

Study 2b

Tender mercies: Contracts, concessions and privatization

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1. Introduction

At the center of various issues of corruption during the Estrada administration was the purported existence of a “nocturnal cabinet” or “court” composed of relatives and close, personal friends of the deposed president. Involved in a wide array of businesses from legalized gambling to stock trading, they are said to be able to directly influence the awarding of government contracts or tilt government’s regulatory provisions to their, or their associates’ favor, this, despite President Estrada’s perorations that his government is one of “*walang kaibigan, kamag-anak o kakilala*” (no friends, relatives or acquaintances).

There have been oblique references in the past from palace and business insiders on how the presidential goodwill has been employed by these people to further still their economic and political interests. However, it took a serious rift between President Estrada and one of his closest friends, Ilocos Sur Governor Chavit Singson, to give the public a solid likeness of the obscure symmetry. The resulting “model” emerging from the Senate hearings does not only reveal the overwhelming prerogative of the President to influence the awarding of government contracts to his favored associates. More important perhaps, it is able to situate *that* prerogative within the workings of an informal regime that is able to combine and stratify the different interests and levels of compensation or payoff for those involved.

Beyond public interest, the prevalence of these allegations of exclusivity moves to an alarming dimension, especially when set against the mainstream of the government’s economic reform program that seek even wider private sector participation in the economy. Since 1987, government has undertaken the task of tearing down excessive and unnecessary economic regulations and controls through liberalization, deregulation, and privatization. Over the last twelve years, it has sold or contracted to private investors some government assets and rights to provide public services worth no less than P191 billion.

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As it is, there is also no sign that the new political leadership will change this course. Prior to and upon assumption of the presidency, Gloria Macapagal-Arroyo has since articulated her intention to continue the government's economic reform program anchored on the same commitment, for fiscal and social reasons. Economically, it means a better financial situation for the treasury, while at the same time, attracting and mobilizing private capital to finance and/or operate services and facilities that the government, for lack of resources, cannot invest and maintain. With this, the government could also focus its limited resources that would have otherwise been allocated for providing the service to other priority areas.

These economic reasons, in turn, dovetail with the expected social returns. Applying a dose of market competition is expected to trigger reforms on the way these public goods and services are being managed, delivered, and priced—aspects that are habitually neglected by government-supported corporations and/or service providers. Through competition, the people (and users of the service) could also exercise their right to choose, which is highly unlikely under conditions where government maintains its traditional monopoly over the provision and operation of public goods and services.

An established government system for concession and privatization that is vulnerable to corruption however, could readily undermine these justifications. For the government, corruption in the granting of government concessions means not obtaining a fair market or monetary value for the “rights” and resources under its control. It also means compromising the country's development potential since contracts on privatization and concessions usually involve huge amounts and are intended to have a positive impact on certain sectors in particular and in the country's economy in general.

For the public, corruption in government contracting and privatization could even inhibit competition from occurring. At best, it might mean having to do with “more of the same,” or worse, having to contend with the deteriorating quality of good or service while at the same time, being forced to pay more.

An oft-neglected point is that eventually, fraudulent transactions affect the business regime itself. For a contractor or service provider, the corrupt nature of the transaction or deal eventually introduces uncertainties into the environment that could have adverse results on how it (and any other firm) conducts business (Campos, Lien, and Pradhan: 1999). An uneven transaction environment for instance, could limit the number of bidders, favor connections over competence, and promote information asymmetry—all of which redound

to additional transaction costs. Over time, such transactions inevitably bind both government negotiators and contractors in a self-sustaining system that advance inefficiency and ineffectiveness.

2. Purpose and Scope of the Study

This study examines corruption in government contracting in private sector for infrastructure or development projects that it (government) normally finance and operate but now, will be wholly or in part, construct, operate, and maintain with the private sector. To examine corruption of this nature, the study used as reference the government's established system for contracting, as articulated in RA 6957 (May 1990), later amended as RA 7718 (July 1994) also known as the Philippine Infrastructure Privatization (PIPP) or Philippine BOT Law.

The system for contracting articulated in RA 7718 is specifically designed to handle government contracts which tap non-government resources for providing and developing services and infrastructure that were previously monopolized by the government. The law even specifies the flexible terms for public-private partnership arrangements which govern ownership, financing, construction, operation and maintenance, and investment returns' incentives (See: Annex I). Imperfect it may be, this makes the contracting system specified in RA 7718 a good referent to examine other government deals or arrangements which run according to the same objectives.

To determine the institutional factors and account for the circumstances that allow corruption to transpire and take root in government-private contracting system, the study examines in detail three government-private sector PIPP deals in infrastructure or development projects that were concluded. Such deals include; the *Cebu Pond A Reclamation Project*, *North Harbor Privatization Project*, and the *Greater Metro Manila Solid Waste Management Contract*. They might not have been negotiated directly under the BOT Law, but still, they operationally "follow" the same contracting system stated in RA 7718, that is, they are variations of the same system.

As differentiated from usual government-private concessionaire contracts, the cases that the study has considered are not those, whose intention and design were primarily to "employ" the services of private contractors and were paid using public funds. Rather, these

deals are of the category where some aspects of government's right to provide, operate, and maintain a public service or good (e.g., facilities) are offered and awarded to private investors. And, along with it, the right to collect the benefits that accrue from the users of that service or good for an agreed period.

It is difficult to document direct payoffs to officials that could be linked to the intention of influencing the different phases of the contract, from negotiation, to the public (or sometimes, government) evaluation of the concessionaire's performance. Such is the case especially, when there are deliberate efforts to conceal these transactions. As the process of negotiations leading to an agreement also involves a number of people and institutions, an attendant task of proving the occurrence of a payoff usually means proving that a conspiracy also exists. But inasmuch as government decisions over the kinds of alternatives or choices to support—within the frame of concessions and privatization—follow an established system, there might be some merit in looking at the phases and inner workings of this system that render it vulnerable to corruption.

3. Structure of the Study

The study is composed of three parts. Further to establishing the purpose of this study, **Section 4** looks into the principles, basic organizational and procedural steps, mechanisms, and parameters for contracting, as provided by the BOT Law. The discussion was rendered by way of a layman's "walk-through" on the supposed structures, mechanisms, and tools for contracting under the BOT within each phase of contracting.

Section 5 examines the different cases of corruption side-by-side with the different contracting phases that are discussed in the study. The objective is not to throw plausibility into the act but rather account for the vulnerability of the system, in whole or in part, against such plausibility. The section, likewise, looks into the different domains and types of corruption in contracting and the socio-cultural context within which they operate

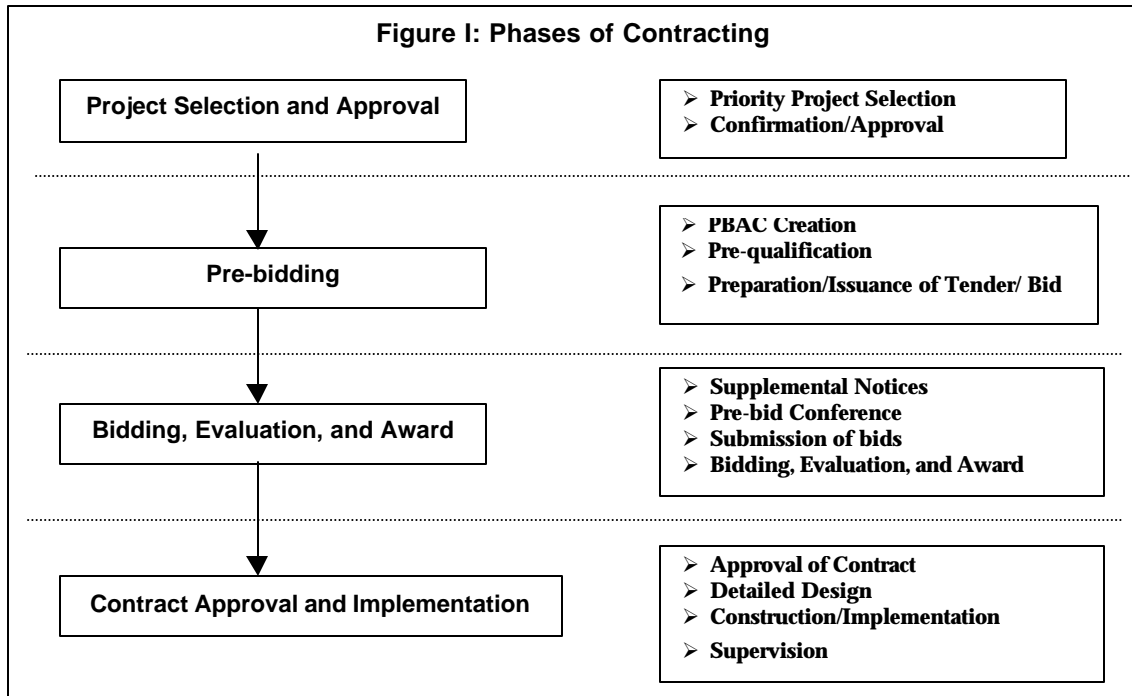
From recapitulating the issues, **Section 6** presents the study's suggestions and recommendations.

4. Phases of BOT contracting: a walk-through

4.1 The BOT Contracting System

The established BOT system for contracting, can be divided into four major phases or parts; namely, (i) project selection and approval; (ii) pre-bidding; (iii) bidding, evaluation, and award; and, (iv) contract approval and implementation. The lineal progression of the phases of contracting does not flow as systematically as it might appear to be, however (See: Figure 1). From one phase leading to next, there are procedures to be followed, technical requirements and assessments to be done, and discussions within and among those parties involved.

As a system, contracting has two, complementary sides. One concerns the pursuit of the *technical and financial objectives* of the deal. Within each phase thus, there are guiding procedures, decision parameters, and sanctions which ensure that the government and other contracting parties would be able to obtain a fair deal and has the capacity to carry out that deal.



The other, and equally important, is the *manner* by which those objectives are managed within the system. Interested project proponents (and even the government) would not be willing to participate in a bargaining process where they perceive the procedures, decision parameters, and sanctions might not be fairly applied to all parties.

Integral therefore to the credibility of the contracting system is the *non-discriminatory* nature of its processes, and concomitant to this, *transparency* to dispel any notion of unfairness and suspicion not only among those involved in the bargaining itself, but between the public and government officials, the latter, being the actual bearers of the former's trust.

4.1.1 Solicitors of public need—Phase I: project selection and approval

The responsibility for drawing-up the list of priority projects that might be covered by the various financial arrangements under the BOT (See: Annex II) is decentralized at the level of the concerned national government agencies (NGAs) and local government units (LGUs). The list is submitted to the National Economic and Development Authority (NEDA) Board, Investment Coordinating Council (ICC) or local development councils (LDCs) for approval or confirmation, depending on the project's cost (See: Table 1).²

The BOT Law does not prescribe a fixed guideline on how LDCs should review and confirm local priority projects. In contrast, the ICC follows an elaborate, two-tracked category for project review and approval, depending on the level of government support and scope.

Projects classified under Track One are those which do not require government support or would require only “minimal” government support.³ Those under Track Two require current or future government appropriations above P300 M to cover direct and/or indirect government guarantees.⁴ The review covers such particulars as project consistency with development programs, economic viability, financial indicators, potential environmental costs, social preparedness, and justification on the choice of BOT contractual arrangements. The ICC review and approval guidelines also require pre-feasibility and market studies, and the conduct of an evaluation for selected BOT schemes (BT, BTO and BLT) and/or projects that require the use of Overseas Development Assistance fund (ODA).

