

Exclusive mandates are granted at the government's sole discretion. The unsolicited proposal must meet the following criteria to be considered by the government in exclusivity:

- A proposal addressing the same or similar need is not already being considered by the government or already under active and advanced consideration by any other private sector party, and
- The private sector party satisfies the government that it has demonstrable commercial advantage over other proponents and that calling for expressions of interest could not be reasonably expected to generate a better value-for-money outcome.

Exclusive mandates will not be granted when the unsolicited proposal is seeking to place risk, cost, or payment obligations upon the government. In such cases, the proposal must be subjected to a competitive bidding process to ensure that it represents a value-for-money outcome for the government. When processing unsolicited (and all other) proposals, the government will take all reasonable steps to protect genuine intellectual property of the private sector by using an output-based specification during the competitive process.

### ***Victoria***

The Australian state of Victoria has been a leader for PPP development. The state government policy on PPPs, released in 2001, does not define a procedure for departments and agencies to apply to unsolicited proposals. However, Chapter 21 of *Partnerships Victoria Practitioner's Guide*<sup>16</sup> sets out general principles, which include:

- Adopt mechanisms to ensure that open competitive bidding is maintained as far as possible;
- Inform the private party that they are required to identify specifically the intellectual property they want to protect, before any proposal discussion begins;
- Return intellectual property to the owner while the service need is put to the market in a manner that accommodates, but does not divulge, the intellectual property. The owner of the intellectual property is free to include it in a bid or to join with other bidders; and

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<sup>16</sup> See

[http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/PVGuidanceMaterial\\_PracGuide/\\$File/PVGuidanceMaterial\\_PracGuide.pdf](http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/PVGuidanceMaterial_PracGuide/$File/PVGuidanceMaterial_PracGuide.pdf).

- Adopt a course that avoids putting others to the cost of preparing fruitless bids in the rare circumstances where the intellectual property is of such outstanding value that a competitive market for the service need would not exist. This course may be to remove the intellectual property from the project solution and to put the remainder of the project out for competitive bidding. Such a course could be adopted if the government is first able to obtain rights to the intellectual property through a negotiation process open to appropriate scrutiny and using sound evaluation techniques.

Competitive bidding remains the general principle to pursue projects involving the private sector. However, the Victorian government wishes to promote discussion on ideas for improving the quality of infrastructure and services; these principles are a response to the private sector's reluctance to present unsolicited proposals for fear of exposing intellectual property to the market through the bidding process.

## CANADA

### *British Columbia*

The government of British Columbia does not have a specific framework for managing unsolicited proposals for infrastructure projects. Guidelines such as the *Capital Asset Management Framework*<sup>17</sup> (*CAMF*) were developed to support provincial public-sector agencies to find the best solutions and apply best practices in managing capital assets. The standards and processes are applied to an asset's full life cycle involving planning, acquisition, operation, maintenance, renewal, or disposal.

Section 8.4.5 of the *CAMF* explains the procedure when agencies receive proposals from the private sector for a specific project or service. First, agencies review the proposals at a conceptual level (pre-feasibility analysis) to determine the following:

- whether the proposal has the support of both the agency responsible and the ministry responsible (if applicable),
- whether the proposal relates to a need supported by the agency or ministry, and
- whether the proposal appears to be feasible.

Proposals that do meet the stage-one criteria proceed to stage two in order to analyze the following:

- whether the proposal is in line with the provincial strategic priorities,
- whether it can be accommodated within the province's fiscal framework, and
- whether it will provide value for money and protect the public interest.

Unsolicited proposals that pass the prefeasibility analysis are assessed on the same basis as proposals received through a competitive solicitation process. They must undergo complete value-for-money and risk assessment, using an appropriate public sector

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<sup>17</sup> See <http://www.fin.gov.bc.ca/pt/dmb/cpf.shtml>.

comparator (PSC) where applicable. A competitive public process will follow where the original proponent will participate on the same terms as any other bidders. The framework does not allow reimbursement of project development costs.

In exceptional cases where the proposal has unique aspects such that the terms could not reasonably be expected to be matched or improved upon by any other proponent (for example, a proponent owns the only viable project site), the agency may work with the proponent to develop a more detailed proposal, business case, or both. Before negotiating contract terms, the agency must issue a public notice of intent to award a contract. The purpose of this notice is to validate that no other proponent can reasonably be expected to meet or exceed the terms of the proposed contract.

### ***Ontario***

In July 2004, the government of Ontario introduced a comprehensive framework, *Building a Better Tomorrow: An Infrastructure Planning, Financing, and Procurement Framework for Ontario's Public Sector (IPFP)* which supports the government's 10-year infrastructure plans for the province.<sup>18</sup> The framework defines the roles and responsibilities of government agencies, ministries, municipalities, and the private sector in approving and managing the planning, financing, and procurement of public infrastructure assets.

The *IPFP* framework recognizes that the private sector has advantages over the public sector, and vice versa, in some areas of infrastructure and service delivery, which is particularly pertinent for risk management and the associated costs of risk transfer. For example, the private sector can more aptly manage commercial risk, whereas the public sector is best positioned to manage regulatory risk.

According to the framework, Ontario ministries are responsible for submitting infrastructure plans, so proponents should work through the appropriate infrastructure (capital) ministry. One paragraph (in section 3.2) refers specifically to unsolicited proposals:

Decisions on infrastructure planning, financing, and procurement will be made based on the government's 3- and 10-year infrastructure investment plans and its annual infrastructure planning process. Unsolicited proposals should conform to meet the guidelines in the framework and be forwarded to Public Infrastructure Renewal Ministry and the appropriate infrastructure ministry for consideration. To be considered, proposals must be consistent with the strategic priorities laid out in the government's investment plans and meet the tests outlined in the framework.

### **CHILE**

At the beginning of the 1990s, Chile urgently needed major infrastructure investments to ensure its economic development, but the government did not have the resources or

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<sup>18</sup> See [http://www.pir.gov.on.ca/userfiles/HTML/cma\\_4\\_35661\\_1.html](http://www.pir.gov.on.ca/userfiles/HTML/cma_4_35661_1.html).

expertise to carry out the large scale of public works required. To face this challenge, the government called on the private sector to take part in the building, maintenance, and operation of major public works. The concessions system originated to give the private sector a key role by allowing it to finance economically profitable projects and to recover their investment through direct charges to the users.

