

**I MINA' TRENTAI DOS NA LIHESLATURAN GUÅHAN**  
**2013 (FIRST) Regular Session**

**Bill No.**     3-32(LS)

Introduced by:

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M 10: 46

**AN ACT TO ADD A NEW CHAPTER 82 TO TITLE 12 OF THE GUAM CODE ANNOTATED; RELATIVE TO AUTHORIZING CERTAIN CONTRACTUAL ARRANGEMENTS FOR PUBLIC PRIVATE PARTNERSHIPS IN ORDER TO MOBILIZE PRIVATE RESOURCES FOR THE PURPOSE OF FINANCING THE CONSTRUCTION, OPERATION AND MAINTENANCE OF INFRASTRUCTURE AND DEVELOPMENT PROJECTS NORMALLY FINANCED AND UNDERTAKEN BY THE GOVERNMENT.**

**BE IT ENACTED BY THE PEOPLE OF GUAM:**

**Section 1.** A new Chapter 82 is added to Title 12 of the Guam Code

Annotated to read:

**“Chapter 82**

**Public Private Partnerships**

Article 1. Preliminary Provisions

Article 2. General Provisions

Article 3. Pre-qualification, Bids, and Awards Committee

Article 4. Bid/Tender Documents

Article 5. Qualification of Bidders

Article 6. Supplemental Notices and Pre-Bid Conferences

Article 7. Submission, Receipt and Opening of Bids

Article 8. Evaluation of Bids

1 Article 9. Negotiated Contract  
2 Article 10. Unsolicited Proposals  
3 Article 11. Award and Signing of Contract  
4 Article 12. Contract Approval and Implementation  
5 Article 13. Investment Incentives and Government Undertakings  
6 Article 14. Coordination and Monitoring of Projects; and Rule-making  
7 Article 15. Project Development and Monitoring Fund  
8 Article 16. Energy Efficiency and Environmentally Sound Standards  
9 Article 17. Final Provisions

## 10 Article 1

### 11 Preliminary Provisions

12 § 820101. Short Title.

13 § 820101. Policy.

14 § 820102. Coverage

15 § 820103. Definition of Term.

#### 16 § 820101. Short Title.

17 This Chapter may be cited as the *Guam Public Private Partnership Act of*  
18 *2012*.

#### 19 § 820102. Policy.

20 It is the declared policy of the Government to recognize the indispensable  
21 role of the private sector as an engine for economic growth and development and  
22 provide the most appropriate incentives to mobilize private resources for the  
23 purpose of financing the construction, operation and maintenance of infrastructure  
24 and development projects normally financed and undertaken by the Government.

25 In line with the foregoing, this Chapter seeks to identify specific incentives,  
26 support and undertakings, financial or otherwise, that may be granted to Project  
27 Proponents, allow reasonable returns on investments made by Project Proponents,

1 provide procedures that will assure transparency and competitiveness in the  
2 bidding and award of projects, ensure that Contractual Arrangements reflect  
3 appropriate sharing of risks between the Government and the Project Proponent,  
4 and ensure strict compliance by the Government and the Project Proponent of their  
5 respective obligations and undertakings and the monitoring thereof, in connection  
6 with or relative to Private Sector Infrastructure or Development Projects to be  
7 undertaken under this Chapter.

8 **§ 820103. Coverage.**

9 This Chapter shall cover all Private Sector Infrastructure or Development  
10 Projects, as hereunder defined, undertaken by Agencies in accordance with such  
11 contractual arrangement or scheme authorized herein.

12 **§ 820104. Definition of Term.**

13 For purposes of this Chapter, the terms and phrases hereunder shall be  
14 understood as follows:

15 (a) *Act* shall mean this Chapter;

16 (b) *Agency* refers to any department, bureau, office, commission, authority  
17 or agency of the Government of Guam;

18 (c) *Amortization* means the regular, periodic repayment of principal and  
19 payment of interest of a debt for a definite period of time, at the maturity of  
20 which the entire indebtedness is paid in full;

21 (d) *Board* means the Board of Directors of the Guam Economic  
22 Development Authority;

23 (e) *Contractual Arrangements* refers to any of the following contractual  
24 arrangements or schemes by which infrastructure and/or development projects may  
25 be undertaken pursuant to the provisions of this Chapter:

26 (1) *Build-and-transfer (BT)* - A contractual arrangement whereby the  
27 Project Proponent undertakes the financing and Construction of a given

1 infrastructure or development facility and after its completion turns it over to  
2 the Agency concerned, which shall pay the Project Proponent on an agreed  
3 schedule its total investment expended on the project, plus a Reasonable  
4 Rate of Return thereon. This arrangement may be employed in the  
5 Construction of any Infrastructure or Development Projects, including  
6 critical facilities which, for security or strategic reasons, must be operated  
7 directly by the Government.

8 (2) *Build-lease-and-transfer (BLT)* - A contractual arrangement  
9 whereby a Project Proponent is authorized to finance and construct an  
10 infrastructure or development facility and upon its completion turns it over  
11 to the Agency concerned on a lease arrangement for a fixed period, after  
12 which ownership of the facility is automatically transferred to the Agency  
13 concerned.

14 (3) *Build-operate-and-transfer (BOT)* - A contractual arrangement  
15 whereby the Project Proponent undertakes the Construction, including  
16 financing, of a given infrastructure facility, and the operation and  
17 maintenance thereof. The Project Proponent operates the facility over a fixed  
18 term during which it is allowed to charge facility users appropriate tolls,  
19 fees, rentals, and charges not exceeding those proposed in its bid or as  
20 negotiated and incorporated in the contract to enable the Project Proponent  
21 to recover its investment, and operating and maintenance expenses in the  
22 project. The Project Proponent transfers the facility to the Agency concerned  
23 at the end of the fixed term that shall not exceed fifty (50) years. This build-  
24 operate-and-transfer contractual arrangement shall include a supply-and-  
25 operate scheme which is a contractual arrangement whereby the supplier of  
26 equipment and machinery for a given infrastructure facility, if the interest of

1 the Government so requires, operates the facility providing in the process  
2 technology transfer.

3 (4) *Build-own-and-operate (BOO)* - A contractual arrangement  
4 whereby a Project Proponent is authorized to finance, construct, own,  
5 operate and maintain an infrastructure or development facility from which  
6 the Project Proponent is allowed to recover its total investment, operating  
7 and maintenance costs plus a reasonable return thereon by collecting tolls,  
8 fees, rentals or other charges from facility users. Under this project, the  
9 proponent who owns the assets of the facility may assign its operation and  
10 maintenance to a Facility operator.

11 (5) *Build-transfer-and-operate (BTO)* - A contractual arrangement  
12 whereby the Agency contracts out the Construction of an infrastructure  
13 facility to a private entity such that the Contractor builds the facility on a  
14 turnkey basis, assuming cost overruns, delays, and specified performance  
15 risks. Once the facility is commissioned satisfactorily, title is transferred to  
16 the implementing Agency. The private entity however operates the facility  
17 on behalf of the implementing Agency under an agreement.

18 (6) *Contract-add-and-operate (CAO)* - A contractual arrangement  
19 whereby the Project Proponent adds to an existing infrastructure facility  
20 which it is renting from the Government and operates the expanded project  
21 over an agreed Franchise period. There may or may not be a transfer  
22 arrangement with regard to the added facility provided by the Project  
23 Proponent.

24 (7) *Develop-operate-and-transfer (DOT)* -A contractual arrangement  
25 whereby favorable conditions external to a new infrastructure project which  
26 is to be built by a Project Proponent are integrated into the arrangement by  
27 giving that entity the right to develop adjoining property, and thus, enjoy

1 some of the benefits the investment creates such as higher property or rent  
2 values.

3 (8) *Rehabilitate-operate-and-transfer (ROT)* - A contractual  
4 arrangement whereby an existing facility is turned over to the Project  
5 Proponent to refurbish, operate and maintain for a Franchise period, at the  
6 expiry of which the legal title to the facility is turned over to the  
7 Government. The term is also used to describe the purchase of an existing  
8 facility from outside Guam, importing, refurbishing, erecting and consuming  
9 it within Guam.

10 (9) *Rehabilitate-own-and-operate (ROO)* - A contractual arrangement  
11 whereby an existing facility is turned over to the Project Proponent to  
12 refurbish and operate with no time limitation imposed on ownership. As  
13 long as the operator is not in violation of its Franchise, it can continue to  
14 operate the facility in perpetuity.

15 (f) *Construction* refers to new construction, rehabilitation, improvement,  
16 expansion, alteration, and related works and activities including the necessary  
17 design, supply, installation, testing and commissioning of equipment, systems,  
18 plants, materials, labor and services and related items needed to build or  
19 rehabilitate an infrastructure or development facility.

20 (g) *Contractor* refers to any entity which may or may not be the Project  
21 Proponent and which shall undertake the actual Construction and/or supply of  
22 equipment for the project.

23 (h) *Direct Government Guarantee* refers to an agreement whereby the  
24 Government or any of its Agencies guarantees to assume responsibility for the  
25 repayment of debt directly incurred by the Project Proponent in implementing the  
26 project in case of a loan default.

1 (i) *Facility Operator* refers to a company which may or may not be the  
2 Project Proponent, and which is responsible for all aspects of operation and  
3 maintenance of the infrastructure or development facility, including but not limited  
4 to the collection of tolls, fees, rentals or charges from facility users.

5 (j) *Franchise* refers to a certificate, permit or other form of authorization  
6 required to be obtained by a Facility Operator from the Agency prior to operating a  
7 project.

8 (k) *Government Undertakings* refers to any form of contribution and/or  
9 support provided under § 821303 of this Chapter, which the Government or any of  
10 its Agencies may extend to a Project Proponent.

11 (l) *Head of Agency* shall be defined as the head of the agency or body, for  
12 government agencies, commissions or offices, and branches of the government.

13 (m) *Investment Incentives* refers to any form of contribution and/or support,  
14 which the Government or any of its Agencies may extend to the Project Proponent  
15 in accordance with § 821302 of this Chapter.

16 (n) *List of Priority Projects* refers to the list of Private Sector Infrastructure  
17 or Development Projects approved in accordance with § 820203.

18 (o) *Negotiated Contracts* refers to contracts entered into by the Government  
19 for convenience even if broader tendering would have been possible. This type of  
20 contract may be resorted to only in cases prescribed under Article 9.