² The ICC is composed by the Department of Finance (Secretary, Chairperson), NEDA (Director-General, Co-chair), Office of the President (Executive Secretary, Member), Departments of Budget and Management (Secretary, Member), Trade and Industry (Secretary, Member), Agriculture (Secretary, Member), Central Bank (Governor, Member), and Energy (Secretary). Other government agencies are invited to the ICC's deliberations when deemed necessary. The NEDA chairs the ICC's Technical Board and also serves as Secretariat.

³ The support can be provided through financial incentives under the Omnibus Investments Code—tax holidays, credit) and/or not requiring appropriations up to P300 M.

Table 1: Approving or Confirming Bodies for BOT Projects

APPROVING/CONFIRMING BODY	PROJECT COST
Approval:	A. National Priority Projects
Investment Coordination Committee (ICC)	P300 million
NEDA Board (upon ICC recommendation)	Above P300 million
Confirmation:	B. Local Priority Projects
Municipal Development Council	up to P20 million
Provincial Development Council	above P20 million to P50 million
City Development Council	up to P50 million
Regional Development Council	above P50 million to P200 million
ICC	above P200 million

The ICC or concerned LDC has 30 working days to act on the lists of projects once the concerned agency/LGU has “satisfactorily complied” with the requirements.⁵ To keep concerned or interested parties informed, the concerned agency/LGU publish once every six months the approved or confirmed list of priority projects that they plan to implement under the BOT’s various contractual arrangements. Interested parties, in turn, are required to officially register with the concerned agency/LGU. Once registered, they regularly receive a copy of the list of the priority projects, at least once every six months. They are later invited to pre-qualify and bid for the approved projects.

4.1.2 Screening the interested—Phase II: Pre-bidding

Upon approval by the NEDA, ICC or LDC, the concerned agency proceeds to the “Pre-bidding Phase,” starting with the creation of a Pre-qualification, Bids, and Awards Committee or PBAC. Essentially, the PBAC stands as the impartial “secretariat” for pre-bidding and bidding concerns by the proponent agency and its composition well follows the

4 For Track 2, government support may take the form of cost sharing (e.g., provision of project-related infra or access infra), direct government appropriations or equity contribution, performance undertaking, or minimum revenue guarantees.

attendant sense of fairness, responsibility, competence (financial and technical), and accountability required as a secretariat.⁶ Specifically, for agencies, the PBAC is composed of ten members with the following designated positions and qualifications:

- At least a third ranking officer of the Agency (Chairman);
- a legal officer (Member-Secretary);
- a technical officer designated by the Head of Agency who is knowledgeable with the technical aspects and requirements of the project (Member-Provisional);
- a technical officer knowledgeable with the regulatory aspects and requirements of the project to be invited by the Agency concerned (Member, provisional and nonvoting);
- an officer knowledgeable in finance (Member);
- an officer knowledgeable in project operation/management (Member);
- a representative from the COA (Observer, nonvoting);
- two representatives from the private sector—one from a recognized contractors association, the other, from either the facility users or recognized accounting association (Observers, nonvoting); and
- a representative from the Coordinating Council of the Philippine Assistance Program (CCPAP).

LGUs, on the other hand, maintain a regular PBAC as prescribed by the Local Government Code of 1991. The PBAC is composed of the local chief executive (governor or city/municipal mayor), who acts as Chair, the chairperson of the appropriate committee of the *sanggunian* (or one chosen by the *sanggunian* for the purpose), a representative of the minority party in the *sanggunian* (or one chosen by the *sanggunian* for the purpose), the local treasurer; two NGO representatives who are represented in the local development council; a certified public accountant from the public sector; and, representatives from the COA.

Within this Phase, the concerned agency/LGU is tasked, through the PBAC, to publish once every week, for three consecutive weeks, a notice inviting all interested parties to pre-qualify and bid. The notice is published in at least two newspapers of general circulation and in at least one local newspaper of general circulation (region, province, city or

⁵ Unless notified in writing, their failure to act on the list indicates that the concerned NGA/LGU can proceed with the solicitation of proposals.

⁶ Its specific responsibilities include: preparation of tender documents, publication of invitation to pre-qualify and bid, pre-qualification of prospective bidders, conduct of pre-bid conferences and issuance of supplemental notices, interpretation of the rules regarding the bidding, the conduct of bidding, evaluation of bids, resolution of disputes between bidders; and recommendation for the acceptance of the bid and/or award of the project.

municipality) where the project would be implemented. The PBAC also prepares the pre-qualification and bid/tender documents, conduct the pre-qualification, and issue the tender/bid documents to pre-qualified bidders.

The bid or tender documents that the concerned agency/LGU prepare through the PBAC, sets the “rules of the bidding,” arbitration procedures, and the project’s minimum designs, performance standards, and economic parameters. The set of documents also include a draft contract that stipulates the legal relationship between the rights and responsibilities of the parties involved (e.g., bonds, guarantees, *force majeure*, taxes and duties, price indices to be used), effects of changes in circumstances, the Bid Form, and other Form of Bid and Performance Securities.

Prospective bidders--individuals, partnership, corporation or firm (local or foreign) are required to submit four principal set of documents to pre-qualify, and subsequently bid for projects that have been approved or confirmed by the NEDA, ICC, or the LDC.

The *first* set contains the legal requirements, which revolve mainly on the issue of ownership. With very few exceptions, the BOT Law confers eligibility to firms that is owned or at least 60% owned by Filipinos.

The *second* concerns the experience or track record of the prospective bidders or applicants in undertaking the same or similar projects in the past. The applicant is also required to disclose its key personnel and their experience. If the bidder is a joint venture or consortium, it is required to submit a business plan which identify its members and its contractors, the experience of the contractors, and description of roles of members and contractors (lead, financing arm).

The *third* set includes documents attesting the financial capability of the applicant to sustain the financing requirements of the project. For purposes of pre-qualification, the contractor-applicants’ financial capability is measured in terms of proof of their ability to provide a minimum amount of equity to the project. The proof could be in the form of a testimonial letter from reputable banks attesting to the soundness of the applicants’ financial soundness and adequacy of resources.⁷

⁷ The concerned agency/LGU determines (on a project to project basis and before pre-qualification), the minimum amount of equity needed.

The *fourth* set of documents concerns the prospective bidder's acceptance of criteria and waiver of rights to enjoin the project.⁸ This attests to their formal acceptance of the pre-qualification criteria established by the PBAC, and waiver of rights to seek any legal action designed to restrain or prevent the completion of the pre-qualification, bidding, and awarding of the contract.

The concerned agency/LGU's PBAC give prospective bidders at least 30 calendar days to prepare their respective pre-qualification documents from the last date of publication of the invitation to pre-qualify and bid.⁹ The PBAC then reviews the pre-qualifying documents submitted by the prospective bidders and, after being countersigned by the Committee's Chairperson, forwards to the head of the concerned agency/LGU the documents that it had marked--either as pre-qualified or pre-disqualified--for review and approval.

Prospective bidders are informed of the result by the PBAC within seven calendar days after the approval, including the reasons for disqualification for those who have been pre-disqualified. Thereupon, the concerned agency/LGU gives the tendering documents to all bidders who have been pre-qualified to give them adequate time to examine and prepare their respective bids prior to the date of opening the bids.

Pre-disqualified bidders may still appeal the decision to the head of the concerned agency (for national projects) or the Department of Interior and Local Government or DILG (for local projects) within 15 working days from the receipt of disqualification. The head of the agency or DILG acts on the appeal within 45 working days from receipt of the appeal, the decision being final and immediately executory.

4.1.3 Keepers of the public trust—Phase III: Bidding, evaluation, and award

Prospective bidders might want to clarify any of the provisions, conditions or requirements, and data contained in the bidding documents. In response to this, likewise, to provide additional information on some aspects or items pertinent to the bidding, the concerned agency/LGU issues *supplemental notices*. They are also required to conduct a *pre-bid*

⁸ This waiver however, does not inhibit the losing bidder from exercising its right to question the lawfulness of its disqualification or rejection of its bid by appropriate administrative or judicial processes.

⁹ Or in the case of projects costing at least P300 million, 45 days.

conference, at least 30 days for projects costing less than P300 million, or 90 to 100 days for projects costing P300 million and more, before the deadline of the submission of bids.¹⁰

Bidders submit their bids on two separate sealed envelopes addressed to the PBAC. The first, labeled *technical proposal*, contains the bidder's proposition papers with regard to the project's operational feasibility, its technical soundness and design, and preliminary environmental assessment. The envelope also contains the bidder's proposal on the project's cost and financing plan, bid security (e.g., in the form of cash, certified check) payable to the concerned agency/LGU with the prescribed schedule, and other documents that may be required by the agency or LGU to support the bidder's technical proposal.

The second envelope, labeled *financial proposal* contains the bidder's "cash flow rights" proposition, that is, information related to user fees, tolls or rentals, amortization, repayment, and other criteria for financial evaluation—depending on the appropriate type of arrangement being applied under the BOT.

Actual evaluation of the bids by the PBAC (and concerned agency/ LGU) is conducted along two stages. The first is the assessment of the bidder's technical proposal (envelope one) vis-à-vis the standards and requirements stated in the bidding documents and other terms which the bidder might offer to the Agency or LGU to make the proposal more attractive (See: Annex III for the general criteria). Only those that passed the first stage bidding qualify for the second stage, where the different bidder's financial proposals contained in envelope two are assessed and compared (See: Annex IV).

The PBAC is ordered to complete the second stage evaluation within 30 days from the date the first stage evaluation has been completed. After concluding its evaluation, it prepares and submits a detailed assessment report on its decision regarding the technical and financial proposal to the head of the concerned agency/LGU, explaining in clear terms the basis for its recommendation. Within 30 days after the conclusion of the second stage evaluation, the decision on whether or not to award the contract should have been made by the concerned agency/LGU.¹¹

¹⁰ Prospective bidders are required to acknowledge that they receive the notices prior to the conduct of bidding. Attendance by prospective bidders to the conference is not mandatory.

¹¹ For Track Two projects, the concerned Agency/LGU submits the draft contract to the ICC for clearance on a no-objection basis (especially, on the final government undertaking to be provided) prior to the approval of awards. The ICC has 15 working days upon submission of complete documentation to decide, otherwise, the concerned Agency/LGU goes on with the award.

4.1.4 Contract executors—Phase IV: Contract approval and implementation

The head of the concerned agency/LGU approves the *Notice of Award* within seven calendar days from the day the decision to award the contract was made (or from the date the ICC's no objection basis for the contract been received). Indicated in the Notice is the date when the winning bidder should post the proof of sufficient equity, and firm commitments from reputable financial institutions to provide sufficient credit lines (that will cover the total estimated cost of the project).

The Notice similarly indicates when the winning bidder should post the performance security in favor of the concerned agency/LGU. Essentially, performance security is a measure to counter the winning bidder or contractor's substandard performance especially during field implementation of the project--the inconveniences of which are usually borne by the public. Its integration within the contract's frame could ensure the winning bidder's faithful performance of its obligations (including prosecution of construction works related to the project).¹²

The Notice is then transmitted to the winning bidder within seven days after its approval. The bidder submits to the concerned agency/LGU the requirements. Thereafter, the head of concerned agency/LGU approves or disapproves the contract within 15 days from the date the winning bidder submitted the requirements.