The process to manage unsolicited proposals is detailed in the main concessions law; the process details are in secondary legislation.<sup>19</sup> Line ministries have responsibility for managing public-private partnership transactions, including unsolicited proposals presented by the private sector. The Ministry of Public Works (not the Ministry of Transportation and Telecommunications) oversaw the concession program in the transport sector, where many of the unsolicited proposals were focused.

Since 1992, more than 200 unsolicited proposals were presented to the administration; 12 resulted in contract award (see table B.1), another 14 received preliminary approval and are being reviewed, and the remaining proposals were rejected.<sup>20</sup>

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<sup>19</sup> The main applicable laws and regulations are: the supreme decree law of the Ministry of Public Works No. 294 (1984), which sets out the reformulated text of Law 15.840, the Organic Law of the Ministry of Public Works, which, in Article 87, authorizes the ministry to carry out public works through the concessions system.

<sup>20</sup> A total of 224 unsolicited proposals were presented to the Ministry of Public Works. Because 14 were considered duplicates, the remaining 210 qualified as valid proposals, thus the total used is 210. *Sistema de Concesiones en Chile 1990–2003*. (June 2003), 52.

**Table B.1: Unsolicited Projects Awarded in Chile, as of March 2006**

Project	Type	Investment (millions)	Concession period (years)	Participants in tender process	Bonus value	Winner	Was bonus a factor?	Award date
Highway 57: Santiago–Colina–Los Andes	Highway upgrade	\$138	28	1	10%	Bonus holder	n.a.	Dec. 1996
Melipilla Bypass	New highway	\$21	30	3	10%	Non-bonus holder	No	Aug. 2001
Inter-Port Highway: Talcahuano–Penco	New highway	\$25	30	3	10%	Bonus holder	No	Jan. 2002
Puerto Montt Airport	Expansion	\$7	12	2	20%	Non-bonus holder	No	June 1995
Iquique Airport	Expansion	\$6	12	3	20%	Bonus holder	No	Aug. 1995
Calama Airport	Expansion	\$4.5	10	4	10%	Bonus holder	No	Oct. 1997
Concepción Airport	Expansion	\$25	17	7	10%	Non-bonus holder	No	March 1999
Cerro Moreno, Antofagasta Airport	Expansion	\$7.5	10	5	10%	Non-bonus holder	No	Dec. 1999
Access Road, Airport Santiago	Urban highway	\$9	12	1	20%	Bonus holder	n.a.	Jan. 1996
Américo Vespucio Northwest System	Urban highway	\$320	30	4	10%	Non-bonus holder	No	March 2002
Américo Vespucio South System	Urban highway	\$270	30	4	10%	Non-bonus holder	No	Aug. 2001
Av. El Salto–Av. Kennedy Bypass	Urban tunnel	\$70	32	2	10%	Non-bonus holder	No	Oct. 2004
<b>Total: 12</b>		<b>\$903</b>						

*Source:* Compiled by authors based on data from Ministry of Public Works, Chile (see appendix C).

*Note:* n.a. = not applicable.

The contracts awarded to the private sector that were unsolicited proposals represent approximately 12 percent of total investment of the concessions program portfolio. Since the beginning of the concessions program in 1993, 48 contracts with private participation have been awarded, representing an investment of more than \$7 billion. Out of the 48 contracts, 12 originated as unsolicited proposals, totaling \$851 million.<sup>21</sup>

<sup>21</sup> See Sistema de Concesiones de Obras Públicas. Cartera de Proyectos 2005–07. Gobierno de Chile. Ministerio de Obras Públicas. Coordinación General de Concesiones. Financial Projections for the Public Sector 2007–09. Ministerio de Hacienda. Dirección de Presupuesto. Commitments under the Concessions System.



For the first two airport concessions, the bonus was valued at 20 percent, which is subtracted from the original proponent's economic offer (lowest passenger departure fee). The Chilean government reduced the bonus to 10 percent for the third airport concession in December 1996 and it has remained the same.

Surprisingly, the ownership of a bonus in all 12 projects has not been very advantageous to the original project proponent in the bidding process. Though the bonus holder receives compensation for project development costs if unsuccessful in the tender process and a bonus could have scared away other potential bidders, the bonus did not in any case determine the award of the project (that is, the same party would have won in the absence of the bonus), although in most cases (10 out of 12 projects) there was more than one bidder.

The market for unsolicited proposals remains active in Chile even though a bidder other than the original proponent was awarded the project in the majority of the cases. As of March 2006, 14 proposals worth more than \$1 billion have received declaration of public interest and have been preliminarily approved and another 38 proposals representing approximately \$3.7 billion are in the pipeline undergoing initial screening.

## **COSTA RICA**

The 1998 Public Works Concession Law in Costa Rica allows the private sector to present unsolicited proposals.<sup>22</sup> However, the Executive Decree detailing the process to handle unsolicited proposals was not passed until July 2004.

The system in Costa Rica follows a two- stage process similar to those in other countries. In the first stage, the private proponent submits a preliminary project presentation to the appropriate agency or ministry that will assess whether the project serves a public interest. Within 45 days, the administration should conduct the initial assessment and if there is interest in the proposal, allow the private party to present a full detailed proposal. At this stage, the administration will list all legal, financial, and environmental studies that the proponent will be required to conduct and will estimate reimbursement of proposal development costs. Such costs will only be reimbursed at the end of the process if a party different than the original proponent is awarded the contract.

Also at this preliminary stage, the proponent is required to submit a bid bond to guarantee that its proposal which cannot exceed more than 1 percent of the estimated project value. Once the complete proposal is submitted within the stipulated period, the administration has four months to accept or reject the project. If the project is accepted, then the administration will conduct a public tender according to the procedure stipulated for solicited projects. The original proponent is allowed to participate under the same terms and conditions as any other bidder.

An interesting aspect of the Costa Rican regulation is that it requires decentralized agencies and state-owned companies to assign or establish a specific unit within their organizations to handle unsolicited proposals. Alternatively, decentralized agencies can subscribe collaboration agreements with the National Concessions Council in the

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<sup>22</sup> Public Works Concession Law No. 7762, Article 20.

Ministry of Public Works (*Consejo Nacional de Concesiones*), the competent agency at the national level, to evaluate unsolicited projects on their behalf.