21 (p) *PBAC* refers to the Pre-qualifications, Bids, and Awards Committee  
22 established in accordance with Article 3 of this Chapter.

23 (q) *Private Sector Infrastructure or Development Projects* means the general  
24 description of Infrastructure or Development Projects normally financed, and  
25 operated by the public sector but which will now be wholly or partly financed,  
26 constructed and operated by the private sector, including but not limited to, power  
27 plants, highways, ports, airports, water supply, irrigation, telecommunications,

1 transport systems, slaughterhouses, warehouses, solid waste management,  
2 information technology networks and database infrastructure, education and health  
3 facilities, sewerage, drainage, dredging, and other infrastructure and development  
4 projects as may otherwise be authorized by the appropriate Agency pursuant to this  
5 Chapter. Such projects shall be undertaken through Contractual Arrangements as  
6 defined herein.

7 (r) *Project Cost* refers to the total cost to be expended by the proponent to  
8 plan, develop and construct the project to completion stage including but not  
9 limited to cost of feasibility studies engineering and design, Construction,  
10 equipment, land and right-of-way, taxes imposed on said cost, and development  
11 cost.

12 (s) *Project Loan* refers to all loans and/or credit facilities extended by  
13 financial institutions, and all other third party lenders to the project company  
14 and/or Project Proponent for the development and/or operation of the project.

15 (t) *Project Proponent* refers to the private sector entity which shall have  
16 contractual responsibility for the project and which shall have an adequate track  
17 record in the concerned industry as well as technical capability and financial base  
18 consisting of equity and firm commitments from reputable financial institutions to  
19 provide, upon award, sufficient credit lines to cover the total estimated cost of the  
20 project to implement the said project.

21 (u) *Public Utility Projects* refers to projects or facilities that provide services  
22 subject to the regulations of Public Utilities Commission and for which a Franchise  
23 is required.

24 (v) *Reasonable Rate of Return* refers to the rate of return that a Project  
25 Proponent shall be entitled to, as determined by the Board, taking into account,  
26 among others, the prevailing cost of capital (equity and borrowings), risks being  
27 assumed by the Project Proponent and the level of Government Undertakings and



1 Investment Incentives extended for the project; provided, further, that in the case  
2 of Negotiated Contracts, such rate of return shall be determined by the Board prior  
3 to call for proposals; provided further, that for Negotiated Contracts for public  
4 utilities projects, the rate of return shall be subject to further approval by the Public  
5 Utility Commission, which in no case shall exceed twelve per centum (12%), as  
6 provided by this Chapter.

7 (w) *Unsolicited Proposals* refer to project proposals submitted by the  
8 private sector, not in response to a formal solicitation or request issued by an  
9 Agency, to undertake Infrastructure or Development Projects which may be  
10 entered into by Agency subject to the requirements/ conditions prescribed under  
11 Article 10.

## 12 **Article 2.**

### 13 **General Provisions**

14 § 820201. Authorized Contracting Government Agencies.

15 § 820202. Eligible Types of Projects.

16 § 820203. List of Priority Projects.

17 § 820204. Publication and Notice.

18 § 820205. Registration of Project Proponents.

19 § 820206. Allowable Modes of Implementation.

20 § 820207. Approval of Projects and Draft Contracts.

21 § 820208. Detailed Guidelines for the Approval of Projects/Contracts.

22 § 820209. Policy on Deviations from Approved Contract.

23 § 820210. Deadline for Approval of Solicited Projects Contracts.

24 § 820211. Applicability of Procurement Law.

25 **§ 820201. Authorized Contracting Government Agencies.**

1 All departments, bureaus, offices, commissions, authorities, or agencies of  
2 the Government of Guam are authorized to enter into Contractual Arrangements  
3 under this Chapter in accordance with the requirements of this Chapter.

4 **§ 820202. Eligible Types of Projects.**

5 (a) The construction, rehabilitation, improvement, betterment, expansion,  
6 modernization, operation, financing and maintenance of the of projects, as  
7 provided for under Subsection (b) of this Section, which are normally financed and  
8 operated by the public sector which will now be wholly or partly financed,  
9 constructed and operated by the private sector, including other infrastructure and  
10 development projects as may be authorized by the appropriate agencies, may be  
11 proposed under the provisions of this Chapter provided however that such projects  
12 have a cost recovery component which covers at least 50% of the Project Cost, or  
13 as determined by the Board.

14 (b) Infrastructure and development projects may include highways,  
15 including expressway, roads, bridges, interchanges, tunnels, and related facilities;  
16 mass transit facilities and related facilities, including bus shelters; port  
17 infrastructures like piers, wharves, quays, storage, handling, ferry services and  
18 related facilities; air navigation, commuter air service, airports and related  
19 facilities; power generation, transmission, sub-transmission, distribution, and  
20 related facilities; telecommunications, backbone network, and related service  
21 facilities; information technology (IT) and data base infrastructure, including  
22 modernization of IT; irrigation and related facilities; water supply, sewerage,  
23 drainage, and related facilities; education facilities, including public libraries and  
24 schools; health infrastructure, including clinics, hospitals, and related facilities;  
25 recreational and sports facilities; tourism related facilities, including a convention  
26 center, a territorial aquarium, and a performing arts center; government office and  
27 multi-purpose buildings; housing projects; markets, slaughterhouses, and related

1 facilities; warehouses and post-harvest facilities; agricultural processing facilities,  
2 including storage; village community and recreational facilities; and environmental  
3 and solid waste management related facilities such as but not limited to collection  
4 equipment, composting plants, and landfill, among others.

5 **§ 820203. List of Priority Projects.**

6 Concerned Agencies may identify projects and maintain a corresponding list  
7 of specific projects that may be financed, constructed, operated and maintained by  
8 the private sector through the Contractual Arrangements or schemes authorized  
9 under this Chapter and to submit for the approval by the Board, as specified in §  
10 820207.

11 **§ 820204. Publication and Notice.**

12 All Agencies shall provide wide publicity of projects proposed for  
13 implementation under the Contractual Arrangements or schemes as authorized  
14 under this Chapter to keep interested or concerned parties informed thereof. For  
15 this purpose, all Agencies shall cause their respective projects to be published at  
16 least once every year in a newspaper of general circulation and to be posted  
17 continuously in the website of the concerned Agency.

18 **§ 820205. Registration of Project Proponents.**

19 Project Proponents may register with the Agency, indicating which projects  
20 are of interest to them, and for this purpose, submit their company profiles in the  
21 form prescribed by the Board. Duly registered Project Proponents shall be  
22 officially notified and furnished by the Agency a copy of the list of their respective  
23 projects and corresponding project updates at least once a year.

24 **§ 820206. Allowable Modes of Implementation.**

25 Projects may be implemented through public bidding or direct negotiation.  
26 The direct negotiation mode is subject to conditions specified in Articles 9 and 10  
27 hereof.

1           **§ 820207. Approval of Projects and Draft Contracts.**

2           Projects, which shall include a draft contract, shall be submitted to the Board  
3 for approval, except that the Board shall secure prior approval from *I Liheslatura*  
4 for the specific related investment incentives and government undertakings before  
5 approving the draft contract.

6           **§ 820208. Detailed Guidelines for the Approval of Projects/Contracts.**

7           The Board, from time to time, shall prescribe or revise detailed guidelines on  
8 the process and procedures for the approval of projects and contracts as well as the  
9 requirements to be submitted in support thereof, provided that the same are  
10 consistent with this Chapter.

11          **§ 820209. Policy on Deviations from Approved Contract.**

12          The Agency shall not proceed with the award and signing of the contract  
13 with the Project Proponent if there are material deviations from the parameters and  
14 terms and conditions set forth in the draft contract as approved by the Board. The  
15 Head of the Agency shall be responsible for compliance with this policy and  
16 violation of this § 820209 shall render the award and/or the signed contract invalid.

17          **§ 820210. Deadline for Approval of Solicited Projects Contracts.**

18          The Board shall act on the project and the contract within thirty (30)  
19 calendar days upon satisfactory compliance by the concerned Agency with the  
20 requirements of the Board. Failure of the Board to act on the project and contract  
21 within the specified period shall be deemed an approval thereof and the concerned  
22 Agency may proceed with the solicitation of proposals. Such approval, however,  
23 shall be valid only for a period of eighteen (18) months from the issuance of the  
24 approval unless the invitation to pre-qualify and to bid has been issued; provided,  
25 that the Board shall issue a written notice of approval or disapproval upon the  
26 written request for extension by the Agency, which must be filed within eighteen  
27 (18) months from the issuance of such approval.

1           **§ 820211. Applicability of Procurement Law.**

2           Notwithstanding any other provision of law, 5 GCA Chapter 5 (the Guam  
3 Procurement Law) shall not apply to projects under this Chapter.

4                           **Article 3**

5                           **Pre-qualification, Bids and Awards Committee**

6           § 820301. Composition.

7           § 820302. Responsibility of PBAC.

8           § 820303. Quorum.

9           **§ 820301. Composition.**

10          For each project approved under this Chapter, the Head of the Agency shall  
11 create a Pre-qualification, Bids and Awards Committee (PBAC). The Committee  
12 shall consist of seven (7) voting members: one (1) representative of the Agency,  
13 who may be the Head of the Agency, and who shall serve as Chairman; one (1)  
14 representative from the government knowledgeable with the technical aspects or  
15 requirements of the project, duly designated by the Head of Agency concerned on  
16 a project-to-project basis; one (1) representative from the Department of Public  
17 Works; two (2) representatives, who may be a government employees,  
18 knowledgeable in finance; one (1) representative from a duly recognized  
19 contractors association; and one (1) representative representing the project's end  
20 users. The Committee shall also include four (4) non-voting members who shall be  
21 observers: one (1) representative from the Office of Public Accountability; one (1)  
22 representative from the Guam Economic Development Authority; one (1)  
23 representative from the Attorney General Office; and one (1) representative from  
24 the General Services Agency. Observers will be notified at least two (2) calendar  
25 days before the following stages: pre-bid conference, opening of bids, evaluation  
26 of bids, contract award, and special meetings of the PBAC. The absence of

1 observers will not nullify the PBAC proceedings, provided that they have been  
2 duly invited in writing.