The successful bidder should execute the contract with the concerned agency/LGU within seven days from receipt of the Notice. In the event of refusal, inability/failure by the bidder to live up to its bid by entering into contract with government, the concerned agency/LGU forfeits its bid security and the next qualified lowest evaluated bidder is allowed to bid for the award.

The approval of the contract does not exempt the successful bidder from securing other government approvals required under existing laws, rules, and regulations. For instance, the winning bidder would still be responsible for securing the necessary environmental clearances from the Department of Environment and Natural Resources (DENR). However, the concerned agency/LGU can assist the bidder in securing such clearances and other related documents or permits.

¹² The schedule is as follows: cash, manager's check, cashier's check, irrevocable letter of credit, bank draft – 20% of the total estimated cost of government undertaking; bank guarantee – 30% of the total estimated cost of government undertaking; and surety bond – 50% of the total estimated cost of government undertaking. Performance Security may be released after the issuance of "Certificate of Completion" of the construction works, provided that there are no claims filed against the contractor (or surety company).

Not later than 15 days from the date of approval of the contract, the concerned Agency/LGU issues a “Notice to Proceed” to the winning bidder/contractor. The winning bidder then prepares and submits the detailed engineering designs and plans (based on the prescribed minimum design and performance standards and specifications stated in the contracted bid) to the agency/LGU for review. If approved, the contractor builds the facility, engaging the services of foreign or Filipino firms.

The concerned agency/LGU exercise technical supervision over project activities of the winning bidder/contractor, conducting inspections to check whether the project is being constructed, operated, and maintained in accordance with the approved plans, specifications, standards and costs. Specifically, the Agency/LGU brings into the project proponent’s attention any deviation or non-compliance for corrective actions. Failure to correct the deviation within the time prescribed by the Agency/LGU may be a ground for the rescission or termination of the contract.

Other than contract rescission or forced termination, the concerned agency/LGU also has several “guarantees” to ensure compliance of the winning contractor to the contract. One is the possible forfeiture of the winning bidder/contractor’s *performance security*. Another, is the payment of liquidity damages, which is specifically designed to “penalize” winning contractors who have failed to complete the work satisfactorily within the period stipulated in the contract (including any grace period duly granted).

The completion of the project facility constructed, and to be operated and maintained by the winning contractor/concessionaire does not remove the concerned agency/LGU’s role. Certain measures have been put in place for them to ensure that the service or facility’s quality will be maintained and that its cost would remain reasonable. For instance, the agency/LGU is tasked to consult with the proper regulatory bodies to warrant the reasonableness of the formula for tolls, fees, rentals, and charges, and monitor (along with regulatory bodies) the consistency of the proposed adjustments with its original contracting bid.

4.2 *The BOT system: recapitulation*

The established BOT system for contracting, can be divided into four major phases: (i) *project selection and approval*, (ii) *pre-bidding* (iii) *bidding, evaluation, and award*; and, (iv) *contract approval and implementation*. Each part contains defined procedures and even schedules of action. There are also prescribed tools and/or standard parameters for rendering an

informed decision that is consistent with the technical and financial goals of the project. And likewise, there are appropriate guarantees or sanctions, which do not only ensure that the *process* of contracting would continue, but that the *obligations* would be met by the contracting parties.

The system, similarly, provides for a managing and regulatory intermediary between the prospective project proponents and the concerned agency/LGU with the creation of a Pre-qualification, Bids, and Awards Committee or PBAC. Its composition conveys impartiality, competence (financial and technical), and accountability.

The BOT contracting system, furthermore, places certain guarantees on how the principles of being *pro-Filipino*, *non-discrimination*, and *transparency*, could be appropriately adhered to across all phases of contracting. There are explicit references to the preferential hiring of Filipino labor, selection of Filipino-owned firms vs. foreign, pre-qualification requirement pertinent to ownership, and transfer of technology during the implementation of the project. These ensure, as far as practicable, the predominance of Filipino involvement in both ownership and undertaking.

Non-discrimination within the system's processes is actualized through the standard application of providing information, feedback, financial and technical requirements, and rules to all prospective bidders/ contractors.¹³ Each prospective bidder has an equal chance of being awarded the contract since they follow the same rules, get the same information at the same time, and is required to adhere to the same, mandatory minimum technical and financial requirements.

Finally, transparency is observed and maintained in the system (especially, dealings among concerned agencies/LGUs and bidders), through the mandatory observance of information dissemination (compulsory publications), feedback requirements (notices, pre-bidding conferences, explanation of decision), and composition of the managing and evaluating bodies both, at the level of project confirmation and approval (NEDA, ICC and LDCs) and the concerned agency/LGU (i.e., PBAC).

The actualization of all these principles contributes to a credible, and level playing field that is conducive for competition to thrive. Overall hence, one can say that the strength

¹³ Being Filipino or Filipino-owned improves the prospect of being selected, but it must be noted that Filipino firms and/or corporations are still subject to the same rules, processes, and requirements that apply to all other non-Filipino bidders. Moreover, it must be also be considered that the primary intent is to ensure Filipino involvement as much as practicable, which at present is hindered by the lack of capital resources, and not to tilt the entire contracting exercise to their favor.

or weakness of the BOT contracting system against graft and corruption would, to a large measure, depend on how the overall principles as well as the defined procedures, tools and parameters, guarantees, and organizational intermediary (i.e., PBAC) within each phase of the contracting system are maintained and managed.

In view of the prevalent public perception of corruption in government contracting, one is moved then to ask, what certain principle has been excluded, or what defined procedure, standard parameter, or time line (See Annex V) in what phase have been dispensed or overlooked. Was the occurrence a failure related to the capacity of the technical/regulatory structure on a particular phase? And should there was any oversight in the application of the system's principle, procedure, parameters, and schedule, on the part of the technical/regulatory body, was it, by any chance, caused by corruption or imperfections in the system itself?

On these, categorizing some details and forms of perceived or actual corruption from the excerpts of several cases that were examined by the study could shed some light.

5. System checks, cases, and gaps

5.1 System's doors and windows

How vulnerable the elements and phases of the BOT contracting system to corruption could be determined largely from the type of "assault" that could be mounted against it. Essentially, whether the failure can be attributed to the weakness of the whole system itself, or just an element in one particular phase of contracting would be principally ascertained by the intent and type of corrupt action (or input) that was committed.

The process of contracting is sequential, one where the progress towards another phase would depend on the completion of the other. Based on this, prospective bidders commonly survey four fundamental stages throughout the phases of contracting that are critical to their interest and the progress of the whole process:

- their choice project will be selected and approved;
- their company or consortium can pre-qualify;
- their technical and later, financial, proposals can pass the evaluation; and
- to secure other government approvals required under existing laws, rules, and regulations (e.g., environmental clearance, certificates, license) during the course of contract implementation on-field.

Among these stages, it is not totally unexpected that public predilection (and cynicism) for assuming that there were irregularities is usually set on the stages of technical and financial evaluation, and of securing government approvals. The stage of evaluations is a "pass-or-fail" situation, one of the points where the discretionary power of the PBAC is most decisive. It is not surprising hence, that at this stage, the members of PBAC are usually the object of criticism (and

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ground that will secure the relation and increase as well the certainty of the result of the transaction or negotiation.

Systemic acts might be *amplified*, that is, directed or designed to change or bypass the "prescribed" contracting system--all of the phases which make up the whole system. Or it could be *compartmentalized*, that is, they are just limited to one or several phases or stages of contracting. In both types, the acts or initiatives are not in the strictest sense illegal, but they erode the credibility of the contracting system. The choice of the type of the initiative to be used would depend, in turn, on the magnitude of change in the environment that one seeks to achieve for his purpose.

In contrast, the **localized domain** includes those acts or initiatives that seek to influence (directly or indirectly) the determining decision in several (or all) phases of the contracting system. These acts or initiatives proceed from the progress of the prescribed system of contracting, thriving on the "predictability" that said system provides. Rather than bypass, their objective is for the prospective corrupt bidder to change the decision on a determining stage to its favor, primarily through illicit means or ruse.

Localized acts of corruption are mostly *compartmentalized*; that is, their application is situational, depending on the particular phase(s) or stage(s) that a prospective bidder wants to pass (through corrupt means). It is also possible however, that these acts and initiatives are following an overarching script or conspiracy that renders the process of contracting a "done deal." And in such cases, said acts and initiatives are said to be *amplified*. Otherwise, they are just an isolated collection of compartmentalized actuations.

The basic cause-and-effect nature of localized acts of corruption makes them readily understandable, in fact, they constitute most of the allegations of corruption (e.g., bribery) in contracting. There are cases, however, when the cause can only be discerned from the context of the act and in such instances, an analysis of the environment yields probable weaknesses on how the contracting system translates into operational guarantees the principles of inclusive and transparent contracting. In any case, there are deliberate efforts to hide these deeds or transactions, making them easier to discern but much harder to prove, broken only occasionally by whistle-blowers, determined investigative reports, and media-courting exposés.

As may be inferred, the principal difference between the two domains is the *object* of the initiatives or intent. The two domains are also complementary but not necessarily co-incident. For instance, localized graft initiatives could be pursued one time, on any critical

stage of any particular phase of contracting, without or with accompanying initiatives aimed at creating an accommodating transaction and/or negotiating environment. Some firms or individuals on the other hand, do not see the need for any localized initiatives as the existing environment offers enough advantage or guarantees to win the contract. Or probably, they are still in the earlier stage of building relations that could be used as a platform to launch localized interventions in the latter phase, or maybe, in other projects. What is evident is that the initiatives in both domains can be combined to ensure that the desired outcome will occur, as may be extracted from the selected cases; namely, the Cebu "Pond A" Reclamation Project, North Harbor Privatization, and the Metro Manila Solid Waste Management Project.

5.3 Cases, plots, and allegations

5.3.1 Cebu City's Reclamation Project

The case of Cebu City's Reclamation Project belongs to the systemic category, albeit with some probable tones of localized forms of corruption initiatives. The Case does not have enough details to layout how collusion, payoff, and perhaps, even kinship, interacted to erode the integrity of the established elements for contracting. The overall plot, however, serves the purpose of the discussion and analysis.

The case began when the Cebu City Development Council passed on the task of contracting to the Philippine Estates Authority (PEA) the reclamation of 60-hectare "Pond A" in exchange for 65% of the property (Philippine Star: 14 July 2000). Effectively, this shifted the responsibility of overseeing the contracting away from Cebu to the PEA, where there is less opportunity for LGU oversight.¹⁵ It was alleged that most of the members of the Council were allied to then Mayor Alvin Garcia (and some, along with the Mayor, it must be noted, are members of the PBAC).

Cebu City Board Member Winston Garcia subsequently alleged that each of the councilors was paid P.5 million to "surrender" to the PEA the control rights to oversee contracting. The money supposedly came from sub contractors that will be engaged by PEA later, and that another P2 million will be paid when the project is eventually bid out to them (subcontractors).