Since the Executive Decree was approved in July 2004, only one project falling under the competence of the National Concessions Council was presented. A Colombian company, *Conalvías*, proposed upgrading the Highway between San Jose and Limon. The proposal was rejected because it did not fit the ministry's master plans for that route. However, the ministry has not made the master plan public, and the administration's inactivity has many critics.

In December 2005, to avoid being crowded with proposals that it cannot properly assess (mostly due to lack of in-house capacity) the Executive Branch by decree froze the receipt of unsolicited proposals. The measure is intended to be temporary until the ministries and decentralized agencies announce the list of projects that are appropriate for private sector involvement.

## **INDIA**

### ***Andhra Pradesh***

The Andhra Pradesh Infrastructure Development Enabling Act (No. 36 of 2001) applies to all infrastructure projects implemented through PPPs.

As in Gujarat, (discussed later) the state of Andhra Pradesh allows project developers to approach the government with their proposals and, apart from the cases where direct negotiations are permitted, the enabling act requires agencies to follow a Swiss challenge approach.

The Swiss challenge approach will be used if the project has any of the following requirements:

- extensive administrative and asset support from the government,
- central and extensive state level clearances,
- fiscal incentives,
- land lease at concessional rents, or
- exclusive rights granted to the project developer.

If the Swiss challenge approach is pursued, then the original proponent is expected to submit a detailed proposal, which should include technical, commercial, financial, and other details of the project and principles of the concession agreement. The government will invite competing proposals from other developers; the initial proponent has a right to match or improve upon the competing offer in a stipulated timeframe. Otherwise, the developer who submitted a superior offer will be awarded the project.

## *Gujarat*

The state of Gujarat in India regulates the procedure to handle unsolicited proposals in its Infrastructure Development Act (No. 11 of 1999, amended by Act No.18 of 2006).<sup>23</sup> Gujarat allows the presentation of proposals by the private sector to the different state agencies. Once the technical and financial aspects of the proposal have been considered (which might include modifications to the original presentation in consultation with the proponent), the proposal is submitted to the State Infrastructure Development Board. The board will consider the proposal if the cost of the project exceeds a certain limit and if no financial assistance (subsidy) is required from the government. The board can return the proposal with or without modifications or for reconsideration.

Once the terms of the proposal are finalized, the specified government agency will follow the same procedure of competitive public bidding. Once a third party is selected following the competitive public bidding, the original proponent will be given an opportunity to make its proposal competitive within 30 days. If the original proponent fails to make a matching offer, then the government agency will reimburse the preparation cost of the proposal and transfer it to the government agency.

The experience in the state of Gujarat is still limited. As of April 2006, 5 project proposals—all in the power sector—have been presented as unsolicited under section 10 of Gujarat Infrastructure Development Act of 1999. Four proposals were accepted and preparations for conducting a tendering process are underway. The total value of the approved projects proposed is approximately \$31 million. Because none of the projects has been awarded, the success of the system is yet to be tested.

## **INDONESIA**

Indonesia regulates private sector involvement in infrastructure in the *Presidential Regulation Concerning Government Cooperation with Business Entities in the Supply of Infrastructure* (No. 67 of 2005). Under Indonesian law, PPPs are referred to as cooperation projects that entail the supply of infrastructure conducted through a cooperation agreement (a written covenant between the minister and the business entity) or a business operation permit (a permit granted by the minister to the business entity). In both cases the business entity is identified through public auction. The minister or regional head is in charge of identifying projects that are for partnership with the private entities and, following public consultations, a list of project priorities is publicly announced and disseminated.

Unsolicited proposals are addressed in Chapter IV, under “Cooperation Projects at the Initiative of Business Entities.” Business entities are allowed to propose projects that are not included in the list of priority projects. Article 11 requires unsolicited proposals to include the following items:

- a feasibility study,
- a cooperation formation plan,
- a plan for project financing and funding resources, and

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<sup>23</sup> See <http://www.gidb.org>.

- a plan for a cooperation offer that includes schedule, process, and evaluation method.

Like projects to be conducted in cooperation with business entities, unsolicited projects should also consider the following aspects:

- suitability with the national or regional medium-term development plan and the infrastructure sector strategic plan,
- suitability of the project location with the regional spatial plan
- the relationship among infrastructure sectors and among regions, and
- the cost analysis and social benefits.

The minister, institution head, or regional head will evaluate proposals to determine if they fulfill the feasibility requirements outlined above. Projects deemed feasible will be processed through public auction following the same procurement process as solicited projects.

The Indonesian system rewards the original proponent in one of two forms:

- (1) By granting the proposal an added value (bonus) not to exceed 10 percent of the proponent's tender and to be openly announced before to the procurement process, or
- (2) By purchasing the project proposal (including intellectual property rights) by the government or the winner of the tender.

In both cases, the minister, institution head, or regional head determines the amount of added value or the value of costs to be reimbursed to purchase the project proposal, based on the consideration of an independent appraiser before the procurement process.

## **KOREA, REPUBLIC OF**

The Private Participation in Infrastructure (PPI) program of the Republic of Korea was formally launched in 1994. The limited success of the initial effort and the effect of the Asian financial crisis of 1997 led the government to introduce a new PPI law in 1998 to revive the program.

The goal of the PPI Act passed in 1998 was to provide more incentives for the private sector to participate in PPI projects. It introduced of a set of provisions to allow unsolicited projects that had been absent in the old PPI law. The 1998 framework for handling unsolicited proposals had specific provisions to encourage the private sector to develop and present proposals for infrastructure projects. Specifically, the 1998 PPI law allowed the following incentives for the initial proponent:

- bonus evaluation points,
- minimum revenue guarantees,<sup>24</sup> and
- foreign exchange guarantees.

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<sup>24</sup> Minimum revenue guarantees for unsolicited proposals were abolished in the 2006 Annual Plan by the Ministry of Planning and Budget. Dr. Young-Geun Lee.

Following the 1998 PPI Act, the Ministry of Planning and Budget established the Private Infrastructure Investment Center of Korea (PICKO) as a specialized agency to provide technical assistance to competent authorities on the preparation of feasibility studies and PPP project tenders. In January 2005, the government passed an amendment to the 1998 Act on PPI, establishing the Public and Private Infrastructure Investment Management Center (PIMAC) as a successor unit.<sup>25</sup>

The Korean PPP market is characterized by a high number of unsolicited proposals. Between July 1999 and April 2006, approximately 141 unsolicited proposals with project costs estimated at \$40.4 billion<sup>26</sup> were presented to PICKO/PIMAC. Of the 141 submissions, 101 proposals were accepted (they reached preliminary approval stage), 33 were rejected, and 7 are under review (see table B.2).