3 **§ 820302. Responsibility of PBAC.**

4 The PBAC herein created shall be responsible for all aspects of the pre-  
5 bidding and bidding process in the case of solicited proposals, and for the  
6 comparative bidding process (otherwise known as the “Swiss Challenge”), in the  
7 case of Unsolicited Proposals, including, among others, the preparation of the  
8 bidding/tender documents, publication of the invitation to pre-qualify and bid, pre-  
9 qualification of prospective bidders, conduct of pre-bid conferences and issuance  
10 of supplemental notices, interpretation of the rules regarding the bidding, the  
11 conduct of bidding, evaluation of bids, resolution of disputes between bidders, and  
12 recommendation for the acceptance of the bid and/or for the award of the project.

13 **§ 820303. Quorum.**

14 A quorum of the PBAC shall be composed of a simple majority of all voting  
15 members of the Committee. The Chairman shall vote only in case of a tie.

16 **Article 4**

17 **Bid/Tender Documents**

18 § 820401. Bid/Tender Documents.

19 § 820402. Instructions to Bidders.

20 § 820403. Minimum Designs, Performance Standards/Specification and  
21 Economic Parameters.

22 § 820404. Draft Contract.

23 **§ 820401. Bid/Tender Documents.**

24 The Agency concerned shall prepare the bid/tender documents, which shall  
25 include the following:

26 (a) “Instructions to Bidders”;

1 (b) “Minimum Design, Performance Standards/Specifications, and  
2 Economic Parameters” such as discount rate, and inflation factor, where  
3 applicable, among others;

4 (c) “Draft Contract” (as approved in accordance with § 820207) reflecting  
5 the contractual arrangement under which the project shall be undertaken, and the  
6 respective undertakings of the contracting parties, among others;

7 (d) “Bid Form” reflecting the required information to properly evaluate the  
8 bid proposal;

9 (e) forms of bid and performance securities;

10 (f) applicable rules and regulations; *and*

11 (g) other documents as may be deemed necessary by the Agency concerned.

12 **§ 820402. Instructions to Bidders.**

13 The instructions to bidders, which establish the rules of the bidding, shall be  
14 clear, comprehensive and fair to all bidders and shall, as far as necessary and  
15 practicable, include the following information:

16 (a) General description and objectives of the project, including a statement  
17 that the project shall be proposed under this Chapter;

18 (b) Contractual arrangement under which the project shall be undertaken;

19 (c) Bid submission procedures and requirements, which shall include  
20 information on the manner of bid submission, the number of copies of bid proposal  
21 to be submitted, where the bids are to be submitted, the deadline for the submission  
22 of bids, permissible mode of transmission of bid proposals, etc.;

23 (d) Investment Incentives and Government Undertakings under Article 13;

24 (e) Bid security and bid security validity period;

25 (f) Milestones;

26 (g) Method and criteria for the evaluation of the technical component of the  
27 bids;

1 (h) Parameters and criteria for evaluation of financial component of the bids  
2 which *shall* include the following criteria in the evaluation of the financial  
3 component of the bid for determining the most advantageous bid for the  
4 Government:

5 (i) Lowest proposed toll, fee, rental or charge at the start of project  
6 operation, if a pre-agreed parametric tariff adjustment formula is prescribed  
7 in the bid document;

8 (ii) Lowest present value of proposed tolls, fees, rentals and other  
9 charges for the period covered by the contract;

10 (iii) Lowest present value of government subsidy to be provided for  
11 the period covered by the contract;

12 (iv) Highest present value of proposed payments to Government, such  
13 as: concession fees, lease/ rental payments, fixed/guaranteed payments,  
14 and/or variable payments/percentage shares of revenue for the period  
15 covered by the contract; and

16 (v) Any other appropriate financial bid parameter as may be approved  
17 by the Board.

18 (i) Minimum amount of equity as prescribed by the Board.

19 (j) Formula and appropriate indices to be used in the adjustments of  
20 tolls/fees/rentals/charges, when applicable. Said formula shall take into account the  
21 reasonableness of the same to users of the project/facility under bidding;

22 (k) Requirements of concerned regulatory bodies, such as, but not limited to:  
23 the Department of Public Works; the Department of Land Management; and the  
24 Guam Environmental Protection Agency;

25 (l) Revenue sharing arrangements, if any; and

26 (m) Expected commissioning date.



1           **§820403. Minimum Designs, Performance Standards/Specification and**  
2 **Economic Parameters.**

3           Minimum design and performance standards/specifications shall be clearly  
4 defined and shall refer more to the desired quantity and quality of the outputs of  
5 the facility and should state that non-conformity with any of these minimum  
6 requirements shall render the bids as non-responsive. Likewise, for the purpose of  
7 evaluating bids, the following economic parameters, among others, shall be  
8 prescribed:

- 9           (a) Discount rate and inflation factor as approved by the Board;  
10          (b) Maximum period of project Construction;  
11          (c) Fixed term for project operation and collection of the proposed  
12 tolls/fees/rentals/charges, if applicable;  
13          (d) Formula and price indices to be used in the adjustments of  
14 tolls/fees/rentals/charges, if applicable;  
15          (e) Minimum period of repayment, if applicable;  
16          (f) Revenue Share of the implementing Agency, if applicable;  
17          (g) Minimum amount of equity as approved by the Board; and  
18          (h) Applicable rules and regulations.

19           **§ 820404. Draft Contract.**

20          The draft contract should clearly define the basic and legal relationship  
21 between the parties and their rights and responsibilities including the specific  
22 Government Undertakings to be provided by the Agency relative to the project.  
23 The draft contract shall be the draft approved by the Board and shall have the  
24 following mandatory terms or conditions:

- 25          (a) specific contractual arrangement, term, and scope of work;  
26          (b) project technical specifications and system features;

(c) implementation milestones including those for securing other approvals,  
project completion date;

(d) cost recovery scheme via proposed tolls, fees, rentals and charges, as the  
case may be;

(e) liquidated damages as contemplated under § 821214;

(f) performance and warranty bonds contemplated under §§ 821208 and  
821209;

(g) minimum insurance coverage;

(h) acceptance tests and procedures;

(i) warranty period and procedures (after transfer);

(j) grounds for and effects of contract termination including modes for  
settling disputes; and

(k) compliance with all other applicable laws, rules, and regulations.

## **Article 5**

### **Qualification of Bidders**

§ 820501. Who May Participate.

§ 820502. Publication of Invitation to Pre-Qualify and Bid.

§ 820503. Period to Prepare Pre-qualification Documents.

§ 820504. Pre-qualification Requirements.

§ 820505. Pre-qualified and Disqualified Proponents.

§ 820506. Issuance of Tender Documents.

§ 820507. Simultaneous Qualifications.

§ 820508. Acceptance of Criteria and Waiver of Rights to Enjoin Project.

#### **§ 820501. Who May Participate.**

Any individual, partnership, corporation or firm, whether local or foreign,  
including joint venture or consortia of local, foreign or local and foreign firms,

1 subject to the limits herein set, may participate or apply for pre- or simultaneous  
2 qualification for projects covered under the provisions of this Chapter.

3 **§ 820502. Publication of Invitation to Pre-Qualify and Bid.**

4 The Head of the Agency concerned shall, after obtaining approval for the  
5 project and the draft contract, forthwith cause to be published, once every week for  
6 three (3) consecutive weeks, in at least one (1) newspaper of general circulation  
7 and in at least one a notice inviting all prospective infrastructure or development  
8 Project Proponents to pre-qualify and bid for the projects so approved. Said  
9 invitation should also be posted continuously in the website of the Agency  
10 concerned during the period stated above. For projects costing at least \$10 million,  
11 the invitation shall also be published in at least one (1) international publication.  
12 Likewise, the Agency concerned shall issue official notification of the same to  
13 Project Proponents registered with them. The published Invitation to Pre-qualify  
14 and Bid shall contain information, among others, whether the Contractor to be  
15 employed to undertake the Construction work needs to be pre-identified for pre-  
16 qualification purposes or not.

17 **§ 820503. Period to Prepare Pre-qualification Documents.**

18 The Agency concerned shall allow prospective bidders at least forty-five  
19 (45) calendar days from the last date of publication of the Invitation to Pre-qualify  
20 and Bid to prepare their respective pre-qualification documents. In any event, the  
21 deadline for submission of pre-qualification statements shall be indicated in the  
22 published Invitation to Pre-qualify and Bid.

23 **§ 820504. Pre-qualification Requirements.**

24 To pre-qualify, a prospective Project Proponent must comply with the  
25 following requirements:

26 (a) Experience or Track Record. The prospective Project Proponent must  
27 possess adequate experience in terms of the following:

1           (1) Firm Experience. By itself or through the member-firms in case of  
2 a joint venture/consortium or through a Contractor(s) which the prospective  
3 Project Proponent may have engaged for the project, the prospective Project  
4 Proponent and/or its Contractor(s) must have successfully undertaken a  
5 project(s) similar or related to the subject infrastructure/development project  
6 to be bid. The individual firms and/or their Contractor(s) may individually  
7 specialize on any or several phases of the project(s). A joint  
8 venture/consortium proponent shall be evaluated based on the individual or  
9 collective experience of the member-firms of the joint venture/consortium  
10 and of the Contractor(s) that it has engaged for the project.

11           For purposes of the above, joint ventures/consortia shall submit as  
12 part of their pre-qualification statement a business plan which shall, among  
13 others, identify their members and their Contractor(s), if the experience of  
14 their Contractor(s) are necessary for the determination of the capacity of the  
15 joint venture/consortium to undertake the project and the description of the  
16 respective roles said members and Contractors, if necessary, shall play or  
17 undertake in the project. If undecided on a specific Contractor, the  
18 prospective Project Proponent may submit a short list of Contractors from  
19 among which it will select the final Contractor. Short listed Contractors are  
20 required to submit a statement indicating willingness to participate in the  
21 project and capacity to undertake the requirements of the project. The  
22 business plan shall disclose which of the members of the joint  
23 venture/consortium shall be the lead member the financing arm, and/or  
24 Facility Operator(s), and the Contractor(s) if required to be pre-identified as  
25 prescribed in the published Invitation to Pre-qualify and Bid or if the  
26 qualifications/experience of their Contractor(s) are necessary for the

determination of the capacity of the joint venture/ consortium to undertake the project.

(2) Key Personnel Experience. The key personnel of the prospective Project Proponent and/or its Contractor(s) must have sufficient experience in the relevant aspect of schemes similar or related to the subject project, as specified by the Agency.