The allegation of payoffs to city councilors is absorbing but what is more interesting, if indeed, it is true, is that the case shows how the strong (or weak) contracting system at the

local levels can be readily outflanked. Systemic and compartmentalized, Cebu's case shows how the intended change in the PBAC could cause changes in the disposition (and perhaps, even "way") of all the other succeeding phases of bidding, from pre-bidding until contract implementation phase. As it was, transferring the local government of Cebu's control rights over the process of contracting to PEA was at the same time, an automatic decision to accept whatever contracting system PEA has in-place. This subsequently overrides the capacity and rights of its own PBAC to handle the matter.

That PEA was still chosen as Cebu City's contract manager (probably because of its mandate and its own interest on the project) despite the recent fallout from the Amari scam, deserves a re-examination of how well the LGU's (and even PEA) PBAC can "vet" prospective bidders/contractors. In this case, either there is a lack of qualified company who can do the job of reclamation or that even at present, there is no excellent database that could track the performance and changing profiles of different firms or companies and shadow personalities (despite the proliferation of many professional associations and organizations in that line of work) that could have been valuable in evaluating the prospective bidders or project partners.

The Cebu Reclamation case also suggests that even the relation between and among those involved (or plans to be involved) in corrupt transaction needs a stable ground to increase the certainty of the result of their transaction. Perhaps, this was what bribing contractors sought to gain by allegedly paying the members of the City's Board. With the transfer of contracting rights to PEA, they would be able to circumvent the long, tedious phases of regular LGU-PBAC contracting, where each phase could produce surprising results and might require dealing with unfamiliar hands who do not know how to "play ball." Thus, the willingness of contractors to provide substantial amount of graft money to shift the control of contracting over to the PEA is, in actuality, a bid to ensure a more accommodating relationship and environment for their transaction to ensue. If true, said preference suggests a lot about PEA's own system for contracting; namely, how its own PBAC might have already been compromised, and that the likely results in some of the contracting phases (e.g., pre-bidding, bidding, evaluation, and award; and even the approval of contract) might have already been fixed.

¹⁵ The project amount insulates it from the approval and confirmation tasks of the NEDA and ICC (not above P50 million).

The Cebu Reclamation case similarly revives one detail regarding a phase in contracting, that of *project selection and approval*. While few will dispute that it should be in the purview of the concerned agency/LGU to select the project, it has been seldom clarified (both at the national and local levels) how the selection was made. Unfortunately, it is during this phase that other government offices (e.g., Malacañang) and officials determine whether the project should fall within the “usual” BOT contracting system.

At present, the development of the criteria for the selection process is left to the discretion of the concerned agency or LGU’s designated unit (the local development councils, in the case of the LGUs, or the planning committee, in the case of a concerned agency). This provides some degree of flexibility as well as serve as filter for the approving/confirming bodies (NEDA, ICC, and LDCs). However, the unclear and arbitrary criteria and processes for selection and prioritization could also pave the way for collusion among those involved to select projects that are advantageous to them or those that have the potential for high payoffs (e.g., most projects will involve infrastructure to maximize payoffs from purchase of materials). The selection of Cebu’s Reclamation project by the LGU itself, leading to the shift in the PBAC, might just be the outcome of this intention.

For both NGA and LGU concerned, the nature as well as the corresponding technical and resource requirements of the selected projects could also significantly narrow down the number of eligible project contractors, leading to the short-listing of well-connected bidders or concessionaire even well before the conduct of pre-qualifications and public tendering. It might be interesting to investigate for instance, how early PEA had known that it would be involved in a major project in Cebu; for such would establish whether PEA's management of Cebu's project is just a set of amplified, localized acts of corruption.

In some ironic sense hence, the project selection and approval phase becomes a parallel exercise of forewarning the entrenched, or developing corrupt connections between and among stakeholders (NGA, LGUs, and the private sector); about what opportunities they should focus and from there, which office or person to approach. Compounding this scenario are cases of some LGUs, where political party affiliation, interests, and sheer social influence could tilt decisions to exclude projects to favor those that benefit only a select group, especially for local projects that are also confirmed locally. The fact that most LDCs only meet once or twice a year (to take on the *whole* local development plan), completes a not-so promising picture.

In any case, the project's being short-listed does not necessarily translate that it is open to compartmentalized or amplified forms of localized acts of corruption, especially those whose amount are subject to the probing approval or confirmation by the NEDA and/or ICC for their economic and financial viability. There are still some systemic checks in the long journey from project selection to the point of project operation (when the public begin to express their satisfaction or dissatisfaction) that raise a lot of uncertainties to the outcome. Among other reasons, it is probably due to this that the members of the project selection unit in concerned agencies and LGUs do not receive as much attention as members of the PBAC. That is, until the actual incidence of corruption has already taken place and meticulous reviews of its background reveals that it is an amplified case of localized corruption initiatives; that even during the early phase of project selection, there already existed an overwhelming influence, compelling incentive, and some considerable level of collusion to have the project approved. It was a done deal.

Unfortunately, the existence of such circumstance, which could have provided an objective reference point for tracing any wrongdoing, can only be established if the rules or guidelines for project selection, as well as the members of the selection committee, are known publicly before the selection has actually transpired. As in the alleged case of corruption in Cebu's Reclamation project, it would be very difficult now for the public to detach the more current issue of bribery to the earlier issue of probable collusion during the phase of project selection, especially due to the sensitive positions that those involved in the case occupy.

By and large, the real utility of analyzing the possible emergence of corruption in the sphere of project selection principally revolves around the issue of transparency and its meritorious impacts. Whether national or local, a clearer process and standard for project selection that the public could readily understand might give more prudence to their judgement. It could likewise inhibit the growing preference of government officials to use the project's peculiarity or urgency as pretexts to circumvent the guarantees of the system of contracting, and/or fix the result of its progression--from beginning to implementation.

5.3.2 The privatization of the North Harbor

On 26 July 2000, then Senate Minority Floor Leader Teofisto Guingona, contractors, and some labor leaders demanded a suspension on the privatization of ports throughout the country until a thorough investigation on alleged "anomalies" has been conducted (The

Philippine Star: 27 July 2000). Sen. Guingona has also filed Senate Resolution 813 which directed the Senate Blue Ribbon Committee to investigate the privatization and modernization of ports that was being pushed by the Philippine Ports Authority (PPA).

One of the principal “anomalies” surrounding the privatization of North Harbor was the charge that the privatization could in fact lead to a “monopoly over cargo operations”—a concern that was raised by a shipper’s group led by the Distribution Management Association of the Philippines or DMAP (Philippine Star: 07 July 2000). This was in reaction to efforts by the North Harbor Consortium or NHC (whose members include the Asian Terminals Inc., International Container Terminal Services, Inc. and other major domestic shipping lines) to get the contract to operate the harbor, which needs a capital infusion of not less than \$200 million to reach an acceptable service level. The DMAP believes that the privatization of North Harbor merely amounts to the transfer of government monopoly to NHC monopoly for a guaranteed period of 25 years.

In response, the PPA decided to re-work a new Terms of Reference (TOR) for the privatization of the harbor and disclosed that it would conduct another hearing (Philippine Star: 13 July 2000). The re-worked TOR would incorporate changes in the areas of engineering, financial requirements and arrangements, and equipment to be provided.

The North Harbor project has an objective and type that resembles an arrangement covered under the BOT and yet, falls outside the BOT contracting system since it is covered by Executive Order No. 59 (or EO 59). The Order allows PPA to contract out the management, operation, and development of the government port directly to a company or firm *without public bidding*.¹⁶ This negatively impacts on the built-in guarantees in a BOT contracting system for that critical stage, especially in terms of impartiality, transparency, financial qualifications of prospective contractors, and financial security. There is an inherent problem for instance, in the situation where the same Agency (PPA), who is also a participant in the process (and needs to conclude a deal), has to stand at the same time as sole overseer of the process and evaluator of prospective contractors whom it (PPA) has been conducting a lot of business. Conversely, due to the prevalence of unfamiliarity, varying background, and multiplicity of interests, it is much harder (but not entirely impossible) to strike a fraudulent deal with a body so composed as the PBAC, whose creation would have

¹⁶ This moved then Sen. Guingona, to claim that the port privatization violates Art. 12 sec. 19 of the Philippine Constitution which prohibit monopolies, and that no combinations in restraint of trade or unfair competition

been required under this circumstance.¹⁷ It is not surprising therefore, that the PPA and the North Harbor privatization project has been perceived by other users of the facility as the principal agent and means, respectively, to establish a “monopoly over cargo operations.”¹⁸

EO 59 might have been rescinded (and along with it, the privatization North Harbor has been put on hold) but not before its systemic implication to government contracting has been emphasized. In essence, it was an amplified systemic act, i.e., its object was to change the whole system of contracting itself. While the Cebu Reclamation Project showed how one can opt for a less stringent PBAC (and gain a higher degree of certainty that the fraudulent transaction could be carried out through switching), the North Harbor case specifically presents another option—that of a complete bypass—with the authority issued no less than by the Office of the President. The alternative readily truncates most of the components within the established phases of a “standard” BOT contracting system which, in addition to their administrative and technical use to the whole process, ensure the relatively graft-free proceeding of contracting.

That former President Estrada had to place the privatization of North Harbor (and all other ports in the country) under a different legal framework, where another one could have carried the same more adequately and appropriately, raises more unsatisfactory answers than reasonable questions in the exercise of his prerogative. It might be argued that given the operational resemblance between the drafting of North Harbor Project’s TOR and tendering documents’ preparation phase, PPA has been observing the same steps, forms, and other instruments that a “standard” BOT contracting system follow (including perhaps, the creation of a PBAC in the future) even if it is operating under a different legal framework. However, this point only brings back the question on why the project has to operate outside the usual contracting system, negating any justification rooted on urgency.

5.3.2 Contract recycling: Metro Manila solid waste management

Unlike the two preceding cases the scope of the alleged corrupt acts in the case of Metro Manila Solid Waste Management is more comprehensive, covering almost all of the critical stages in the different phases of contracting. Beyond the issue of personalities, it also

can be allowed, given the potential advantages that the deal can have on the members of the NHC against all other users of the harbor.

¹⁷ And which would have been under pressure to lend impartial evaluation, given the second-line oversight that the NEDA and ICC could have provided.

¹⁸ An argument that could have been checked by the ICC under the “standard” BOT contracting set-up.

shows the cast of weaknesses and malleability in the government's contracting system which give the exercise a negative reputation, particularly under a conducive or complementing environment.

In August 1999, former President Estrada created the Greater Metro Manila Solid Waste Management Committee (GMMSWMC) whose task, in partnership with the Metro Manila Development Authority (MMDA), was to draft a solid waste management plan for Metro Manila and the adjacent eight provinces. The plan was supposed to take on the problem of handling the tons of trash that Metro Manila and the surrounding provinces generate daily.

The GMMSWMC, which was headed by then Presidential Committee on Flagship Programs and Projects chair Secretary Roberto Aventajado, subsequently designed the Metro Manila Solid Waste Management Project. Among other means of disposal, its aim was to dump a portion (i.e., one third) of the 13,400-ton daily garbage into a sanitary landfill under a build-own-operate scheme.¹⁹ The GMMSWMC proceeded to prepare and issue the Terms of Reference (TOR) for the Project, a 25-year landfill contract whose total worth is \$330 million. The TOR was approved four months later by the Metro Manila Development Council.