**Table B.2: Unsolicited Proposals Submitted in Korea, 1999–2006**

Status	1999	2000	2001	2002	2003	2004	2005	2006	Total
Presented	5	27	15	21	38	15	19	1	141
Under review	0	0	0	0	0	0	0	7	7
Rejected	3	7	2	10	9	0	2	0	33
Accepted	2	20	13	11	29	15	11	0	101

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*Source:* PIMAC.

In terms of competition, 65 projects have already undergone a public tender process. On average, although third parties presented competitive bids, a third party won the bidding in only 6 cases. The bonus points awarded in the evaluation were between 0 and 6 percent (2.7 percent on average). In the 6 projects won by third party bidders, the bonus was between 0 and 4 percent, which means out of 1,000 points, the original proponent received 20–40 points more than a third party. The bonus points do not seem to be a main factor to decide a preferred bidder. Furthermore, when the original proponent submits a modified proposal in the process of inviting alternative proposals, then the possibility of receiving bonus points is lost. It is common for an original proponent to submit a modified proposal.

The recent policy decisions for PPI projects in Korea have been directed toward improving the efficiency of public funds and giving priority to solicited projects, thus since early 2005, the following reforms reorganized PICKO into PIMAC, aimed at reducing the number of unsolicited projects:

- *Mandatory consultation.* The review process must include consultations between PIMAC and the line agencies or ministries at every stage of the implementation procedure.

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<sup>25</sup> PIMAC is the result of a merger between Private Infrastructure Investment Center of Korea (PICKO) of the Korea Research Institute for Human Settlements and the Public Investment Management Agency of the Korean Development Institute.

<sup>26</sup> Based on US\$1=KRW950. Total project cost is the aggregate sum of survey cost, design cost, construction cost, compensation cost, incidental cost, operation equipment cost, taxes and charges, and operation reserves.

- *Introduction of the Value for Money (VfM) Test.* Since 2005, the feasibility of every project should be reviewed and screened through a VfM test. PIMAC published a manual for guiding the test, which is separated into three phases: first, a “Decision to Invest” is used to confirm whether a project is worth the social benefit; second, a “Decision to Implement by PPP” is carried out to determine whether a project is suitable to be implemented by private finance initiative (PFI) after comparing it with the public sector comparator (PSC); and third, the suitability of a project is determined after analyzing the results of qualitative VfM (life-cycle costs of PSC) and quantitative VfM evaluation (level of service quality). In addition, projects that are deemed suitable are carried through additional financial analysis to calculate the expected amount of government subsidy (compensatory portion for construction cost and operation cost).
- *Elimination of the minimum revenue guarantee.* Previously, minimum operating revenue guarantees (MRG) were 80 percent of operating revenue for the first 5 years of operation, 70 percent during the 6 to 10 years after commencement of operations, and 60 percent from years 11 to 15. However, since 2005, these guarantees no longer apply.

## **THE PHILIPPINES**

The energy crisis in the late 1980s, coupled with the impending budget deficit, prompted the government of the Philippines to seek private sector support in carrying out national priority projects. To enable such involvement, in December 1990, the Philippine Congress enacted Asia’s first build-operate-and-transfer (BOT) law, known as Republic Act No. 6957.<sup>27</sup>

The concept of unsolicited proposals in BOT projects was later introduced in Republic Act No. 7718 of 1994 and its Implementing Rules and Regulations (IRR), which stipulate that unsolicited proposals should

- Involve a new concept or technology;
- Not be part of the agency or local government unit’s (LGU) list of priority projects, as consolidated under the medium-term public investment program for national government agencies; and
- Not require any direct government guarantee, subsidy or equity.

In addition, any component of an approved solicited project will not be eligible as an unsolicited proposal.

Two key government bodies are currently involved in managing unsolicited proposals in the Philippines. The BOT Center,<sup>28</sup> as an attached unit to the Department of Trade and Industry, is mandated to provide project development assistance and monitoring

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<sup>27</sup> “An Act Authorizing the Financing, Construction, Operation, and Maintenance of Infrastructure Projects by the Private Sector and for other purposes.” This law was subsequently amended by R.A. No. 7718 in April 1994 to increase private investment in other infrastructure sector among other features.

<sup>28</sup> Before the creation of the BOT Center, the Coordinating Council of the Philippine Assistance Program (CCPAP) was identified as the agency responsible for the coordination and monitoring of projects implemented under the BOT Law, pursuant to Section 12 of R.A. 7718. CCPAP was later reorganized and converted into the Coordinating Council for Private Sector Participation (CCPSP), by Administrative Order No. 67, series of 1999, as amended by Administrative Order No. 103, series of 2000. Executive Order 144, dated November 2002 provided for the conversion of the CCPSP to the current BOT center and transferred as an attached unit from the Office of the President to the Department of Trade and Industry.

functions in addition to marketing the BOT/PSP program to prospective investors, developers, and government agencies. In addition, the Investment Coordination Committee (ICC) of the National Economic and Development Authority (NEDA) Board<sup>29</sup> is mandated to review and approve private sector projects under BOT schemes and its variants in the context of investment planning, financing, and monitoring of balance-of-payments implications of major national projects.

It is difficult to estimate how many unsolicited proposals were submitted since the mechanism was introduced in 1994 because proposals are first channeled through line ministries and local government units. Unsolicited proposals only reach central agencies such as the BOT Center and NEDA-ICC Secretariat if they are found to have sufficient merit to be sponsored. Table B.3 lists unsolicited proposed projects that have secured a contract and are operational as of June 2006. Table B.4 provides information about projects under review.

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<sup>29</sup> The ICC was created by Executive Order No. 230 of December 1992. The ICC is composed of the Director-General of the NEDA Secretariat, the Executive Secretary, the Secretaries of Finance, Agriculture, Trade and Industry, and of Budget and Management, and the Governor of the Central Bank.