(b) Financial Capability. The prospective Project Proponent must have adequate capability to sustain the financing requirements for the detailed engineering design, Construction and/or operation and maintenance phases of the project, as the case may be. The Agency concerned shall determine on a project-to-project basis, and before prequalification, the minimum amount of equity needed. For purposes of pre-qualification, this capability shall be measured in terms of proof of the ability of the prospective Project Proponent and/or the consortium to provide:

(1) Equity. A minimum amount of equity to the project measured in terms of the net worth of the company, or in the case of joint ventures or consortia, the combined net worth of members, *or* a set-aside deposit equivalent to the minimum equity required; *or*

(2) Debt. A letter testimonial from a commercial bank or any international bank attesting that the prospective Project Proponent and/or members of the consortium are banking with them, and that they are in good financial standing and/or are qualified to obtain credit accommodations from such banks to finance the project.

The Agency, through its PBAC shall complete the evaluation of the pre-qualification documents of the prospective Project Proponents within thirty (30) calendar days.

**§ 820505. Pre-qualified and Disqualified Proponents.**

1           The Agency, through its PBAC, shall, within a period of thirty (30) calendar  
2 days after the deadline set for the submission of the pre-qualification documents,  
3 determine which among prospective proponents are “pre-qualified” or  
4 “disqualified”. Accordingly, the PBAC shall duly inform the prospective Project  
5 Proponents who have been pre-qualified within seven (7) calendar days after  
6 approval thereof. Disqualified proponents shall likewise be informed stating  
7 therein the grounds for their disqualification within the same period. Those  
8 disqualified may appeal the disqualification within fifteen (15) working days from  
9 receipt of the notice of disqualification to the Head of Agency and upon filing of a  
10 non-refundable appeal fee in an amount equivalent to no less than one-half of one  
11 percent (0.5%) of the anticipated Project Cost as approved by the Board. The  
12 bidding process will be suspended while the appeal is being evaluated. The Head  
13 of Agency concerned or his authorized representative, as the case may be, shall act  
14 on the appeal within fifteen (15) working days from receipt of the appeal. The  
15 decision of the Head of Agency may be appealed to the Public Auditor which shall  
16 act on the appeal within thirty (30) working days. The decision of the Public  
17 Auditor on the appeal shall be final and immediately executory. The appeal fee  
18 shall be payable to the Treasurer of Guam and deposited in the General Fund.

19           **§ 820506. Issuance of Tender Documents.**

20           The Agency concerned shall make available the related bid documents to all  
21 pre-qualified bidders as soon as practicable to provide respective bidders ample  
22 time to examine the same and to prepare their respective bids prior to the date of  
23 opening of bids.

24           **§ 820507. Simultaneous Qualifications.**

25           In the exigency of service, the Agency Head may opt to do a simultaneous  
26 qualification instead of a pre-qualification of proponents. In case of simultaneous  
27 qualification, the publication of the invitation, following the requirements in §

820502, shall be for the submission of qualification requirements and bid proposals. The bidders shall be asked to submit their proposal in three envelopes; the first envelope - the qualification documents corresponding to the requirements so stated in § 820504 herein; the second envelope - the technical proposal; and the third envelope - the financial proposal. The requirements for bid submission are covered under Article 7 of this Chapter. The period for the preparation of the qualification documents shall be subsumed under the time allotted for bid preparation.

**§ 820508. Acceptance of Criteria and Waiver of Rights to Enjoin Project.**

All prospective bidders shall be required to submit, as part of their qualification documents, a notarized statement stipulating that the bidder (1) has accepted the qualification criteria established by the PBAC of the Agency concerned, and (2) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the concerned Agency or its PBAC to prevent or restrain the qualification process or any proceedings related thereto, the holding of a bidding or any proceedings related thereto, the negotiation of and award of the contract to a successful bidder, and the carrying out of the awarded contract. Such waiver shall, however, be without prejudice to the right of a disqualified or losing bidder to question the lawfulness of its disqualification or the rejection of its bid by appropriate administrative or judicial processes not involving the issuance of a writ of injunction or prohibition or restraining order.

**Article 6**

**Supplemental Notices and Pre-Bid Conferences**

§ 820601. Responsibility of Bidder.

§ 820602. Supplemental Notices.

§ 820603. Pre-bid Conference.

1           **§ 820601. Responsibility of Bidder.**

2           The prospective bidder shall be solely responsible for having taken all the  
3 necessary steps to carefully examine and acquaint himself with the requirements  
4 and terms and conditions of the bidding documents with respect to the cost,  
5 duration, and execution/operation of the project as it affects the preparation and  
6 submission of his bid. The Agency concerned shall not assume any responsibility  
7 regarding erroneous interpretations or conclusions by the prospective bidder out of  
8 data furnished or indicated in the bidding documents.

9           **§ 820602. Supplemental Notices.**

10          If a bidder is in doubt as to the meaning of any data or requirements or any  
11 part of the bidding documents, written request may be submitted to the Agency  
12 concerned for an interpretation of the same, allowing sufficient time for the  
13 concerned Agency to reply before the submission of his/her bid. Any substantive  
14 interpretation given by the concerned Agency shall be issued in the form of a  
15 Supplemental Notice, and furnished to all prospective bidders. The Agency  
16 concerned may also issue Supplemental Notices to all prospective bidders at any  
17 time for purposes of clarifying any provisions of the bidding documents provided  
18 that the same is issued within a reasonable period to allow all bidders to consider  
19 the same in the preparation of their bids. Receipt of all Supplemental Notices shall  
20 be duly acknowledged by each bidder prior to the submission of his bid and shall  
21 be so indicated in the bid.

22          **§ 820603. Pre-bid Conference.**

23          A pre-bid conference shall also be conducted by the concerned Agency at  
24 least thirty forty-five (45) calendar days before the deadline for the submission of  
25 bids to clarify any provisions, requirements and/or terms and conditions of the  
26 bidding documents and/or any other matter that the prospective bidders may raise.  
27 Nothing stated at the pre-bid conference shall modify any provisions or terms and



1 conditions of the bidding documents unless such is made as a written amendment  
2 thereto by the concerned Agency. Any amendments shall be issued by the Agency  
3 concerned to all bidders within a reasonable time to allow them to consider the  
4 same in the preparation of their bids and shall be duly acknowledged by each  
5 bidder prior to the submission of his bid and shall be so indicated in his bid. A  
6 summary of the pre-bid conference proceedings shall also be issued to all  
7 prospective bidders by the Agency concerned. Attendance to the pre-bid  
8 conference by prospective bidders shall not be mandatory.

## 9 **Article 7**

### 10 **Submission, Receipt and Opening of Bids.**

11 § 820701. Requirements for Bid Submission.

12 § 820702. Submission of Late Bids.

13 § 820703. Opening of the Envelope for Qualification of Bidder.

14 § 820704. Evaluation of Qualification Requirements.

15 § 820705. Rejection of Bids.

16 § 820706. Opening of the Envelope for the Technical Proposal.

17 § 820707. Opening of the Envelope for the Financial Proposal.

18 § 820708. Withdrawal and/or Modification of Bids.

19 § 820709. Confidentiality and public disclosure.

#### 20 **§ 820701. Requirements for Bid Submission.**

21 Bidders shall be required to submit their bids on or before the deadline  
22 stipulated in the "Instructions to Bidders". For pre-qualified bidders, their bids  
23 shall be submitted in two (2) separate sealed envelopes, the first being the technical  
24 proposal and the second the financial proposal. In case of simultaneous  
25 qualification, three (3) envelopes shall be submitted. The first envelope shall be the  
26 qualification requirements, the second the technical proposal and the third the  
27 financial proposal. All envelopes shall bear the name of the bidder and project to

1 be bid out in capital letters and addressed to the PBAC of the concerned Agency.  
2 They shall be marked "Do Not Open Before (date and time of opening of bids)".  
3 The envelopes shall be appropriately labeled as Qualification Requirements,  
4 Technical Proposal and Financial Proposal.

5 (a) The "Qualification Requirements" shall contain requirements as stated in  
6 § 820504.

7 (b) The "Technical Proposal" shall contain the following:

8 (1) Compliance statements with regard to the contractual arrangement  
9 and term and scope of work, project technical specifications, system  
10 features, implementation milestones including project completion date,  
11 acceptance tests and procedures, warranty period and procedures (after  
12 transfer), and other technical parameters as stated in the tender documents;

13 (2) Operational feasibility of the project, which shall indicate the  
14 proposed organization, methods and procedures for the operation and  
15 maintenance of the project under bidding;

16 (3) Technical soundness/preliminary engineering design, including  
17 proposed project timeline;

18 (4) Preliminary environmental assessment, which shall indicate the  
19 probable adverse effects of the project on the environment and the  
20 corresponding mitigating measures to be adopted;

21 (5) Project Cost;

22 (6) Bid security in the form of cash, certified check, manager's check,  
23 letter of credit, or bank draft/guarantee issued by a reputable bank, or a  
24 surety bond callable on demand issued by an entity duly registered and  
25 recognized by the Insurance Commissioner and acceptable to the Agency, or  
26 any combination thereof payable to the Agency in an amount equal to one  
27 and one-half percent (1.5%) of the total Project Cost (as indicated by the

1 prospective Project Proponent). The posting of the bid security is for the  
2 purpose of guaranteeing that the proposed contract awardee shall enter into  
3 contract with the concerned Agency within the time prescribed therefore.  
4 Bids and bid securities shall be valid for a period to be prescribed by the  
5 Agency concerned in the bidding documents but in no case beyond one  
6 hundred and eighty (180) calendar days from the date of opening of bids,  
7 subject to § 821106; and

8 (7) Other documents as may be required by the concerned Agency to  
9 support the bidder's technical proposal.

10 (c) The "Financial Proposal" shall contain the following, as the case may be:

11 (1) Compliance statements with regard to the financial parameters  
12 stated in the tender documents, which may include those on liquidated  
13 damages as contemplated under § 821214, performance and warranty bonds  
14 contemplated under §§ 821208 and 821209, insurance cover for the project  
15 including comprehensive general liability insurance, acceptance tests and  
16 procedures, and warranty period and procedures (after transfer);

17 (2) Proposed Project Cost, operation and maintenance cost, project  
18 financing scheme including the amount of equity to be infused and debt to  
19 be obtained for the project, sources of financing, and all other related costs;  
20 *and*

21 (3) Financial bid corresponding to the parameters contained in §  
22 820402 (h).