The President himself gave the green light in January 2000, and solicitations for the proposals were first published on 13 February 2000. On 28 September 2000, the Pro-Environment Consortium (PEC) won the bid for the contract over eight other bidders; but not without allegations that it did due to its good connections all the way up to Malacanang. Effectively, it was able to use these connections to its advantage in most, if not all of the critical stages of contracting.

The contract, however, was not awarded to PEC pending the decision to a lawsuit filed by another firm who claims to have a valid waste management contract won during the Ramos administration.

PEC's knowledge that the project will be selected and approved reportedly antedates even the creation of the GMMSWMC. One waste management company official, who wants to remain anonymous, recalls that PEC executives already "knew about the landfill project long before the GMMSWMC was going to be created." He also mentioned that PEC

¹⁹ See also a related article by Nocum, A. (Philippine Daily Inquirer: 13 July 2000), entitled "Bidding for Metro landfill faces delays," PDI Report.

executives "were already floating the project before anyone said the word 'bidding' at a time when the MMDA had no money for this [project]" (Sison in PCIJ: 24 January 2001).

The consortium supposedly built upon this foreknowledge to engineer certain events that would establish its position once the project was selected and approved. For instance, it held elaborate public presentations on landfills that were attended by government officials and people involved in waste management during the *first quarter of 1999*, which far predate the creation of the GMMSWMC.²⁰ Coincidence or market instinct, these presentations widened PEC's head start from its competitors several ways. One is that they "provided a great opportunity to pick the brains of officials involved in garbage," which will prove valuable in the consortium's later bid to win the contract. The activities also enabled PEC to "cement relationships with people who matter," a strategic gain, since "personal relationships are a factor in government contracts."²¹

Further, through the elaborate presentations, PEC was able to project an impression that it is involved in the mainstream and circle of key people involved in solid waste management. This impression placed it directly and inevitably, in the path of the future project. By the time the GMMSWMC "selected" and "approved" the solid waste management project in December 1999 (which validated the consortium's business acumen), PEC's involvement appears to be inevitable, "as a matter of course."

Despite the stringent requirements, PEC supposedly participated in the pre-qualification, already aware that it will be pre-qualified. According to the waste management official, PEC already knew the minimum qualifications of prospective contractors (to pre-qualify) at least a year before the bidding, and hence, it was able to prepare ahead of its competitors. If such indeed was the case, then there is also reason to believe that PEC already had certain notions about the salient points of the tender or bid that will be issued, based on the pre-qualifying capacity that the project requires. Again, PEC is several steps ahead of its competitors.

It was also presumed that the set of personalities behind the PEC and not the consortium's technical capacity was the main reason behind its being pre-qualified. The consortium includes the German-based Rethman Recycling GmbH, one of the largest waste

²⁰ John Gabriel Puzon, one of the incorporators of the Environmental Dynamics Corporation (EDC) one of PEC's four investors, admits that his family arranged the presentations and affirmed that they started holding these as early as 1998. He however denies that the PEC executives had prior knowledge of the project, or that they have received help from the MMDA.

²¹ In Sison, M. (PCIJ: 24 January 2001), quoting the same waste management official.

management companies in Europe with 66 years experience (Arias in Manila Bulletin: 03 January 2001). It is also reputedly the largest recycling and privately owned waste management company in the world. Other than Rethman however, no other member of the consortium had previous hands-on experience in solid waste management or in operating a landfill site (Sison in PCIJ: 24 January 2001). Even the individuals who formed the PEC do not have a track record in operating a multi billion-peso business.²² Rethman might just be the real, as well as PEC's "trojan" horse.

This brings into focus one of the consortium's local investor, the Environmental Dynamics Corporation (EDC). Apparently, the corporation includes, as its incorporators, Frank Puzon, who was the personal pilot and high school classmate of Estrada at the Ateneo de Manila. Another EDC incorporator is sugar trader Raul V. Gamban. He is a cousin of Guia Gomez, former Estrada mistress and mother of one of Estrada's sons, Joseph Victor or 'JV' Ejercito. Certainly, this lends credence to the quiet but deafening impression to the public (and business insiders) of the consortium's "other qualifications." There were also allegations that GMMSWMC head Sec. Aventajado was close to the incorporators of PEC, one of the bidders.²³

Doubtless, the impression that PEC might have a direct line to the Palace was also weighed by members of the PBAC, in the same way that they considered the same notion or active assertion from PEC's other competitors.²⁴ Apparently, PEC is not the only firm which is close to GMMSWMC head Sec. Aventajado or even to the President. There was no shortage of prospective, qualified bidders whose key people were, one way or another, connected to the Palace or Palace relatives at that time. The owner of one of the qualified bidders, R-II Builders Inc., is construction heavyweight Reghis Romero, who bought the Manila Times from the Gokongweis, and also known as a close associate of Aventajado.²⁵ Behind another bidder, ECWES, is Jacinto Ng Sr., one of Estrada's longtime friends. He and one of his companies are reported to be the owners of two mansions in Wack-Wack,

²² In Sison, M. (PCIJ: 24 January 2001). See also Transparency and Accountable Governance (TAG) Report, entitled "Firm Linked to Estrada Got Metro Manila Garbage Contract" by the same author (February, 2001).

²³ Sec. Aventajado does not deny this but asserts that the bidding was "above board." He also claimed that the Malacanang could not have been partial to any bidders since there were other similarly "well-placed" people whose companies participated in the bidding (Sison in PCIJ: 24 January 2001).

²⁴ Denying that they receive any assistance from Guia Gomez, PEC's John Gabriel Puzon pointed out that each of the bidders had its own backers, their rivals were heavyweights, and PEC was the only weak one (Sison in PCIJ: 24 January 2001).

Mandaluyong that have been linked, in turn, to another presidential mistress, Laarni Enriquez (Sison in PCIJ: 24 January 2001).

Very few (if any) members of PBAC would have failed to notice these links; much more, consider them as incidental. At any rate, the PBAC's decision to pre-qualify PEC, despite the consortium's manifest technical dependence to only one of its investors, only contributes to continuing public suspicions about PEC's connection to the Palace. Sec. Aventajado might also claim that other competitors' links to Estrada might have prevented the Palace from being partial. However, this does not prevent the members of PBAC to be partial to what they construe as signals (even if there was none involved) from Malacanang.²⁶ Or probably, the parameters that were used during pre-qualification were not as stringent as believed.

Similarly, PEC allegedly participated in the bidding stage with two crucial information. One was that technically, it already and has even received considerable help from officials of the MMDA itself in preparing their proposal.²⁷ The assistance did not only help PEC technically. It also conveyed the impression that the consortium is already operating "from the inside." It follows that PEC already has a working feel of what the proponent agency (MMDA) operationally needs, and as such, its proposal might just hew closer, or in accord with what would be required during tendering and bidding.

The other was that PEC has been given insider information on the government's ceiling on the tipping fee (i.e., the amount paid for every ton of trash thrown in a designated dumping site). The ceiling provides a good baseline figure on how low the bidder can go. According further to the same company official, who is likewise familiar with the detailed workings of the MMDA, PEC was also "told about what proposal the government would be most interested in, what the desired time frame is, and what the expectations are in terms of system efficiency" (Sison in PCIJ: 24 January 2001).

Counting the time of the TOR's issuance up to the deadline of submission of bids fixed by the PBAC on 06 June (2:00 p.m.), it only took PEC about six months to prepare the

²⁵ The Manila Times was sold by the Gokongweis shortly after the newspaper was sued by then President Estrada for libel. It was later established that Romero had merely fronted for presidential friend Mark Jimenez (Sison in PCIJ: 24 January 2001).

²⁶ The tendency of some members of Estrada's cabinet to please him as a person using their public offices has been in the minds of some people who have been observing their behavior. Then BIR chief Rualo, for example, is known for investigating tax irregularities of private companies (including the Manila Times) which are deemed hostile to the President.

²⁷ The claim was supposedly made by Gene Puzon (brother of Frank, one of EDC's incorporators) to the unnamed waste management official (*supra*, footnote 19: p. 32).

technical and financial aspects of its proposal. Matching the profile of the consortium's technical expertise vis-à-vis this accomplishment raises a reasonable modicum of skepticism. Some of the requirements also take time to prepare, given the growing local resistance to open a garbage "dumpsite" in their communities. Among these, for example are the certificates of willingness to host a landfill from the host province and willingness to host transfer stations; certification of site suitability from the Department of Environment and Natural Resources (DENR); and certificate of conversion exemption from the Department of Agrarian Reform (DAR). As the company official points out, "these requirements certainly take time to accomplish so that anyone with no benefit of guidance would find it impossible to secure them right away" (Sison in PCIJ: 24 January, 2001).

Due to the volume as well as the stringency of the requirements, it is not surprising at all that of the 17 companies that purchased the proposal documents for the project, only nine actually submitted their proposals. Two of them even submitted late.

It might be interesting to note that of these nine, only two--PEC and Dizon-CGEA--would pass the stages of financial and technical evaluation.²⁸ PEC would eventually win over Dizon-CGEA due to its much lower tipping fee bid of \$18.89 per ton against Dizon-CGEA's \$32.

PEC might have passed all the phases of contracting but in the end, the government, failed to award the contract due to a Temporary Restraining Order (TRO) that was issued by the Pasig RTC. The TRO was requested by Jancom Environmental Corporation and Generale des Eaux Vivendi, who claim that they had previously been awarded a \$350-million contract on solid waste management under the administration of former Pres. Fidel Ramos (Sison: TAG Report February, 2001).

Faced with this problem, the MMDA and GMMSWMC solicited new proposals and conducted a new bidding in November 2000 to solve the garbage problem on an interim basis (Arias in Manila Bulletin: 03 January 2001). The urgency of the garbage problem has since grown, with the approaching deadline for San Mateo sanitary landfill's closure and continuing public outrage over the Payatas landfill garbage avalanche in July, which killed more than 120 people (Trinidad in PDI: 13 July 2000).

²⁸ According to MMDA records, 17 bidders had registered their intent to participate in the bidding. Only seven submitted their bids on time; namely, R-II Builders Inc.; Celdex-Cintec-DMCI Holdings; Pro-Environment Consortium (PEC); Lamar Integrated Construction Services Inc.; Dizon Copper-Silver Mines Inc. and CGEA Asia Holdings Pte. Ltd.; Eurasian Company for Waste and Environment Service Phils. Corp. (ECWES); and

By the following month (December), two two-year contracts with a total value of \$51.1 million for interim controlled dumpsites were awarded by the MMDA and GMMSWMC. One contract went to Waste Action Recycling (WAR), the other, to a consortium made-up of R-II Builders, DM Consunji, and Celdex. In effect, the two contracts would be the stopgap measure for solid waste management while the GMMSWMC and MMDA take on the Jancom lawsuit. It is with a trace of irony that the members of the R-II consortium had failed the technical evaluation for the 25-year contract while WAR was not even among those who participated in the earlier bidding.²⁹

Meanwhile, residents and local officials of Mariveles, Bataan (interim site of WAR) and Semirara, Antique (interim site of R-II Builders-DM Consunji-Celdex) are opposing the setting-up of the dumpsites. Both areas have already secured TROs to prevent the contractors from dumping garbage in their areas. The Jancom-Vivendi suit is yet to be decided.