**Table B.3: Unsolicited Projects Presented to BOT Center and ICC Secretariat, 1994–2006 (operational and awarded)**

Project title and Status	Sponsor agency	Sector	Type/variant	Estimated project cost (millions)	Year approved	Status	Winner	Was “right to match” a factor?
<b>Under concession/operational</b>								
Alien Certificate of Registration I-Card Project	BI	Information technology	BOT	\$2.80	2003	Ongoing	Original proponent	No
Caliraya–Botocan–Kalayaan Power Plant Project	NPC	Power/water	BROT	\$450.00	n.a.	Operational	Original proponent	Yes
Casecnan Multipurpose BOT Project	NPC	Power/water	BOT	\$650.00	1994	Operational	Original proponent	No
Computerization of the Civil Registry System	NSO	Information technology	BTO	\$65.00	1996	Operational	Original proponent	No
San Roque Multipurpose Project	NPC, NIA, DENR, DPWH	Power/water	BOT	\$1,141.00	1996	Operational	Original proponent	No
<b>Subtotal: 5 projects</b>				<b>\$2,308.80</b>				
<b>Awarded/under construction</b>								
Land Titling Computerization Project	LRA	Information technology	BOO	\$82.00	1998	Ongoing	Original proponent	No
Machine-Readable Passports and Visas Project	DFA	Information technology	BOT	\$50.30	1995	Terminated by DFA	Original proponent	No
San Pascual Cogeneration Power Plant Project	NPC	Power	BOO	\$400.00	1995	Operational	Original proponent	No
Pampanga GIS Center	Pampanga Province LGU	Information Technology	BTO	\$0.96	n.a.	Ongoing	Original proponent	No
Tarlac Public Market	Tarlac City LGU	Property development	BOT	\$3.88	n.a.	Ongoing	Original proponent	No
Roxas Commercial Center	Roxas, Isabela LGU	Property development	BOT	\$1.00	n.a.	Ongoing	Original proponent	No
<b>Subtotal: 6 projects</b>				<b>\$538.14</b>				
Ninoy Aquino International Airport Terminal III Development Project <i>Cancelled</i>	DOTC	Transport	BOT	\$369.15	1995	Partially completed but not in operation. Contract nullified.	Third party	Yes
<b>Subtotal: 1 project</b>				<b>\$369.15</b>				

Source: BOT Center, NEDA-ICC.

Note: n.a. = not available.

**Sponsor agency:** BI = Bureau of Immigration, DENR = Department of Environment and Natural Resources, DFA = Department of Foreign Affairs, DOTC = Department of



Transportation and Communications, DPWH = Department of Public Works and Highways, LGU =local government unit, LRA = Land Registration Authority, NIA = National Irrigation Administration, NPC = National Power Corporation, NSO = National Statistics Office.

**Type variant:** BOT= build-operate-and-transfer; BOO = build-own-and-operate; BROT= build-rehabilitate-operate-and-transfer; BTO = build-transfer-and-operate.

**Table B.4: Unsolicited Projects Presented to BOT Center and ICC Secretariat, 1994–2006 (under review)**

Project title and Status	Sponsor agency	Sector	Type/variant	Estimated project cost (millions)	Status
Balara–La Mesa–San Jose del Monte–Baliwag Toll Road Project (La Mesa Parkway, Stage 1)	DPWH, MWSS	Transport	BOT	n.a.	Under review
Bulacan Central Bulk Water Supply Project	LWUA	Water	BOT	\$29.12	Second pass approval secured
Bureau of Immigration Government Building	BI	Property development	BT/BOO	n.a.	First pass approval secured
4Caticlan Airport	DOTC	Transport	BOT	n.a.	Under review
Extensible Automated Fingerprint Identification System (XAFIS)	NBI	Information technology	BOT	\$41.56	Second pass approval secured
Improving the Philippine Postal Corporation's Financial and Operational State through ICT/E-commerce Opportunities	PPC	Information technology	BLT	\$61.45	Second pass approval secured
Laoag Commercial Complex	Laoag LGU	Property development	BTO	\$7.30	Second pass approval secured
Mass Rail Transit Line 7 (MRT 7)	DOTC	Transport	BGTOM	\$1,298.80	First pass approval secured
Metro Cebu Bulk Water Supply–Luyan River in Carmen	MCWD	Water	BOO	\$34.00	First pass approval secured
Metro Manila Transit Line 4 (MRT 4)	DOTC	Transport	BT/BOO	\$958.00	First pass approval secured
Metro Manila Transit Line 8 East Rail Project	DOTC	Transport	BT/BOT	n.a.	Under review
Muntinlupa Skywalk	LGU	Transport	BOT	n.a.	Under review
Northern Intermodal Transport Terminal Complex	DOTC	Transport	BOO	\$17.30	First pass approval secured
Pasig Expressway Unsolicited BOT Proposal	DPWH	Transport	BOT	\$700.19	First pass approval secured
Establishment of a Thermal Coating and Printing Plant	PCSO	Property development	BOT	n.a.	Under review
San Fernando Runway Lights Development Project	PPMA	Transport	BT	\$0.39	First pass approval secured
SSS Corporate Center Project	SSS	Property development	BTO/BOT	\$103.52	First pass approval secured
Legaspi City Water District Supply (Legaspi, Daraga, Sorsogon and Tabaco Water Districts)	LCWD	Water	BOT	n.a.	First pass approval secured
<b>Subtotal: 18 projects</b>				<b>\$3,251.64</b>	

*Source:* BOT Center, NEDA-ICC.

*Note:* n.a. = not available.

**Sponsor agency:** BI = Bureau of Immigration; DOTC = Department of Transportation and Communications; DPWH = Department of Public Works and Highways; LCWD = Legaspi City Water District; LGU = local government union; LWUA = Local Water Utilities Administration; MCWD = Metro Cebu Water District; MWSS = Metropolitan Waterworks and Sewerage System; NBI = National Bureau of Investigation; PCSO = Philippine Charity Sweepstakes Office; PPC = Philippine Postal Corporation; PPMA = Poro Point Management Authority; SSS = Social Security System.

**Type/variant:** BGTOM = build-gradually transfer-operate-manage; BLT = build-lease-transfer; BOO = build-own-operate; BOT = build-operate-and-transfer; BT = build-transfer; BTO = build-transfer-operate.

Based on tables B.3 and B.4, unsolicited proposals totaled 30 projects (\$6.47 billion) in three categories (a) under concession or operational (5 projects at \$2.31 billion), (b) awarded or under construction (6 projects at \$0.54 billion and 1 cancelled at \$0.36 billion), and (c) under review or in the pipeline (18 projects at \$3.25 billion).