23 **§ 820702. Submission of Late Bids.**

24 Bids submitted after the deadline for submission prescribed in the  
25 "Instructions to Bidders" shall be considered late and shall be returned unopened.

26 **§ 820703. Opening of the Envelope for Qualification of Bidder.**

1 At the date and time stipulated in the “Instructions to Bidders”, the PBAC  
2 shall open the envelope and ascertain whether the same is complete in terms of the  
3 information required under § 820504. Such information shall be recorded at the  
4 time, including the names and addresses of required witnesses. All bidders or their  
5 representatives present at the opening of the first envelopes shall sign a register of  
6 the opening of the qualification envelope.

7 **§ 820704. Evaluation of Qualification Requirements.**

8 The qualification documents will first be evaluated prior to the opening of  
9 the technical proposal. The Agency shall inform bidders whether they are qualified  
10 or disqualified, and for the latter, the reasons for disqualification, within fifteen  
11 (15) calendar days. Only qualified bidders shall be allowed to participate in the bid  
12 evaluation. Disqualified bidders shall be informed of the grounds of  
13 disqualification and their technical and financial proposals returned unopened.

14 **§ 820705. Rejection of Bids.**

15 Incomplete information on any of the envelopes and/or non-compliance with  
16 the bid security requirements prescribed in § 82701(b)(6) shall be grounds for  
17 automatic rejection of bids.

18 **§ 820706. Opening of the Envelope for the Technical Proposal.**

19 At the date and time of bid opening, as stipulated in the “Instructions to  
20 Bidders”, the PBAC shall open only the technical proposal and ascertain whether  
21 the same is complete in terms of the data/information required under § 820701 (b)  
22 and whether the same is accompanied by the required bid security in the prescribed  
23 form, amount and period of validity. Such information shall be recorded at the  
24 time, including the names and addresses of required witnesses. All bidders or their  
25 representatives present at the opening of the first envelopes shall sign a register of  
26 the bid opening.

27 **§ 820707. Opening of the Envelope for the Financial Proposal.**

1           Only those bidders whose technical proposal passed the evaluation criteria  
2 as prescribed under § 820801 hereof shall have their financial proposal opened for  
3 further evaluation. Those who failed the evaluation of the technical proposal shall  
4 not be considered further, and the PBAC shall return their financial proposals  
5 unopened together with the reasons for their disqualification from the bidding.  
6 Once the bidders who have qualified for the evaluation of the financial proposal  
7 have been determined, the PBAC shall notify said bidders of the date, time and  
8 place of the opening of the envelopes for the financial proposal. The opening  
9 thereof shall follow the same procedures prescribed for the opening of the previous  
10 envelopes.

11           **§ 820708. Withdrawal and/or Modification of Bids.**

12           Withdrawal and/or modification of bids may be allowed upon written notice  
13 by the bidder concerned to the Agency prior to the time and date set for the  
14 opening of bids (opening of first envelopes) as specified in the “Instructions to  
15 Bidders”. No bids shall be modified or withdrawn after the time prescribed to open  
16 bids. Bid modifications received after said period shall be considered late and will  
17 be returned unopened. Withdrawal of bids after the bid opening date shall cause  
18 the forfeiture of the bidder’s bid security.

19           **§ 820709. Confidentiality and public disclosure.**

20           (a) A bidder may identify those portions of a bid or other submission that the  
21 bidder considers to be trade secrets or confidential or proprietary information. In  
22 order for confidential and proprietary information and trade secrets to be exempt  
23 from disclosure, the bidder shall do all of the following:

24                   (1) Invoke such exclusion upon submission of the information or other  
25 materials for which protection is sought;

26                   (2) Identify the data or other materials for which protection is sought  
27 with conspicuous labeling;

1 (3) State the reasons why protection is necessary; and

2 (4) Fully comply with any applicable provisions of law with respect to  
3 information the bidder contends should be exempt from disclosure.

4 (b) Notwithstanding any other provision of law, in order to properly balance  
5 the need to maximize competition under this Chapter and create a transparent  
6 bidding process, bids shall not be subject to release or disclosure by the Agency  
7 until the award of the contract and the conclusion of any protest or other challenge  
8 to such award, absent an administrative or judicial order requiring such release or  
9 disclosure.

## 10 **Article 8**

### 11 **Evaluation of Bids**

12 § 820801. The First Envelope Evaluation.

13 § 820802. The Second Envelope Evaluation.

14 § 820803. Right to Reject All Bids.

#### 15 **§ 820801. The First Envelope Evaluation.**

16 The evaluation of bids shall be undertaken in two (2) stages, in accordance  
17 with the procedures described below.

18 The first envelope evaluation shall involve the assessment of the technical,  
19 operational, environmental, and financing viability of the proposal as contained in  
20 the bidders' first envelopes *vis-a-vis* the prescribed requirements and  
21 criteria/minimum standards and basic parameters prescribed in the bidding  
22 documents. Only those bids that have been determined to have positively passed  
23 the first stage of evaluation shall be qualified and considered for the second stage  
24 of evaluation.

25 The Agency concerned shall evaluate the technical proposals of the bidder in  
26 accordance with the following criteria:

1 (a) Technical soundness (preliminary engineering design) - The basic  
2 engineering design of the project should conform to the minimum design and  
3 performance standards and specifications set by the Agency concerned as  
4 prescribed in the bidding documents. The engineering surveys, plans and estimates  
5 should be undertaken within +/- 20% of the final quantities. The Construction  
6 methods and schedules should also be presented and shown to be feasible or  
7 “doable”.

8 (b) Operational feasibility - The proposed organization, methods, and  
9 procedures for operating and maintaining the completed facility must be well  
10 defined, should conform to the prescribed performance standards, and should be  
11 shown to be workable. Where feasible, it should provide for the transfer of  
12 technology used in every phase of the project.

13 (c) Environmental Standards - The proposed design and the technology of  
14 the project to be used must be in accordance with the environmental standards set  
15 forth by the Guam Environmental Protection Agency, as indicated in the bid  
16 documents. Any adverse effects on the environment as a consequence of the  
17 project as proposed by the prospective Project Proponent must be properly  
18 identified, including the corresponding corrective/mitigating measures to be  
19 adopted.

20 (d) Project Financing - The proposed financing plan should positively show  
21 that the same could adequately meet the Construction cost as well as the operating  
22 and maintenance costs requirements of the project. The Agency concerned shall  
23 assess the financing proposals of the bidders if the same matches and adequately  
24 meets the cost requirements of the project under bidding.

25 (e) Enhancements - Other terms which the prospective Project Proponent  
26 may offer to the Government to make the proposals more attractive, such as, but  
27 not limited to provisions allowing the Government to share in revenues and less

1 government guarantees or reduction in the level of Government Undertakings,  
2 Investment Incentives, or support.

3 The PBAC of the Agency concerned shall complete the evaluation of the  
4 technical proposal within thirty (30) calendar days from the date the bids are  
5 opened.

6 **§ 820802. The Second Envelope Evaluation.**

7 The second envelope evaluation shall involve the assessment and  
8 comparison of the financial proposals of the bidders, based on the parameters  
9 stated in § 820402 (h). The second stage evaluation shall be completed by the  
10 PBAC of the concerned Agency within fifteen (15) calendar days from the date the  
11 first stage evaluation shall have been completed.

12 **§ 820803. Right to Reject All Bids.**

13 The Agency concerned reserves the right to reject any or all bids, waive any  
14 minor defects therein and accept the offer it deems most advantageous to the  
15 Government.

16 **Article 9**

17 **Negotiated Contract**

18 § 820901. Direct Negotiation.

19 § 820902. Unsolicited Proposals.

20 § 820903. Conditions for Negotiated Projects.

21 § 820904. Financial and Technical Evaluation of Negotiated Contracts.

22 **§ 820901. Direct Negotiation.**

23 Direct negotiation shall be resorted to when there is *only* one complying  
24 bidder left as defined hereunder:

25 (a) If, after advertisement, only one prospective Project Proponent  
26 applies for pre-qualification and it meets the pre-qualification requirements,



1 after which, it is required to submit a bid/proposal which is subsequently  
2 found by the Agency to be complying;

3 (b) If, after advertisement, more than one prospective Project  
4 Proponent applied for pre-qualification but only one meets the pre-  
5 qualification requirements, after which it submits a bid proposal that is  
6 found by the Agency to be complying;

7 (c) If, after pre-qualification of more than one prospective Project  
8 Proponent, only one submits a bid which is found by the Agency to be  
9 complying; *or*

10 (d) If, after pre-qualification, more than one prospective Project  
11 Proponent submit bids but only one is found by the Agency to be  
12 complying;

13 In such events, however, any disqualified bidder may appeal the  
14 disqualification within fifteen (15) working days from receipt of the notice of  
15 disqualification to the Head of Agency and upon filing of a non-refundable appeal  
16 fee in an amount equivalent to no less than one-half of one percent (0.5%) of the  
17 Project Cost. The negotiations will be suspended while the appeal is being  
18 evaluated. The Head of Agency concerned or his authorized representative, as the  
19 case may be, shall act on the appeal within fifteen (15) working days from receipt  
20 of the appeal. The decision of the Head of Agency may be appealed to the Public  
21 Auditor who shall act on the appeal within thirty (30) working days. The decision  
22 of the Public Auditor shall be final and immediately executory. The appeal fee  
23 shall be payable to the Treasurer of Guam and deposited in the General Fund.

24 **§ 820902. Unsolicited Proposals.**

25 Unsolicited Proposals may be accepted by an Agency on a negotiated basis,  
26 subject to the conditions provided under Article 10.

27 **§ 820903. Conditions for Negotiated Projects.**

1 In addition to the above requisites for negotiated projects, the concerned  
2 Agency must prescribe the Reasonable Rate of Return and obtain approval by the  
3 Board prior to the negotiation in the case of solicited proposals as referred to under  
4 § 820901 of this Chapter. The scope of negotiation, in the case of solicited  
5 proposals referred to under § 820901 of this Chapter, shall be limited to the  
6 financial proposal of the proponent and compliance with the approved Reasonable  
7 Rate of Return.

8 **§ 820904. Financial and Technical Evaluation of Negotiated Contracts.**

9 In so far as applicable, the same rules provided for the evaluation of the  
10 technical and financial aspects of bid proposals shall be applied in the evaluation of  
11 Negotiated Contracts authorized in this Chapter.