All told, the metro garbage case instructs how systemic initiatives (even if compartmentalized) and localized acts can work interdependently to clear each critical stage (and with it, phases) of contracting; among others, the use of a "trojan horse" to pre-qualify, subtle appearance of long involvement in solid waste management long before the issue became important, alleged interfacing with MMDA, and probable persuasive projection of the firm's influential linkages. Effectively, the case shows how one (or perhaps, even several) prospective bidder(s) can maximize its high-level contacts and stock of inside information to maintain the timing and momentum of its bid, and eventually, win the contract.

The case is also significant in that it brings into view the limits of the contracting system's legal boundaries to account for those actions which are not really illegal, but when taken within their contextual environment, they suggest shades of corruption that leave a discernment of incongruity to the contracting system's (and even one's own) principles. Except for obtaining insider's information, most of the aforementioned schemes that PEC employed, for example, fall within this domain. They are systemic and localized acts whose taints of corruption become evident only when placed within the context within which they occur--not far from the Filipino's concept of *delicadeza*.

the FLB Construction-Kabukiran Garden-Big Trust International Joint Venture (FLB-Kabukiran-BTI). Under the BOT Law, these bids should have been returned unopened to the prospective bidders.

²⁹ Along with Eurasian Company for Waste and Environment Service Phils. Corp (ECWES), R-II Builders and Celdex-DM Consunji failed in the technical evaluation for having no bid security, no technical description of

Whether deliberate or not, this point is particularly illustrated by the situation created when PEC's actuations are set alongside its claims. Despite of not having prior knowledge of the project and experience on solid waste management, it decided to enter the field, and was even able to prepare the stage for its later involvement prior to project selection and approval. To date, it might be interesting to determine when, exactly, did Rethman learn about the project.

PEC also denies that the contract was a "done deal" and that its connection to the Palace was a factor in the evaluation and awarding of the contract. But just a week after it won the bid, Ms. Gomez met with EDC incorporators and some other people who are also close to Estrada in her office.³⁰ As it was, Ms. Gomez might not be an incorporator of EDC, but in addition to her personal relationship with Estrada, she is also close to then Presidential Management Staff (PMS) Head Leonora de Jesus (the companion of Ramon Abad, Estrada's campaign manager). In turn, since January 1999, the task of reviewing government projects costing P50 million and above has been transferred to the PMS. The trail of social connections apparently, does not end here for the PMS section tasked to review the projects was headed by Atty. Crispin Remulla. Atty. Remulla is not only the son of former Cavite governor Juanito Remulla, a loyal ally of Estrada. He was also a former lawyer of "JV" Ejercito (Tordesillas, 2000: 192).

Doubtless, what made the phases and stages more vulnerable to these subtle systemic and localized acts were the fundamental weaknesses from the way PBAC managed them. It could have checked some of the allegations, especially, that which concerns access by one (or even several bidders) to inside information. It could have also coordinated its own silent investigations or examination (especially prior to pre-qualification) of the bidders with other offices, which have other, more appropriate indicators of impropriety.³¹ Further, PBAC's lapses to act as impartial manager and arbiter were also manifest. Despite the fixed date and time of the deadline, it allowed late bidders to still participate in the bidding.³² It was also

the proposed interim sanitary landfill, and "inadequate preliminary design drawings to support narrative descriptions on project components" (Sison in PCIJ: 24 January, 2001).

³⁰ Ms. Gomez met Puzon's nephew and co-EDC incorporator, John Gabriel Puzon, and Raul Roberto de Guzman, Estrada's nephew who was presidential consultant on the environment and water. The meeting was held at her Wynsum Tower office in Pasig. See Sison (PCIJ: 24 January 2001).

³¹ There might not be a correlation for instance, but probably, the pattern of changes in the value of the companies' stock as well as their record of involvement in other government contracts could also be examined.

³² Deadline was set on 06 June 2000 at 2:00 p.m. PBAC however allowed two bidders who submitted their bid beyond the stated time to participate: Solid Waste Integrated Sustainable Systems-Philippines Inc., and IPM Construction and Development Corp. (Nocum, A. in PDI: 13 July 2000).

unclear whether a dispute resolution mechanism was established (or probably inoperable) among the parties, given references in public of certain "irregularities," which came from among the bidders themselves.³³ Overall, these oversights contributed to the growing suspicion of partisanship, bribery, and competence of the PBAC to perform its functions.

Much of the latter oversights however, could be traced to the absence of an alternative plan (in case of serious delays or failure to award the 25-year contract) and subsequent efforts to compensate for this lack too late. The bidding proceeded under the flawed assumption that the Jancom-Vivendi contract could be ignored. And by the time that it became apparent that the new contract under PEC will not materialize, MMDA and GMMSWMC were already hard-pressed to find quick solutions. The solution came in the form of posthaste solicitations of new proposals and conducting a new round of bidding for two two-year contracts.³⁴

Operating under haste, it was inevitable that the defined procedures, schedules, parameters, requirements, and perhaps, even the basic principles of contracting were corrupted.³⁵ There were reports for instance that the bids for the interim project contracts were allegedly opened behind closed doors (for MMDA's eyes only) and that some of PEC's earlier ideas and bids were used by other bidders. One of the contracts was awarded to a consortium of firms that were disqualified in the previous contracting. The other, to a company (WAR) which was not even among those who participated in the earlier bidding for the 25-year landfill contract (Bondoc in Manila Bulletin: 03 December 2000).³⁶ There was also confusion on whether the 2-year interim project contracts were part of the original 25-year contract (which PEC considers the "main" contract) or were, in fact, new contracts with distinct TORs. From all indications, it seems that the original objective, course, and procedures of contracting on solid waste management have already been overtaken by situational necessities (landfill closure, Payatas tragedy, and lobbying inside Malacanang).

One last point that the metro garbage case presents is the likelihood of a contract being a "fixed or done deal." Were the initiatives really compartmentalized, or did they

³³ See Nocum, A., (PDI: 13 July 2000).

³⁴ It is a bit surprising that the President did not request emergency powers to solve the metro garbage problem. Or probably, there might be some truth to allegations that it was already a done deal, until the Jancom-Vivendi lawsuit brought a very different ending.

³⁵ According to PEC, it took only nine days for the PBAC to decide on these two contracts.

³⁶ Prior to the award, Sec. Aventajado reportedly claimed that he did not know the people behind WAR (Bondoc in Manila Bulletin: 03 December 2000).

actually follow an overarching script or conspiracy (i.e., amplified) only to give a semblance of legitimacy and fairness to the process of awarding?

Compared to Cebu's reclamation case (supra: p. 26), the metro garbage case appears to have all of the necessary capital to rig a deal. Circumstances seem to support the allegations that PEC knew the project beforehand. It has overwhelming influence from its connection to the Palace and that influence had been expanded still, by its dealings with key people and concerned government agencies, especially, in refining its technical and financial proposals. In addition to these, it was also highly likely that PEC had access to inside information. Its high state of readiness and uncanny, detailed knowledge of technical project specifications that were material to sustain its position in each of the phases of contracting were, to some outsiders, too fortuitous to be attributed only to business acumen. Through these aforementioned advantages, PEC was able to keep uncertainty to a minimum or predictable level.³⁷

From these, it is highly likely that the metro garbage deal was not entirely a "done deal" but a contract that was pursued with bias. Ironically, that the contract was not awarded to PEC was not due to the anti-corruption guarantees of the contracting system that are integrated within the procedures, technical and financial parameters, or competence of the PBAC. It was due to a legal technicality.

5.4 Recapitulation and Summary

Thus far, it is possible to plot some of domains and corresponding types of corrupt acts or initiatives that are currently in service. On systemic initiatives, prospective bidders and/or partner government officials could opt to change the entire system of contracting (amplified initiatives) by opting to operate under a different legal framework and system for contracting. Such was the case of North Harbor privatization contracting "bypass." Other systemic acts are directed not to the changing of the whole contracting system but only on a particular or several phases or stage in contracting (compartmentalized). PEC's alleged interfacing with MMDA personnel improved its technical position and conveyed the impression and regard, both publicly and to MMDA, that it is a buddy, a familiar hand to the agency. In a similar vein, it was able to "cement relationships with people who matter,"

³⁷ The uncertainty involved in the long process of contracting leading to the implementation of the project is considerable. In fact, it might even be directly proportional to the duration and pace of the process due to the growing probability of contravening variables from occurring.

particularly those, who can act on its behalf (when the process of contracting would be in full swing) during its public presentations.

The case of Cebu's "Pond A Reclamation Project" is another example of this systemic, compartmentalized approach. Effectively the PBAC shift was expected to change the disposition of succeeding phases of contracting, from pre-bidding to implementation phase. The change would also relax the atmosphere involving the suspected payment of additional bribe by sub contractors later, most likely, after the contract has been awarded.

On localized acts and initiatives, prospective bidders and/or partner government officials could opt to change or bring the decision in any determining phase (or stage) of the contracting system to their favor by using individuals or institutions. In the metro garbage case, there were allegations that PEC for instance, had used Malacanang and agency insiders heavily to obtain crucial information to hurdle the stages of pre-qualification, and technical and financial evaluations way ahead of its competitors. It was also admitted by one PEC executive that each of the bidders has its own "backers," (supra, footnote 23) probably reaching also to the Palace. Although a point emanating more from hindsight, perhaps, there is also some merit to look into the composition, individual track record, and actions of decision makers who are granted with discretionary powers within the system of contracting. For instance, head of agencies, the LDCs, (project selection and approval), and the PBAC (as manager and arbiter of the system).

Localized initiatives, such as the use of other individuals or institutions, might only be directed at a specific determining decision phase or stage (i.e., compartmentalized). They could also be part of an elaborate plot or conspiracy to conclude a "pre-awarded contract" (i.e., amplified). Said plots are deemed unlikely, given the host of uncertainties or contravening variables attendant to the long process of contracting.

PEC's (and to some point, Cebu's) case illustrates its possibility. As it is, it appears that in such cases, the use of localized initiatives should be matched by an accommodating environment to render the progression of contracting more stable and hence, predictable. At the minimum, it would require a combination of systemic and localized acts, which make use of overwhelming influence, compelling incentives, and well-developed level of collaboration.

6. Conclusion and Recommendations

As mentioned earlier, the vulnerability of the BOT contracting system to corruption could be determined largely from the type of "assault" that could be mounted against it.

There are various initiatives or acts of corruption in contracting but generally, they come from two domains. Those that seek to have an environment that is partial to their position and illicit incentive; and those that seek to change or fix the decision in any determining phase (or stage) of the contracting system in favor of a group or individuals who participate in the bid.

On the vulnerability of the BOT contracting system to such initiatives, the study offers the following conclusions and recommendations:

1. *While the use of "alternative" BOT contracting system will always remain an option for the President to take, there is a need perhaps to elaborate the circumstantial and economic parameters involved in exercising this prerogative.*

Circumventing a "standard" BOT contracting system is not readily acquired, for in most cases, only the President can provide or allow it. Since the power crisis in the early 1990s, Malacanang has found convincing subterfuge--crisis and/or extreme necessity--to use other systems of government contracting in private sector infrastructure and development projects (BOT Program) under the mantle of limited emergency powers.

Unfortunately, it appears that there is no shortage of crises and extreme necessities that compel the petition for and use of emergency powers, and with this, the non-use of the standard contracting system. Had Estrada not been deposed, the use of "alternative" contracting systems appears to be headed towards greater heights, given the proposed Mindanao-wide rehabilitation that would have been done, again, under an emergency power.