The ICC, as the approving authority for BOT proposals, has not rejected any unsolicited BOT proposal. Rejections by the implementing agencies, however, if any, are undocumented and reporting is not mandatory.

The process for unsolicited proposals in the Philippines has some flaws:

*Unrealistic or Unforced Timelines.* The private sector investors view the process as protracted and counter-productive if the government takes too long to review and approve a project. Timelines are especially obstructive for information technology projects because these products and services quickly become outdated. For example, the Department of Foreign Affairs's machine-readable passport and visa project was terminated because the proposed technology was no longer compliant with contemporary international standards. However, sometimes the prescribed timelines are not sufficient to facilitate compliance, as in the case of lapsed validity of bids and first-pass approvals beyond the prescribed 180 days (for example, Carmen Bulk Water Supply Project).

*Right-to-Match Advantage.* In general, unsolicited proposals were awarded to the original proponent either as a result of the right to match or due to the absence of challenging bids. The possibility of conducting complex technical studies, for example, a hydrology risk study or other related feasibility studies, render certain projects unattractive to potential challengers given the limited time and high cost to prepare a comparative proposal.

*Lack of Transparency.* The tender for comparative proposals remains the responsibility of the agency or LGU. The BOT law and the IRR do not specifically require the agency or LGU to submit details of the tender proceedings to any oversight authority. As such, detailed information on the challengers and comparative proposals on a per project basis is not available, nor is it maintained or documented by either the BOT Center or the ICC Secretariat. As a result, there is no evidence of effective competition, which limits any possible benefits from third parties submitting more attractive bids.

The lessons learned from more than a decade of experience in the administration of Philippine BOT projects have resulted in policy changes in the BOT process; amendments to the BOT law are also being proposed at the House of Representatives, under House Bill 5002. In particular for unsolicited proposals, HB 5002 provides for the following revisions:

- A longer period for the preparation of comparative or competitive proposals up to 120 days;

- Removal of new concept or technology as criteria for unsolicited proposal eligibility; and,
- Removal of the right-to-match provision in exchange for reimbursement of the actual development costs to the original proponent in the event that the challenger outbids the original proponent.

These issues seem to be shared in Taiwan, though it has a shorter history with unsolicited proposals. As illustrated below, the use of the right to match in Taiwan has fallen short to encourage competitive bids because in the majority of the cases, third parties did not take part in the tender process.

## **SOUTH AFRICA**

South Africa has established a firm regulatory framework for national and provincial government institutions to enter into public-private partnership (PPP) agreements. The central legislation governing PPPs for national and provincial governments is Treasury Regulation 16, issued by the Public Finance Management Act in 1999.

The regulation makes no provision for unsolicited bids. The transport sector in South Africa is an exception to the national PPP framework. The specific provisions for unsolicited proposals management are allowed and administered by the South African National Roads Agency Limited (SANRAL), an arms-length agency of the Ministry of Transport.

Since the system has been in place, four proposals have been presented to SANRAL, but none has yet been publicly tendered. One of the four has been rejected; the other three are undergoing the review process.

**Table B.5: Status of Unsolicited Proposals to SANRAL, as of March 2006**

<b>Project</b>	<b>Value (millions)</b>	<b>Status</b>
<b>N1–N2 Winelands Toll Highway</b>	\$400	Likely to be publicly tendered in 2006
<b>N2 Wild Coast Toll Highway</b>	\$600	Set aside but not rejected as a result of the ministerial decision from the National Department of Environmental Affairs and Tourism
<b>R300–Cape Town Ring Road</b>	\$300	Under review and to be submitted to the Minister of Environmental Affairs and Tourism
<b>John Ross Highway Project</b>	Unknown	Abandoned

*Source:* SANRAL

## **SRI LANKA**

The *Guidelines on Private Sector Infrastructure Projects*<sup>30</sup> of the National Procurement Agency of Sri Lanka provide the general framework for handling unsolicited proposals. As per the *Guidelines*, line agencies and ministries receiving unsolicited proposals process them according to the procedures applicable to solicited proposals.

<sup>30</sup> See [http://www.npa.gov.lk/documents\\_and\\_circulars.php](http://www.npa.gov.lk/documents_and_circulars.php).

Unsolicited proposals should contain all basic information to ascertain the economic and financial viability of the project. Once the need is determined, the relevant line ministry should, by advertisement, call for proposals. The party that made the original offer should be given a chance to improve it in the invitation for bids and offers if the proposal has been significantly changed to suit the needs and objectives of the agency involved. No decision should be made solely on the basis of unsolicited offers without inviting proposals and bids through public advertisement.

## **TAIWAN (CHINA)**

In early 2000, Taiwan's Act for the *Promotion of Private Participation in Infrastructure Projects* came into force. In March 2002, Taiwan's Public Construction Commission implemented the *Guidelines for Evaluation of Unsolicited Proposals by the Arranging Authority* under the umbrella of Article 46 of the BOT Act, which provides for the submission of unsolicited proposals by the private sector for the development of infrastructure projects.

The Public Construction Commission (PCC) falls under the authority of the Executive Yuan and has overall responsibility for the monitoring and control of all projects under the BOT Act including those originating as unsolicited proposals.<sup>31</sup> The scope of possible projects for private participation—solicited or unsolicited—includes a broad range of sectors.<sup>32</sup> While the PCC maintains overall responsibility for BOT projects, a specific project will by its nature also fall under the authority of other levels of the government.

The planning and coordination of major infrastructure projects, such as energy or transportation projects, fall within the responsibility of the Council for Economic Planning and Development of the Executive Yuan. Specific project assessment, selection, and management, however, will be further delegated to the relevant government ministry.<sup>33</sup> Local city and county governments will also get involved when a proposed project falls within their jurisdiction.

The *Guidelines* arose from the needs of both the private sector and the government to address the administrative and procedural elements for unsolicited proposals.<sup>34</sup> The private sector had, for the most part, been unwilling to carry the risk of preparing an unsolicited proposal; it lobbied for further administrative guidance from the PCC.<sup>35</sup>

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<sup>31</sup> The PCC also maintains overall responsibility for administering the Government Procurement Act. Infrastructure projects tendered by the central government will be done so pursuant to the Government Procurement Act. The BOT Act permits various models for private participation in infrastructure projects: build-operate-transfer, build-transfer-operate, rehabilitate-operate-transfer, build-own-operate, operate-transfer, or other approved models. State projects must also be published on the PCC's procurement website.