12 **Article 10**

13 **Unsolicited Proposals**

14 § 821001. Requisites for Unsolicited Proposals.

15 § 821002. New Technology.

16 § 821003. Projects Ineligible for Unsolicited Proposals.

17 § 821004. Investment Incentives and Government Undertakings for  
18 Unsolicited Proposals.

19 § 821005. Submission of a Complete Proposal.

20 § 821006. Treatment of more than one proposal for the same or similar  
21 project.

22 § 821007. Evaluation of Unsolicited Proposals.

23 § 821008. Negotiation with the Original Proponent.

24 § 821009. Approval of Unsolicited Projects/Contracts by the Board.

25 § 821010. Tender Documents.

26 § 821011. Invitation for Comparative Proposals.

27 § 821012. Posting of Bid Bond by Original Proponent.

1       § 821013. Qualification of Comparative Proponents.

2       § 821014. Submission of Proposal.

3       § 821015. Evaluation of Comparative Proposals.

4       § 821016. Disclosure of the Price Proposal.

5       § 821017. Failure of a winning comparative proponent to enter into contract.

6       **§ 821001. Requisites for Unsolicited Proposals.**

7       Any Agency may accept Unsolicited Proposals on a negotiated basis  
8 provided that all the following conditions are met:

9           (a) the project involves a new concept or technology and/or is not part  
10 of the List of Priority Projects;

11          (b) no Direct Government Guarantee, subsidy or equity is required;  
12 *and*

13          (c) the Agency concerned has invited by publication, for three (3)  
14 consecutive weeks, in a newspaper of general circulation, comparative or  
15 competitive proposals and no other proposal is received for a period of sixty  
16 (60) working days. If no comparative or competitive proposal or no  
17 complying bid is received by the Agency, the original proponent shall  
18 immediately be awarded the contract. In the event that a comparative  
19 proponent submits a price proposal better than that submitted by the original  
20 proponent, the latter shall have the right to match such price proposal within  
21 thirty (30) working days from receipt of a notification from the Agency of  
22 the result of the comparative or competitive bid. Should the original  
23 proponent fail to match the price proposal of the comparative proponent  
24 within the specified period, the contract shall be awarded to the comparative  
25 proponent. On the other hand, if the original proponent matches the price  
26 proposal of the comparative proponent within the specified period, the  
27 project shall immediately be awarded to the original proponent.

1           **§ 821002. New Technology.**

2           The Project Proponent proposing a project involving a new concept or  
3 technology shall incorporate in its proposal information regarding said new  
4 concept or technology which it should have directly, or through any of its key  
5 members, successfully implemented at a scale similar to the proposed project. The  
6 information disclosed must be in sufficient detail so as to allow the Agency to  
7 properly evaluate the new concept or technology. Additionally, the new technology  
8 must possess at least one of the following attributes:

9           (a) A recognized process, design, methodology or engineering concept  
10 which has demonstrated its ability to significantly reduce implementation of  
11 Construction costs, accelerate project execution, improve safety, enhance  
12 project performance, extend economic life, reduce costs of facility  
13 maintenance and operations, or reduce negative environmental impact or  
14 social/economic disturbances or disruptions either during the project  
15 implementation/Construction phase or the operation phase;

16           (b) A process for which the Project Proponent or any member of the  
17 proponent joint venture/consortium possesses exclusive rights, either world-  
18 wide or regionally; or

19           (c) A design, methodology or engineering concept for which the  
20 proponent or a member of the proponent consortium or association possesses  
21 intellectual property rights.

22           **§ 821003. Projects Ineligible for Unsolicited Proposals.**

23           Projects included in the “List of Priority Projects”, as defined under §  
24 820203, shall not be eligible to be accepted as Unsolicited Proposals, unless  
25 involving a new concept or technology. In addition, any component of an approved  
26 solicited project shall not be eligible for any Unsolicited Proposal.

1           **§ 821004. Investment Incentives and Government Undertakings for**  
2 **Unsolicited Proposals.**

3           With prior approval from *I Liheslatura*, the Government may grant  
4 Investment Incentives and Government Undertakings to Unsolicited Proposals as  
5 enumerated under Article 13, except for Direct Government Guarantees, direct  
6 government subsidy or government equity. The sale, lease, or grant of usufruct,  
7 with consideration of government assets, including among others, right-of-way, to  
8 Project Proponents shall not be considered as direct subsidy or equity.

9           **§ 821005. Submission of a Complete Proposal.**

10          For a proposal to be considered by the Agency, the proponent has to submit  
11 a complete proposal, which shall include a feasibility study, company profile, and  
12 the draft contract adverted to in § 820404 above. The Agency shall acknowledge  
13 receipt of the proposal and advise the proponent whether the proposal is complete  
14 or incomplete within seven (7) calendar days from submission thereof. If  
15 incomplete, it shall indicate what information is lacking or necessary.

16          **§ 821006. Treatment of more than one proposal for the same or similar**  
17 **project.**

18          In the case where the Agency receives more than one Unsolicited Proposal  
19 involving the same or similar project, the Agency may reject all such proposals and  
20 instead, bid out the project as a solicited proposal. Otherwise, the Agency shall  
21 evaluate the proposals using a first in time approach. Under this approach, the first  
22 complete proposal is evaluated and decided upon. The second complete proposal  
23 will only be entertained if the first one is rejected. Otherwise, the second proposal  
24 will be considered only if there is a failure in the negotiation of the first proposal or  
25 during the “invitation for comparative proposals” as defined under § 821011.

26          **§ 821007. Evaluation of Unsolicited Proposals.**

1       The Agency is tasked with the initial evaluation of the proposal. The Agency  
2 shall: (1) appraise the merits of the project; (2) qualify the proponent based on the  
3 provisions of Article 5 hereof; (3) assess the appropriateness of the contractual  
4 arrangement and reasonableness of the risk allocation; and (4) inform the Board of  
5 its receipt of an Unsolicited Proposal. The Agency is given thirty (30) calendar  
6 days to evaluate the proposal from the date of submission of the complete  
7 proposal. Within this thirty (30)-day period, the Agency, shall advise the proponent  
8 in writing whether it accepts or rejects the proposal. Acceptance means  
9 commitment of the Agency to pursue the project and recognition of the proponent  
10 as “original proponent” subject to § 821008. At this point, the Agency will no  
11 longer entertain other similar proposals unless the parties are unable to agree  
12 during the period for negotiations specified in § 821008 below, or the original  
13 proponent is unable to comply with the parameters set by the Board, or until the  
14 solicitation of comparative proposals has been completed. The Agency shall  
15 inform the Board of its decision to accept or to reject the Unsolicited Proposal. In  
16 case of acceptance, the Agency shall submit to the Board all pertinent  
17 documentation.

18       **§ 821008. Negotiation with the Original Proponent.**

19       The Agency shall indicate in its letter of acceptance, as referred to under §  
20 821007, the confirmation of the proponent as the “original proponent” and the  
21 mechanics of the negotiation including the commencement date and the authorized  
22 representative(s) of the Agency. Negotiations shall focus on the project scope,  
23 implementation arrangements, and the terms and conditions of the draft contract  
24 for the Unsolicited Proposal, among others. The Agency and the original proponent  
25 shall conclude negotiations within a period of ninety (90) calendar days from  
26 receipt by the proponent of written notice from the Agency to commence  
27 negotiation. The Agency and the original proponent shall negotiate in good faith

1 and endeavor to complete the negotiation within the ninety (90)-day period;  
2 provided, that should there be irreconcilable differences during the negotiation  
3 period, the Agency shall have the option to reject the proposal by advising the  
4 original proponent in writing stating the grounds for rejection and thereafter may  
5 accept a new Unsolicited Proposal, or bid out the project as a solicited proposal, or  
6 undertake the project on its own. The Agency shall, at the end of the ninety (90)-  
7 day negotiation period, submit a report to the Board of the result of its negotiation  
8 with the original proponent.

9 **§ 821009. Approval of Unsolicited Projects/Contracts by the Board.**

10 The Head of Agency shall secure approval of the unsolicited project and  
11 draft contract inclusive of the Reasonable Rate of Return from the Board after  
12 negotiation with the original proponent. An Unsolicited Proposal shall be  
13 submitted to the Board only upon official endorsements by the Head of the  
14 concerned Agency stating that the project meets the requisites for accepting  
15 Unsolicited Proposals as specified in § 821001 (a) and (b) above. The Agency shall  
16 also submit to the Board its evaluation/appraisal of the merits of the project as  
17 justification for accepting the project including providing the same of the  
18 acceptance letter to the original proponent as part of the documentation for the  
19 project.

20 The approval by the Board of the unsolicited project and contract under this  
21 section shall be valid only for a period of eighteen (18) months from the issuance  
22 of the approval unless the invitation for comparative proposals has been issued;  
23 provided, that the Board shall issue a written notice of approval or disapproval  
24 upon the written request for extension by the Agency, which must be filed within  
25 eighteen (18) months from the issuance of such approval.

26 The original proponent shall, within forty-five (45) calendar days from  
27 receipt of Notice of Approval from the Board, notify the Agency in writing of its

1 acceptance of all the terms and conditions of the approval of the Board. Failure by  
2 the original proponent to submit such acceptance in writing shall be deemed a  
3 rejection by the Agency of the Unsolicited Proposal. The Agency shall thereafter  
4 notify the original proponent of said rejection.

5 The “original proponent” status shall expire at the end of the validity period  
6 of the approval by the Board of the unsolicited project and contract.

7 **§ 821010. Tender Documents.**

8 The qualification and tender documents shall be prepared along the lines  
9 specified under Articles 4 and 5 hereof. The contract as approved by the Board  
10 which shall be part of the tender documents will be considered final and non-  
11 negotiable by the comparative proponents. Proprietary information shall, however,  
12 be respected, protected and treated with utmost confidentiality. As such, it shall not  
13 form part of the bidding/tender and related documents.

14 **§ 821011. Invitation for Comparative Proposals.**

15 The Agency PBAC shall publish the invitation for comparative proposals  
16 after receipt of the notification from the Original Proponent that the latter accepts  
17 all the terms and conditions indicated in the Notice of Approval, in accordance  
18 with § 821009. The invitation for comparative or competitive proposals should be  
19 published at least once every week for three (3) consecutive weeks in at least one  
20 (1) newspaper of general circulation. Said invitation should also be posted  
21 continuously in the website of the Agency concerned during the period stated  
22 above. For projects costing at least \$10 million, the invitation may also be  
23 published at least once (1) in at least one (1) international publication.