Given the volume and sense of urgency of the projects, the fear of the political opposition and some sectoral groups that Mindanao's rehabilitation will be exploited by the President's neo-cronies holds reason (Philippine Star: 07 July 2000), but the point does not end there. The same situation could materialize some time in the future.

Circumventing the "standard" BOT contracting system might be circumstantially attractive or expedient, but its economic cost could also be high. To solve the power crisis for example, the Ramos administration signed long-term contracts worth billions of pesos with private power producers, where NAPOCOR was duty-bound to buy and pay their production on the basis of their entire production even if it is unable to use the supply when the demand is low (Philippine Star: 07 July 2000).

Higher still is the cost of the vulnerability that it brings about in government contracting in general. Effectively, it strips the contracting system of its safeguarding principles, guiding procedures, decision parameters, and sanctions that are integrated within

each of its phases, rendering the total alternative system highly susceptible to *localized acts* of graft and corruption.

2. *The government should guarantee the use of a standard BOT contracting system in its operations.*

Despite the BOT Law, government (i.e., agencies, LGUs) follows different systems of contracting even for projects that fall within the various schemes under the BOT. This does not only inhibit private sector participation. The different systems make it also difficult to follow the trail of responsibilities and accountabilities. Corollary to these points, the discretionary latitude from the *per project* or *per agency* approach invites corruption. Furthermore, this approach, and the consequent variances in the inputs and procedures run counter to the overall thrust of the Arroyo administration to simplify transactions and minimize the exercise of discretionary powers.

3. *The government should, along with the private sector (business and members of the civil society) review and further streamline the processes and requirements of contracting.*

The BOT contracting system's has built-in guarantees (e.g., procedures, standards, requirements, sanctions, information exchange) which ensure that the process of contracting would continue and that the obligations can be met by the contracting parties. This elaborate array of guarantees however, could also delay the implementation of the project to be contracted, lending reason to those who opt for more expedient ways of contracting.

In view of this, the government (through NEDA/DTI) could initiate a review of the BOT contracting system with other sectors, whose objective would be to improve the flow as well as the guarantees of the system. One specific area that could be examined is how to actualize transparency in all phases of contracting particularly in project selection and approval. Another thrust of the review is to shorten the system's phases and sub processes. The process of pre-qualifications for instance, could be discarded since stringent technical and financial evaluations would be done anyway during the opening of bids. As it is, pre-qualifying is becoming an opportunity for some government officials to seek rent, especially, in contracts involving procurement (e.g., medicine and other medical supplies, textbooks, communications equipment). Some government offices continue to pre-qualify firms that they or other agencies have had some problems in the past.

4. *The government should develop and install a better system that could be used to examine and/or "vet" prospective bidders.*

With the assistance of other sectors, the government should develop and install a centralized system that could be used to monitor individuals and firms that would want to bid for government contracts (even those not under the BOT). Said system in-place, could “institutionalize” the reputation of the business and the person, especially those with opprobrious contracts and performance records (locally or in other countries).

Said system could also discourage the practice of firms with “well-placed” executives to use their connections for purposes of winning the contract because through such, the public would have already anticipated it.³⁸ Consequently, it might even pressure them to be more circumspect in their actions; and the public, to be more factual and responsible in their accusations and suspicions. Further, it could counter the justifications based on ignorance by government officials (and agencies) for their continued dealings with “notorious” individuals and firms.

5. *There is a need to develop a norm for a cooperative, inclusive, transparent, and fair contracting system.*

In a way, a contracting system that is based on the principles of inclusiveness and transparency remains largely incongruous to the prevailing socio-political culture in the country which places a premium on personal relationships rather than on institutional checks and balances. It is also an anachronism vis-à-vis an economy whose configuration is defined by few, supra industrialists.³⁹

Rather than subscribe, however, to the rule of the fittest, an inclusive and transparent contracting system remains the best alternative to manage the different interests of firms and individuals in the business. From this, government, along with the business and other sectors, could undertake long-term initiatives to develop or set a norm that, in spite of competition, emphasizes cooperative approaches to the maintenance (and furtherance) of a contracting system that is non discriminatory and transparent.

An initial step towards this direction is the signing of agreements or public “pacts” by government, business, and other concerned sectors regarding their stance and conduct pertinent to contracting. Although these agreements may or may not carry legal obligations,

³⁸ Finding or securing a new “rulebook,” one that is partial to one’s position and more accommodating to bribery, is not readily acquired, for in most cases, only the President can provide or allow it. With this, it also follows that it is not acquired on the cheap, that is, it can only be obtained (or engineered) by those who have substantial political, social, and economic capital or incentives.

³⁹ It is not surprising hence, that Estrada’s “poor people” can identify whom they derisively call the *mayayaman* (rich) are and where their capital is—Makati, the country’s financial district. Like in politics, these same people (and their relatives) dominate the different boardrooms of big and small businesses in the country.

they could serve as fair and legitimate referent points for censuring (or commending) those, including government, who violated the agreement (or code of conduct) and put pressure as well to those who did not sign them. With it, there will be no mistaking where consensual judgement will side against, in case of deviation or clear violation. Perhaps, the agreement could also cover those acts that though not deemed as illegal, leave nevertheless, a sense of impropriety in the conduct of the transaction.

6. *There is a need to consolidate and rationalize the activities and involvement of non-government sectors and representatives in the system of contracting.*

An observation that one does not fail to notice is the seeming inability of those in the non-government to maximize their participation in the process of contracting. This, despite their mandated involvement in the process, as provided by the provisions of the BOT Law and Local Government Code. While there has been a proliferation of initiatives that run parallel to government, few of those in the non government sector has made use of quasi-government venues for decision-making (e.g., LDCs, and PBAC) which offer direct routes to influence decisions and policies. Doubtless, an independent course of action is preferable, but maintaining said course of action entail some cost and lost strategic opportunities.

It might be in the best interest of those in the non government sector and member of the civil society to consolidate their efforts in checking corruption in government contracting. Other than for reasons of economy, said consolidation could be directed to provide appropriate focus, increase their persuasive influence, and systematically develop the level of their technical competencies pertinent to contracting. In a way, this professionalized approach to government “contract watching” could provide one of the bases for a sustained and operationally more weighty non-government sector involvement in contracting.

In line with this consolidation, there might be some merit in looking at the current level of involvement of professional groups and societies in the business of contracting. Their more active involvement could provide the initial stock of technical capability or expertise to monitor and further reform the contracting system.

Finally, there is also some merit to always remember the primary reasons behind why government has to enter these contracts. It might just be possible that after so much effort, after transparency and inclusiveness has been served, the succeeding management systems that would ensure that the supposed socio-economic benefits would redound to their intended beneficiaries, would cause their eventual failure.

References:

1. Books and Manuscripts

- Antonious. [1990]. "Corruption in Government: Report of an Interregional Seminar." UN Department of Technical Cooperation for Development and Center for Social Development and Humanitarian Affairs, New York.
- Campos, J.E. D. Lien and S. Pradhan. [1999]. "The Predictability of corruption: implications for investment" in Campos J.E. ed. (1999) *The Boom and bust of East Asia* (manuscript).
- CIME. [1997]. "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents." 21 November , Working Group on Bribery in International Business Transactions.
- COA-PTTAF. [1999]. *Manual on Contracts Review*. Commission on Audit: Adriana Printing Company.
- _____. [1999]. *Manual on Procurement*. Commission on Audit: Adriana Printing Company.
- Coronel, S. (Ed.). [1998]. *Pork and Other Perks, Corruption and Governance in the Philippines*. Philippine Center for Investigative Journalism, Evelio B. Javier Foundation, and Institute for Popular Democracy. PCIJ, Pasig: Philippines.
- _____. (Ed.). [2000]. *Betrayals of Public Trust, Investigative Reports on Corruption*. PCIJ (with grant from Asia Foundation), Quezon City: PCIJ.
- _____. and E. Tordesillas. [2000]. "All the President's Men" in S. Coronel ed., *Betrayals of Public Trust, Investigative Reports on Corruption* (pp.181-195). Quezon City: PCIJ
- Estache, A. and D. Martimort. (1998). *Transaction Costs, Politics, Regulatory Institutions, and Regulatory Outcomes*. The Economic Development Institute of the World Bank (manuscript).
- Metro Manila Development Authorities Documents on Greater Metro Manila Solid Waste Management Project*.
- NEDA-ICC Documents on North and South Luzon Expressway Projects*.
- NEDA-ICC Documents on the Metro Rail Transit (MRT III) Project*.
- Pascual, C. G. [2000]. *Privatization and Labor: A Case Study of the Metropolitan Waterworks and Sewerage System (MWSS)*. Philippine Center for Policy Studies (manuscript).
- Republic Act 6957*. [1990], later amended as RA 7718 [1994]. *Philippine Infrastructure Privatization (PIPP) or Philippine BOT Law*.
- Republic Act 7160, Local Government Code of the Philippines*[1991].
- Solon, O. and S.J. Pamintuan [1998]. "Opportunities and Risks in the Privatization-Regulation of the Manila Water and Sewerage System". A paper presented during the joint IDE-UPSE symposium-workshop on Studies in Governance and Regulation, EDSA Shangri-la Hotel, Mandaluyong City, Philippines.

- Stone, Levy and Paredes. [1992] "Public Institutions and Private Transactions: The Legal and Regulatory Environment for Business Transactions in Brazil and Chile." *World Bank Policy Working Paper 891*, Washington, D.C.
- Tanzi, V. [1994]. "Corruption, Governmental Activities, and Markets." *IMF Working Paper*.
- The World Bank. [1999]. "Fostering Institutions to Contain Corruption". *Note No. 24*.
- UNDP. [1998] *Corruption & Integrity Improvement Initiatives in Developing Countries* (manuscript).
- Wolfensohn, J.D. [1998]. *New Measures to Combat Fraud and Corruption* (manuscript).
- Yotopoulos. [1989]. "The (Rip)Tide of Privatisation: Lessons from Chile" *World Development*, 17(5), pp. 683-702.

2. *Journals, Magazine, Newspapers*

- Aquino, N. [2000]. "Senate to shelve Napocor Privatization Bill- Osmena" *Business World*, 04 December.
- Arias, P. R. [2001]. "Metro Manila's garbage problem; Twists and turns in garbage crisis." *Manila Bulletin*, 2-3 January.
- Bagares, R. [2000]. "Metro landfill project award set in August" *Philippine Star*, 31 July.
- Bondoc, J. [2000]. How Serious are They in Solving the Barbage Crisis? *Philippine Star*, 07 December.
- Dalisay, A. [2000]. "No monopoly at North Harbor." *Philippine Star*, 06 July.
- Danao, E. [2000]. "Guingona presses probe on award of port projects." *Philippine Star*, 27 July.
- Freeman News Service. [2000]. "Garcia to sign deal with PEA after all" *Philippine Star*, 14 July.
- Nocum, A. [2000]. "Bidding for Metro landfill faces delays." *Philippine Daily Inquirer*, 03 July.
- Philippine Star* [2000]. "Cronies to benefit most from emergency powers." 07 July.
- Realubit, J. I. [2000]. "PPA to draft new TOR for North Harbor privatization." *Philippine Star*, 13 July.
- Sison, M. N. [2001] "Firm Linked to Estrada Got Metro Manila Garbage Contract." *Philippine Center for Investigative Journalism (PCIJ) Report*, 24-25 January.
- Torres, T. P. [2000]. "PNCC rejects TRB claim on facilities issue." *Philippine Star*, 21 July.
- Trinidad, A.H. [2000]. "Payatas death toll hits 124; Palace tackles waste problem." *Philippine Daily Inquirer*, 13 July.