<sup>32</sup> Eligible sectors include: transportation facilities, common conduit, environmental pollution prevention facilities, sewage lines, water supply facilities, hydraulic facilities, sanitation and medical facilities, social welfare facilities, labor welfare facilities, cultural and educational facilities, major facilities for tour sites, power facilities, public gas and fuel supply utilities, sports facilities, parks facilities, major industrial facilities, major commercial facilities, major hi-tech facilities, development of new towns, and agricultural facilities.

<sup>33</sup> Examples include the Ministry of Transportation and Communications, the Ministry of Economic Affairs, the Environmental Protection Administration, and the Ministry of Interior.

<sup>34</sup> The first unsolicited proposal failed because neither the proponent nor the relevant authorities had any direction or guidance on making or assessing the proposal.

<sup>35</sup> Private sector interest was fueled in part by government tax incentives under the BOT Act for private participation in infrastructure projects.

Before the *Guidelines*, only one unsolicited proposal was submitted in two years (2000–2002). However, activity has increased since the *Guidelines* are in place.

The *Guidelines* establish two categories of unsolicited proposals: Type 1 projects, in which the proponent acquires and provides the land for the project, and Type 2 projects, in which the proponent requires the government to acquire or provide the land, facilities, or both for the project.

For a Type 1 project, the proponent must submit a detailed proposal. The scope of the detailed proposal and required supporting documentation has been defined in Article 46-1 of the BOT Act. The arranging authority or the relevant competent government entity at the request of the arranging authority will evaluate the project based on policy objectives, compliance with relevant acts and regulations, the degree of government support required for the project, and the overall feasibility of the project. The arranging authority has six months to evaluate the proposal, though this period may be extended for an additional six months. If the project is approved based on the evaluation of the detailed proposal, then the parties move into the project planning phase and sign the concession agreement.

For a Type 2 project, the proponent must submit the project outline for the initial evaluation phase. The arranging authority will then publish the details of the proposed project within one week of receiving the proposal. The private sector has 15 days to present alternative proposals for the use of the government land, facilities, or both identified in the initial proposal. The arranging authority then undertakes the initial evaluation phase for all proposals received. The arranging authority must also consider the additional factors of whether the project would be in the public interest and whether it would be the best use of the land or facilities. At the completion of the initial evaluation, the arranging authority will either reject the proposal or approve it for further consideration.

Once the arranging authority has completed the initial evaluation of a Type 2 project and approved the proposal for consideration, the proponent must submit a detailed proposal to the arranging authority for the secondary evaluation phase. The arranging authority will then form an evaluation committee to assess the detailed proposal. The arranging authority has six months to evaluate the proposal, though this may be extended for an additional six months. If the project is approved based on the evaluation of the detailed proposal, then the parties move to negotiations over the proponent's intellectual property rights in the proposal and the invitation to bid.

Type 2 projects must be open to the private sector for competitive bidding. The proponent and the arranging authority will exclusively negotiate the invitation to bid.<sup>36</sup> This negotiation provides the proponent both the opportunity to further develop its working relationship with the arranging authority and to tailor its bid to address its strengths and overcome its weaknesses. The proponent can also ensure that its intellectual property rights in the proposal are adequately protected. The *Guidelines* also provide the proponent with one of two possible advantages: the right to match a superior competitive bid or a bonus (expressed as a percentage over which the proponent's bid can exceed the best offer and still be selected).

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<sup>36</sup> If the parties are unable to negotiate the invitation to bid, then the arranging authority retains the right to proceed with the project.

Since the *Guidelines* came into force, 29 unsolicited proposals have gone to competitive bidding and had contracts awarded for approximately \$3.44 billion,<sup>37</sup> which represent 43.4 percent of the total (solicited and unsolicited) BOT project portfolio (see table B.6). The majority of the proposals have been for infrastructure projects in the tourism and commercial building sectors.

**Table B.6: Proposals Evaluated by the PCC, as of May 2006**

Proposal status	Number	Percent
Presented	193	
Considered not feasible	142	74
Under review	22	11
Accepted, contract awarded	29	15

*Source:* Public Construction Commission, Executive Yuan.

*Note:* a. Proposal was either formally rejected or did not proceed far beyond the submission of the project outline.

The *Guidelines* establish that the competitive bidding period shall be 45 days. This time limit leaves little opportunity for interested third parties to assess and prepare qualified bids. As of May 2006, of the 29 projects that were competitively tendered, third parties submitted bids in only one case. In all cases the original proponent was granted the right to match and the bonus was not used. Apparently, responsible authorities lack any practical guidance on defining and calculating the bonus. There is a degree of uncertainty over the bonus that granting the right to match has been viewed as the most practical option. The reliance on the right to match has been cited as a concern because it has been known to discourage competitive bids (in all cases the contract was awarded to the original proponent).

Currently, the central government is considering amendments to the BOT framework to address its experiences. Unsolicited proposals have been relatively well received by local officials who see this process as a more defined than for standard BOT projects. PPP principles, however, still suffer from a lack of understanding and the success of a BOT project is often seen as being dependent upon the capabilities of the responsible authority. Local officials have the legal right to retain outside consultants to advise on projects, however, this practice has not been common.

A major criticism from the foreign business community is the lack of expertise and experience in BOT projects locally and the failure to retain outside experts to compensate for this shortcoming. Local officials have also been criticized for a somewhat prevalent view that PPP shifts all of the costs and risks of a project onto the private sector. Overall, experience with BOT projects in Taiwan has tempered foreign participation in unsolicited proposals; the majority of proposals have been submitted by local companies.

<sup>37</sup> Removing three specific projects (one that was subsequently terminated and two of significant value) the overall value of private investment stands at \$1.5 billion.

## UNITED STATES

### *State of Virginia*

The Public-Private Transportation Act of 1995 (PPTA), as amended in October 2005, is the legislative framework enabling the Commonwealth of Virginia, local governments, and certain other public entities, to enter into agreements authorizing private entities to develop and or operate qualifying transportation facilities.

The PPTA of 1995 allows both solicited and unsolicited project proposals. The major steps involved in evaluating, selecting, and implementing the projects are similar for solicited and unsolicited proposals.

Proposals are evaluated and implemented according to a six-phase process.