24 It shall indicate the time, which should not be earlier than the last date of  
25 publication, and place where tender/bidding documents could be obtained. It shall  
26 likewise explicitly specify a time of sixty (60) working days reckoned from the  
27 date of issuance of the tender/bidding documents upon which proposals shall be



1 received. Beyond said deadline, no proposals shall be accepted. A pre-bid  
2 conference shall be conducted ten (10) working days after the issuance of the  
3 tender/bidding documents.

4 **§ 821012. Posting of Bid Bond by Original Proponent.**

5 The original proponent shall be required at the date of the first day of the  
6 publication of the “invitation for comparative proposals” to submit a bid bond  
7 equal to the amount and in the form required of the comparative proponents.

8 **§ 821013. Qualification of Comparative Proponents.**

9 The evaluation criteria used for qualifying the original proponent should be  
10 the same criteria used for the comparative proponents.

11 **§ 821014. Submission of Proposal.**

12 The bidders are required to submit the proposal in three envelopes at the  
13 time and place specified in the Tender Documents. The first envelope shall contain  
14 the qualification documents, the second envelope the technical proposal as required  
15 under § 820701 (b), and the third envelope the financial proposal as required under  
16 § 820701 (c). Proposals shall be treated in the same manner as bids provided for  
17 under § 820709, for the purpose of protecting confidential and proprietary  
18 information.

19 **§ 821015. Evaluation of Comparative Proposals.**

20 Proposals shall be evaluated in three stages: Stage 1, qualification  
21 documents; Stage 2, the technical proposal; and Stage 3, the financial proposal.  
22 Only those bids which pass the first stage will be considered for the second stage  
23 and similarly, only those which pass the second stage will be considered for the  
24 third stage evaluation. The Agency will return to the disqualified bidders the  
25 remaining envelopes unopened, together with a letter explaining why they were  
26 disqualified. The criteria for evaluation will follow Article 5 for the qualification of

1 bidders and Article 8 for the technical and financial proposals. The time frames  
2 under Articles 5 and 8 shall likewise be followed.

3 **§ 821016. Disclosure of the Price Proposal.**

4 The decision to disclose the price or financial proposal of the original  
5 proponent in the Tender Documents shall be mutually agreed upon between the  
6 Agency and the original proponent. If the original proponent's price proposal was  
7 not disclosed in the Tender Documents, it should be revealed upon the opening of  
8 the financial proposals of the comparative proponents.

9 **§ 821017. Failure of a winning comparative proponent to enter into**  
10 **contract.**

11 In the event of refusal, inability or failure of the winning comparative  
12 proponent to enter into contract with the Agency within the specified time in the  
13 Tender Documents, its bid security shall be forfeited in favor of the Agency. In  
14 such an event, the Agency concerned shall consider for award the bidder with the  
15 next-ranked complying comparative bid which is better than the offer of the  
16 original proponent. The original proponent shall again be given the right to match  
17 the comparative proponent's bid. If no other comparative bid is determined to be  
18 better than the offer of the original proponent, the project shall immediately be  
19 awarded to the original proponent.

20 **Article 11**

21 **Award and Signing of Contract**

22 § 821101. Recommendation to Award.

23 § 821102. Decision to Award.

24 § 821103. Notice of Award.

25 § 821104. Withdrawal/Substitution of a Member.

26 § 821105. Validity of Bids/Return of Bid Security.

27 § 821106. Extension of Validity of Bids.

1           § 821107. Failure of Bidding.

2           **§ 821101. Recommendation to Award.**

3           Within seven (7) calendar days from the date the financial evaluation shall  
4 have been completed, the Agency PBAC will submit to the Head of Agency a  
5 recommendation to award. The PBAC will prepare and submit a detailed  
6 evaluation/assessment report on its decision regarding the evaluation of the bids  
7 and explain in clear terms the basis of its recommendations.

8           **§ 821102. Decision to Award.**

9           Within seven (7) calendar days from the submission by PBAC of the  
10 recommendation to award, the Head of Agency shall decide on the award. The  
11 approval shall be manifested by signing and issuing the “Notice of Award” to the  
12 winning Project Proponent within seven (7) calendar days from approval thereof.  
13 All unsuccessful bidders shall be informed in writing of the decision of the Agency  
14 to award the project to the winning Project Proponent. Such decision shall be made  
15 available to the public when requested.

16          **§ 821103. Notice of Award.**

17          The “Notice of Award”, which is issued by the Head of Agency, shall  
18 indicate, among others, that the winning Project Proponent must submit within  
19 thirty (30) calendar days from official receipt of the “Notice of Award” the  
20 following:

21               (a) prescribed performance security;

22               (b) proof of commitment of the required equity contribution, as  
23 specified by the Agency:

24                       (1) in the case where the Project Proponent is a corporation -  
25 e.g., treasurer’s affidavit attesting to actual paid-up capital,  
26 subscription agreement(s) between a shareholder(s) of the Project  
27 Proponent and the Project Proponent itself covering said equity

1 contribution, or shareholders agreement between and amongst two (2)  
2 or more shareholders of the Project Proponent undertaking to  
3 contribute/subscribe the required equity contribution; or

4 (2) in the case of a joint venture/consortium - an undertaking of  
5 the members thereof to infuse the required equity contribution to the  
6 joint venture/consortium.

7 (c) proof of firm commitments from reputable financial institution to  
8 provide sufficient credit lines to cover the total estimated cost of the project;

9 (d) in the case of a joint venture/consortium, the agreement indicating  
10 that the members are jointly and severally liable for the obligations of the  
11 Project Proponent under the contract; or

12 (e) such other reasonable conditions imposed by the Agency.

13 Failure to submit the requirements within the prescribed thirty (30)-calendar  
14 day period will result in confiscation of the bid security. Within seven (7)-calendar  
15 days upon receipt of the foregoing requirements for award, the Head of Agency  
16 shall determine and notify the winning bidder of its compliance of all the  
17 conditions stated in the said notice.

18 **§ 821104. Withdrawal/Substitution of a Member.**

19 Subject to the approval of the Agency, any member of the joint venture or  
20 consortium, or its pre-qualified Contractors may withdraw as such prior to award  
21 of the project or any time during the contract term, provided that, the remaining  
22 members or shareholders with or without the substitute are still legally, technically,  
23 and financially capable of successfully carrying out the implementation/operation  
24 of the project or that a suitable and acceptable substitute with equal or better  
25 qualifications is replacing such withdrawing member or shareholder subject to the  
26 provision in § 821103 (d). A withdrawal made in violation of this Section shall be

1 a ground for disqualification or cancellation of the contract, as the case may be,  
2 and forfeiture of the proponent's bid or performance security.

3 **§ 821105. Validity of Bids/Return of Bid Security.**

4 The execution of the contract shall be made within the period of the validity  
5 of the bid security. The required bid security shall be valid for a reasonable period  
6 but in no case beyond one hundred eighty (180) calendar days following the  
7 opening of the bids. Bid securities shall be returned to the unsuccessful bidders as  
8 soon as the contract is signed by the winning bidder.

9 **§ 821106. Extension of Validity of Bids.**

10 When an extension of validity of bids is considered necessary, those who  
11 submitted bids shall be requested in writing to extend the validity of their bids  
12 before the expiration date. However, bidders shall not be allowed to modify or  
13 revise the price or other substance of their bids. Bidders shall have the right to  
14 refuse to grant such an extension without forfeiting their bid security, but those  
15 who are willing to extend the validity of their bids should be required to provide a  
16 suitable extension of bid security.

17 **§ 821107. Failure of Bidding.**

18 In the case of solicited bids, when no complying bids are received or in case  
19 of failure to execute the contract with a qualified and contracting bidder due to the  
20 refusal of the latter, the bidding shall be declared a failure. In such cases, the  
21 project may be subjected to a re-bidding.

22 **Article 12**

23 **Contract Approval and Implementation**

24 § 821201. Execution/Approval of the Contract.

25 § 821202. Other Approvals for Contract.

26 § 821203. Grant of Franchise.

27 § 821204. Contract Effectivity.

- 1       § 821205. Notice to Commence.
- 2       § 821206. Preparation and Approval of Detailed Engineering Design.
- 3       § 821207. Project Construction.
- 4       § 821208. Performance Guarantee for Construction Works.
- 5       § 821209. Performance Guarantee for Operation.
- 6       § 821210. Review of Project Construction, Operation, and Maintenance.
- 7       § 821211. Contract Variation.
- 8       § 821212. Milestones.
- 9       § 821213. Release of Performance Guarantee/Operating Security.
- 10      § 821214. Liquidated Damages.
- 11      § 821215. Repair and Maintenance Costs.
- 12      § 821216. Repayment Schemes.
- 13      § 821217. Revenue Sharing.
- 14      § 821218. Adjustments of tolls/fees/rental/charges.
- 15      § 821219. Audit of collections.
- 16      § 821220. Contract termination/rescission.
- 17      § 821221. Venue for Litigation.
- 18      § 821222. Transfer of and Warranty Over the Facility.
- 19      **§ 821201. Execution/Approval of the Contract.**

20       The Agency and Project Proponent shall execute the draft contract as  
21 approved by the Board. The authorized signatory(ies) of the winning bidder and  
22 the Agency shall execute and sign the contract for the project, within seven (7)  
23 calendar days from receipt by the winning bidder of the notice from the Agency  
24 that all conditions stated in the Notice of Award have been complied with. The  
25 contract is the law between the parties and the parties shall perform their respective  
26 prestations, obligations, and undertakings thereunder with utmost good faith with  
27 the end in view of attaining the objective hereof. An original signed copy of the

1 contract shall be submitted to the Board within seven (7) calendar days after  
2 signing thereof.

3 In the event of refusal, inability or failure of the winning bidder to enter into  
4 contract with the Government within the time provided therefor, the Agency  
5 concerned shall forfeit its bid security. In such an event, the Agency concerned  
6 shall consider the bidder with the next ranked complying bid. If the same shall  
7 likewise refuse or fail to enter into contract with the Government, its bid security  
8 shall likewise be forfeited and the Agency concerned shall consider the next  
9 ranked complying bid, and so on until a contract shall have been entered into. In  
10 the event that the concerned Agency is unable to execute the contract with any of  
11 the complying bidders, a failure of bidding will be declared and the project may be  
12 subjected to a re-bidding.