Annex I: Public-Private Contractual Arrangement Under BOT Law

TYPE OF ARRANGEMENT	ELIGIBILITY REQUIREMENTS
For all Arrangements	<p>➤ Financing</p> <p>The project proponent may obtain financing from foreign and/or domestic sources and/or engage the services of a foreign and/or Filipino contractor.</p> <p>Projects which would have difficulty in sourcing funds may be financed partly from different government appropriations and/or from Official Development Assistance (ODA) of foreign governments or institutions not exceeding 50% of the project cost, and the balance to be provided by the project proponent.</p> <p>➤ Project Proponent Nationality</p> <p>The facility operator must be Filipino if the operation of the infrastructure or development facility requires a public utility franchise.</p> <p>If proponent is a corporation, it must be registered with the Securities and Exchange Commission (SEC) and should be owned no less than 60% by Filipinos.</p> <p>➤ Labor</p> <p>In the case of foreign contractors, Filipino labor shall be employed or hired in the different phases of the construction where Filipino skills are available</p>
Build-operate-and-transfer (BOT)	<p>Project proponent undertakes the financing, construction, operation and maintenance of an infrastructure facility.</p> <p>Project proponent operates the facility over a fixed term. During the period, it is allowed to charge the facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in the bid or incorporated in the contract to enable the proponent to recover the cost of investment, operations, and maintenance.</p> <p>Project proponent transfers the facility to the government agency or local government unit (LGU) concerned at the end of the fixed term, which shall not exceed 50 years.</p>
Build-and-transfer (BT)	<p>Project proponent undertakes the financing and construction of an infrastructure or development facility and, upon completion, turns it over to the government agency or LGU concerned.</p> <p>Government agency or LGU concerned shall pay the proponent on an agreed schedule the total investments expended on the project, plus a reasonable rate of return thereon.</p>
Build-own-and-operate (BOO)	<p>Project proponent is authorized to finance, construct, own, operate, and maintain an infrastructure or development facility.</p> <p>The proponent is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users.</p>

Annex II: Eligible Types of Projects for BOT Scheme

(Compiled from Rule 2.2, Section 2.2, Implementing Rules and Regulations; RA 6957)

1. Highways, including expressway, roads, bridges, interchanges, tunnels, and related facilities.
2. Railways or rail-based projects packaged with commercial development opportunities.
3. Non rail-based mass transit facilities, navigable inland waterways and related facilities.
4. Port infrastructure like piers, wharves, quays, storage, handling, ferry services and related facilities.
5. Airports, air navigation, and related facilities.
6. Power generation, transmission, distribution, and related facilities.
7. Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities.
8. Information technology and data base infrastructure.
9. Irrigation and related facilities.
10. Water supply, sewerage, drainage, and related facilities.
11. Education and health infrastructure.
12. Land reclamation, dredging and other related development facilities.
13. Industrial and tourism estates or townships, including related infrastructure facilities and utilities.
14. Government buildings, housing projects.
15. Markets, slaughterhouses, and related facilities.
16. Warehouses and post-harvest facilities.
17. Public fishports and fishponds, including storage and processing facilities.
18. Environmental and solid waste management related facilities such as collection equipment, composting plants, incinerators, landfill and tidal barriers, among others.

TYPE OF ARRANGEMENT	ELIGIBILITY REQUIREMENTS
Build-lease-and-transfer (BLT)	<p>Project proponent is authorized to finance and construct an infrastructure or development facility.</p> <p>Upon completion, the proponent turns it over to the government agency or LGU concerned on a lease arrangement for a fixed period.</p> <p>Ownership of the facility is automatically transferred to the government agency or LGU concerned.</p>
Build-transfer-and-operate (BTO)	<p>The public sector contracts out the building of an infrastructure facility to a private entity.</p> <p>The contractor builds the facility on a turnkey basis, assuming cost overrun, delay, and specified performance risks.</p> <p>Title is transferred to the implementing agency once the facility is commissioned satisfactorily. The private entity however, operates the facility on behalf of the implementing agency under an agreement.</p>
Contract-add-and-operate (CAO)	<p>The project proponent adds to an existing infrastructure facility which it is renting from the government.</p> <p>The proponent operates the expanded project over an agreed franchise period.</p> <p>There may or may not be a transfer arrangement in regard to the facility.</p>
Develop-operate-and-transfer (DOT)	<p>A private project proponent will build a new infrastructure project. Favorable conditions that are external to the project are integrated into the contract by giving the proponent the right to develop adjoining property (and thus enjoy some of the benefits the investment generates, e.g., higher property or rent values).</p>
Rehabilitate-operate-and-transfer (ROT)	<p>An existing facility is turned over to the private sector to refurbish, operate, and maintain for a franchise period.</p> <p>Legal title to the facility is turned over to the government upon expiry of the franchise.</p> <p>(Note: arrangement also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting, and consuming it within the host country).</p>
Rehabilitate-own-and-operate (ROO)	<p>An existing facility is turned over to the private sector to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity.</p>

Annex III: Technical Proposal/Bid Requirement-Evaluation Parameters

ITEM	MEANING/PURPOSE	CRITERIA (BIDDING)
Project Operational Feasibility	Refers to the proposed organization, methods and procedures for the operation and maintenance of the project.	The proposed organization, methods and procedures for operating and maintaining the completed facility must be well defined, should conform to the prescribed performance standards, and should be shown to be workable. Where feasible, it should provide for the transfer of technology used in every phase of the project.
Technical Soundness	Basic engineering design of the project.	The basic engineering design of the project should conform to the minimum design and performance standards and specifications set by the agency/LGU concerned as prescribed in the bidding documents. The engineering surveys, plans and estimates should be undertaken within plus or minus 20% of the final quantities. The construction methods and schedules should also be presented and shown to be feasible or "doable."
Preliminary Environmental Assessment	Initial assessment indicating the possible adverse effects of the project on the environment and attendant mitigating measures.	The proposed design and the technology of the project to be used must comply with the environmental standards set forth by the Agency/LGU concerned under the related bidding documents and acceptable to the DENR. Any negative or adverse effects on the environment arising from the project as proposed by the bidder must be properly identified, along with the corresponding corrective measures.
Project Cost/Financing Plan	Operating and maintenance cost requirement of the project, including, but not limited to, proposed equity contribution, debt, etc.	The proposed financing plan should positively show that it could adequately meet the construction, maintenance, and operating costs requirements of the project. The Agency or LGU concerned shall assess the financing proposals of the bidders if the same match and adequately meet the cost requirements of the project under bidding.

ITEM	MEANING/PURPOSE	CRITERIA (BIDDING)
<p>Bid Security (payable to the Agency/LGU concerned)</p> <ol style="list-style-type: none"> 1. If estimated construction cost is less than P5 billion: not less than 2% of the estimated cost. 2. If est. cost is P5 to P10 billion: not less than 1.5% of the estimated cost but at least P100 million 3. If est. cost is P10 billion and above: not less than 1% of the estimated cost but at least P150 million 	<p>Bid security is posted as a guarantee that the proposed contract awardee shall, within 7 calendar days from receipt of notice of award, enter into contract with the concerned NGA or LGU and furnish the required performance security within the time prescribed therefor.</p>	<p>Mandatory</p>
		<p>Enhancements, or other terms which the bidder may offer to the government (i.e., proponent agency or LGU) to make the proposals more attractive, such as revenue-sharing, less government guarantees or reduction in government undertakings or support.</p>

Annex IV: Financial Bid/Proposal Requirement-Evaluation Parameters

TYPE OF ARRANGEMENT	COVERAGE	ASSESSMENT/COMPARISON CRITERIA (BIDDING)
BOT, BOO, CAO, DOT, ROT, ROO	<ul style="list-style-type: none"> ➤ Proposed user tolls/fees/rentals/ other charges. ➤ Present worth of the proposed user tolls/fees/rentals/other charges over the fixed term based on the discounting rate and foreign exchange rate prescribed under the bidding document. 	<p>Assessment and comparison of the financial proposal of bidders shall be based on the present value of the proposed tolls, fees, rentals, and other charges over a fixed term.</p> <p>The Agency or LGU shall award the contract to the bidder whose proposed tolls, fees, rentals, charges are determined to have the lowest present value.</p>
BT, BLT, BTO	<ul style="list-style-type: none"> ➤ Proposed amortization payments and repayment period. ➤ Present worth of proposed amortization payments based on the discounting rate and foreign exchange rate prescribed in the bidding documents. 	<p>Assessment and comparison shall be based on the present value of the proposed schedule of amortization payments.</p> <p>The Agency or LGU shall award the contract to the bidder whose proposed amortization payments are determined to have the lowest present value.</p> <p>A Filipino bidder who submits an equally advantageous bid with exactly the same price and technical specifications as that of a foreign project proponent shall be given preference.</p>
For projects which are not public utilities, where the Agency or LGU requires payments to be made by the prospective bidder and/or contractor, and where the Agency/LGU opts to adopt the method and criteria prescribed for financial evaluation.	<ul style="list-style-type: none"> ➤ Proposed payments schedule ➤ Present worth of proposed payments based on the discounting rate prescribed in the bidding documents. 	<p>Assessment and comparison may be based on present value of proposed payments.</p> <p>The Agency or LGU shall award the contract to the bidder whose proposed payments are determined to have the highest present value.</p>

Annex V: BOT Contracting System Timeline
(Based on BOT Law)

Item	Number of Days
For the ICC or LDC to act on the lists of projects once the concerned agency/LGU has “satisfactorily complied” with the requirements.	30 working days
Publication once every week, for three consecutive weeks, of notice inviting all interested parties to pre-qualify and bid.	21 days
Prospective bidders' preparation of their respective pre-qualification documents.	30 calendar days from last date of publication of the invitation
PBAC informs prospective bidders of result of pre-qualification (approval or reasons for disqualification)	7 calendar days
Time during which a pre-disqualified bidder can appeal the decision.	15 working days from the receipt of disqualification.
Time for the head of the agency or DILG to acts on the appeal.	45 working days from receipt of the appeal.
Concerned agency/LGU conducts pre-conference bid (for projects up to 300 million).	30 days before the required submission of bids.
Concerned agency/LGU conducts pre-conference bid for projects costing P300 million and more	90 to 100 days before the required submission of bids.
PBAC completes the second stage evaluation of the bidding	30 days from the date the first stage evaluation has been completed.
The decision on whether or not to award the contract should have been made by the concerned Agency/LGU.	Within 30 days after the conclusion of the second stage evaluation
Agency/LGU transfers the Notice of Award to the winning bidder	7 days after approval of the Notice of Award
Approval or disapproval by agency/LGU of Notice requirements	Within 15 days from the date the winning bidder submitted the requirements.
Concerned agency/LGU issues a “Notice to Proceed” to the winning bidder/contractor.	Not later than 15 days from the date of approval of the contract
The successful bidder executes the contract with the concerned agency/LGU.	Within seven days from receipt of the Notice of Award.