Phase 1: Quality control review by Department of Transportation to determine if a conceptual proposal meets the requirements of law.

Phase 2: Review, evaluation, and recommendation by an independent review panel of one or more conceptual proposals.

Phase 3: Review and concurrence or rejection of the conceptual proposal(s) by the appropriate oversight board and a recommendation that the department seek a detailed proposal from the proponent(s).

Phase 4: Final selection of the successful detailed proposal(s).

Phase 5: Negotiation process of a draft interim or comprehensive agreement.

Phase 6: Final stage of review before to the execution of the interim or comprehensive agreement by the appropriate department administrator and proponents.

Except for those proposals that require the designation of a coordinating public entity, within 30 days of the receipt of an unsolicited proposal, the Department of Transportation will initiate a review to determine if the proposal meets all legal and policy requirements.

The department will publish a notice accepting the proposal for evaluation and invite others to submit competing proposals. The notice will state that the department has received and accepted an unsolicited proposal under the PPTA Act, that it intends to evaluate the proposal, that it may negotiate an interim or comprehensive agreement with the proponent based on the proposal, and that it will accept any competing and compliant proposals for simultaneous consideration. If the proposal is modified or amended, then the initial proponent will also be given the opportunity to add information during the competing period. Proposals will be posted for at least 90days (provided federal oversight, financial participation, or approval are not needed).

The department also reserves the right to treat other proposals received after the original proposal as either a competing proposal or a non-competing unsolicited proposal. Within



30 days of the close of the competition period for unsolicited proposals, the department will review any competing proposals for quality control and determine whether the proposal is competing and compliant with applicable laws. All proposals that pass the quality control review will be forwarded immediately to the secretary of transportation. The secretary of transportation will then have 60 days to appoint and designate a chair for an independent review panel (IRP) to evaluate the proposals (composed of senior state transportation officials and other individuals who have appropriate expertise). The IRP will review the proposals and any comments received from affected jurisdictions or the general public, then will make recommendations to the department or public entity's oversight board. The IRP may recommend that the proposal is adequate to begin negotiations of an interim or comprehensive agreement.

Following review and recommendations by the IRP, the oversight board will review the conceptual proposals and any recommendations of the IRP and will recommend to the department of transportation whether to advance to a detailed proposal stage. If proceeding, the department will form a proposal review committee to review the recommendations of the IRP and the oversight board, and within 45 days, may request that none, one, or more proponents submit detailed proposals. Based upon a review of the detailed proposals, the department may select none, one, or more proposals for competitive negotiations. The department will have 60 days to review the proposals. If the department, upon receipt and review of the detailed proposal, determines that the proposal meets the selection criteria established for evaluation of the detailed proposal and that initiation of the negotiation stage will be in the public interest, then the department may initiate the negotiation stage.

### ***Territory of Guam***

The *Build-Operate-Transfer Implementing Rules and Regulations* (Public Law 24-294 Bill No. 717) allow the Guam Waterworks Authority (GWA) to accept unsolicited proposals on a negotiated basis provided that all of the following conditions are met:

- Projects involve a new concept and technology and are not part of the current list of priority projects of the agency;
- No direct government guarantee, subsidy, or equity is required; and
- GWA has invited—by publication in a newspaper of general circulation and by other international media—comparative or competitive proposals, and no other proposal is received for 60 working days. If another proponent submits a lower-priced proposal, then the original proponent has the right to match that price within 30 working days.

The BOT committee will evaluate all unsolicited proposals to ensure technical and financial merit within 90 days of receipt. If the committee finds that the unsolicited proposal has merit, then it will submit its recommendations and the proposal to the board of directors for disposition. When another proponent submits a lower-priced proposal following publication by GWA and the original proponent matches that price within 30 working days, then the BOT committee will identify which proposal has greater technical merit and submit its recommendations and the proposals to the board of directors for disposition.

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## APPENDIX C

### LINKS TO LAWS AND REGULATIONS

#### **Argentina**

<http://infoleg.mecon.gov.ar/infolegInternet/anexos/105000-109999/108805/norma.htm>

#### **Australia, New South Wales**

<http://www.treasury.nsw.gov.au/wwg/pdf/wwgguidelines.pdf>

#### **Australia, Queensland**

[http://www.coordinatorgeneral.qld.gov.au/pp\\_partnerships/policy\\_guidance.shtm](http://www.coordinatorgeneral.qld.gov.au/pp_partnerships/policy_guidance.shtm)

#### **Australia, Victoria**

[http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/PVGuidanceMaterial\\_PracGuide/\\$File/PVGuidanceMaterial\\_PracGuide.pdf](http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/PVGuidanceMaterial_PracGuide/$File/PVGuidanceMaterial_PracGuide.pdf)

#### **Canada, British Columbia**

<http://www.fin.gov.bc.ca/pt/dmb/cpf.shtml>

#### **Canada, Ontario**

[http://www.pir.gov.on.ca/userfiles/HTML/cma\\_4\\_35661\\_1.html](http://www.pir.gov.on.ca/userfiles/HTML/cma_4_35661_1.html)

#### **Chile**

[http://www.mop.cl/documentos/ley\\_cgc.pdf](http://www.mop.cl/documentos/ley_cgc.pdf)

#### **Costa Rica**

<http://www.mopt.go.cr/cnc/decreto.html>

#### **India, Andhra Pradesh**

<http://www.apidc.org/Infraact.pdf>

#### **India, Gujarat**

<http://www.gidb.org>

#### **Indonesia**

<http://www.kkppi.go.id/laws/PerPres67.pdf>

#### **Republic of Korea**

<http://www.mpb.go.kr/english.html>

#### **The Philippines**

[www.botcenter.gov.ph/botlaw/index.htm](http://www.botcenter.gov.ph/botlaw/index.htm)

#### **South Africa**

[http://www.nra.co.za/usb\\_policy.pdf](http://www.nra.co.za/usb_policy.pdf)

**Sri Lanka**

<http://www.boi.lk>

**Taiwan (China)**

<http://www.pcc.gov.tw/eng/indexE.htm>

**United States, Guam (Territory)**

[http://www.guamlegislature.com/24th\\_Guam\\_Legislature/Public\\_Laws\\_24th/PL240294.htm](http://www.guamlegislature.com/24th_Guam_Legislature/Public_Laws_24th/PL240294.htm)

**United States, Virginia (State of)**

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC5600000002200000000000>



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