#### 13 **§ 821202. Other Approvals for Contract.**

14 The Project Proponent shall, as may be required under the existing laws,  
15 rules and regulations secure any and all other approvals for the contract or the  
16 implementation thereof from government regulatory agencies or bodies. This  
17 includes securing the necessary and appropriate clearances from the Guam  
18 Environmental Protection Agency, the Department of Public Works, and the  
19 Department of Land Management. The Agency may provide the necessary  
20 assistance to the Project Proponent in securing all the required clearances. The  
21 contract shall provide milestones in securing such other approvals required for the  
22 implementation of the contract.

#### 23 **§ 821203. Grant of Franchise.**

24 Subject to the provisions of existing laws, once a contract involving Public  
25 Utility Projects is executed by the Project Proponent and the Agency, a  
26 presumption arises that the public interest will be served by the implementation of  
27 the project covered thereby, and immediately upon application by the Project

1 Proponent, the Public Utilities Commission shall grant in favor of the Project  
2 Proponent a Franchise on a provisional basis to operate the facility and collect the  
3 tolls, fees, rentals, and other charges stipulated under the contract, and after  
4 hearing and determination that all other requirements are complied with, make  
5 such Franchise permanent and for a fixed term.

6 **§ 821204. Contract Effectivity.**

7 The contract shall be effective upon signing thereof by the Head of Agency  
8 and unless another date is stipulated therein.

9 **§ 821205. Notice of Commence.**

10 The concerned Agency shall issue the “Notice to Commence  
11 Implementation” of the project to the proponent not later than seven (7) calendar  
12 days from the date of the approval/signing of the contract by the Head of Agency.

13 **§ 821206. Preparation and Approval of Detailed Engineering Design.**

14 The Project Proponent shall be responsible for the preparation of the detailed  
15 engineering designs and plans based on the prescribed minimum design and  
16 performance standards and specifications and shall submit the same to the Agency  
17 concerned.

18 The Agency concerned shall review the detailed engineering designs and  
19 plans prepared by the Project Proponent in terms of its compliance with the  
20 prescribed standards and specifications, and if found acceptable, shall approve the  
21 same for incorporation in the contract to be signed by the Project Proponent and  
22 the Agency. This approval by the Agency concerned notwithstanding, the Project  
23 Proponent shall be solely responsible for the integrity of its detailed engineering  
24 designs and plans. The approval thereof by the Agency concerned does not  
25 diminish this responsibility, nor does it transfer any part of such responsibility to  
26 the Agency concerned.

27 **§ 821207. Project Construction.**



1 The Project Proponent shall build the facility in accordance with the design  
2 and performance standards and specifications prescribed in the approved detailed  
3 engineering design. Hiring of labor shall be subject to existing labor laws, rules  
4 and regulations. This includes 5 GCA Chapter 5.

5 **§ 821208. Performance Guarantee for Construction Works.**

6 To guarantee the faithful performance by the Project Proponent of its  
7 obligations under the contract, including the prosecution of the Construction works  
8 related to the project, the Project Proponent shall post a performance guarantee in  
9 favor of the Agency concerned, within the period and in the form and amount  
10 stipulated in the Notice of Award. The performance security may be in the form of  
11 cash, bank draft or guarantee confirmed by a bank, letter of credit issued by a  
12 reputable bank, surety bond callable on demand issued by surety or insurance  
13 companies duly accredited by the Office of the Insurance Commissioner, or a  
14 combination thereof, in accordance with the following schedules:

15 (a) Cash, irrevocable letter of credit, bank draft - a minimum of two  
16 percent (2%) of the total Project Cost.

17 (b) Bank Guarantee - a minimum of five percent (5%) of the total  
18 Project Cost.

19 (c) Surety Bond - a minimum of ten percent (10%) of the total Project  
20 Cost.

21 The performance guarantee shall be valid up to acceptance by the Agency of  
22 the facility.

23 **§ 821209. Performance Guarantee for Operation.**

24 For projects where the proponent or other third parties shall operate the  
25 project, the Agency shall determine whether the Project Proponent will post an  
26 operating security, simultaneously with the acceptance of the facility and the  
27 release of the performance security. The operating security will be issued to

1 guarantee the proper operation of the project in accordance with the operating  
2 parameters and specifications under the contract. The Agency shall determine the  
3 amount but the form shall be in accordance with the preceding Section. This  
4 operating security shall be valid ninety (90) calendar days after the turn-over of the  
5 facility, as contemplated in § 821222, or as may be provided in the contract  
6 whichever is longer.

7 **§ 821210. Review of Project Construction, Operation, and Maintenance.**

8 The Agency may inspect and check, from time to time, the project to  
9 determine whether the project is constructed, operated and maintained in  
10 accordance with the approved plans, specifications, standards and costs under the  
11 contract. In the event that the Agency concerned shall find any deviation from or  
12 non-compliance with the approved plans, specifications and standards, it shall  
13 bring the same to the attention of the Project Proponent for the necessary corrective  
14 actions. Failure of the Project Proponent to correct the deviation within the time  
15 prescribed by the Agency may be a ground for the rescission/ termination of the  
16 contract, in accordance with § 821220 (b) of this Chapter. Such technical  
17 supervision by the Agency concerned shall not diminish the singular responsibility  
18 of the Project Proponent for the proper Construction, operation, and maintenance  
19 of the facility, nor does it transfer any part of that responsibility to the Agency.

20 **§ 821211. Contract Variation.**

21 Subject to the prior approval by the Board, upon recommendation by the  
22 Agency, a contract variation may be allowed by the Agency, provided, that:

23 (a) Except as may be allowed under a parametric formula in the  
24 contract itself, there is no increase in the agreed fees, tolls and charges or a  
25 decrease in the Agency's revenue or profit share derived from the project; or

26 (b) There is no reduction in the scope of works or performance  
27 standards, or fundamental change in the contractual arrangement nor

1 extension in the contract term, except in cases of breach on the part of the  
2 Agency of its obligations under the contract; or

3 (c) No additional Government Undertaking, or increase in the  
4 financial exposure of the Government under the project; or

5 (d) Such is necessary due to an unforeseeable event beyond the  
6 control of the parties. Under no circumstances shall a Project Proponent  
7 proceed to commence a proposed contract variation unless approved by the  
8 Board. Failure to secure approval of the Board shall render the contract  
9 variation void.

10 **§ 821212. Milestones.**

11 The Project Proponent shall execute the project in accordance with pre-  
12 determined milestones. Failure by the Project Proponent to comply with these  
13 milestones may result to contract rescission and forfeiture of the performance  
14 security of the proponent, in accordance with § 821220 (b) hereof.

15 **§ 821213. Release of Performance Guarantee/Operating Security.**

16 (a) Performance Guarantee. The performance guarantee shall be released by  
17 the Agency concerned after the issuance of the “Certificate of Completion and  
18 Acceptance” of the Construction works, and the acceptance by the Agency of the  
19 project as completed in accordance with the agreed standards and specifications,  
20 provided that there are no claims filed against the Project Proponent or its  
21 Contractor. As may be agreed upon in the contract, a portion of the performance  
22 security shall be released upon compliance with corresponding milestones.

23 (b) Operating Security. The operating security shall be released by the  
24 Agency concerned on the transfer date of the facility, provided that there are no  
25 claims filed against the Project Proponent and its Contractor.

26 **§ 821214. Liquidated Damages.**

1           Where the Project Proponent fails to satisfactorily complete the work on or  
2 before completion date, including any extension or grace period duly granted, or  
3 meet the operating performance standard as prescribed in the contract, the Project  
4 Proponent shall pay the Agency concerned liquidated damages, as specified in the  
5 contract as an indemnity and not by way of penalty. The performance security or  
6 operating security, as the case may be, shall answer for any liquidated damages due  
7 to the Agency. During the Construction period, the amount of liquidated damages  
8 due for every calendar day of delay beyond the completion date will be determined  
9 by the Agency. During the operation period, the amount of liquidated damages,  
10 which will be determined by the Agency, shall be based on the principle of fair  
11 compensation for damages which the Agency will sustain as a result of the Project  
12 Proponent's failure to meet its obligations. The imposition and collection of  
13 liquidated damages shall be without prejudice to the right of the Agency concerned  
14 to rescind the contract and proceed with the procedures prescribed under § 821220  
15 (b).

16           **§ 821215. Repair and Maintenance Costs.**

17           The Project Proponent shall, within the contract term and the warranty  
18 period prescribed under § 821222, undertake the necessary and appropriate repair  
19 and maintenance of the project, in accordance with the design and performance  
20 standards prescribed in the approved contract, in order to ensure that the facility  
21 operates at the desired level of service. For this purpose, and where applicable, a  
22 portion of the project's revenues equivalent to the cost of the project's repair and  
23 maintenance, as indicated in the Project Proponent's bid proposal shall be set aside  
24 and reserved exclusively for repair and maintenance costs of the project. For  
25 facility, an escrow account may be established for the purpose.

26           **§ 821216. Repayment Schemes.**

1 (a) General Classification. The repayment schemes for the projects shall  
2 depend on the contractual arrangement as follows or as may be approved by the  
3 Board:

4 (1) For projects undertaken through BOT, CAO, DOT, ROT, BOO  
5 and ROO arrangements, the Project Proponents may be repaid by  
6 authorizing it to collect reasonable tolls, fees, and charges for a fixed term.  
7 In the case of BOT, CAO, DOT, ROT arrangements, such term shall in no  
8 case exceed fifty (50) years. However, for BOO and ROO arrangements, the  
9 Project Proponent, upon renewal of its Franchise or contract with the  
10 Agency, may be allowed to continue collecting toll, fees, charges and rentals  
11 for the operation of the facility or the provision of the service.

12 (2) For projects undertaken through BTO arrangement, the Project  
13 Proponent may be repaid by either of the following two options: First Option  
14 - the Agency provides Amortization as may be appropriate and reasonable.  
15 Tolls, fees, rentals and charges that the Project Proponent may collect while  
16 operating the facility on behalf of the Agency may be applied directly to the  
17 Amortization. Moreover, the Facility operator may be repaid by the Agency  
18 through a management fee as may be incorporated in the management  
19 contract entered between the Agency and the Implementing Rules and  
20 Regulations Project Proponent; Second Option - the Project Proponent may  
21 be allowed to directly collect tolls, fees, rentals and charges for a fixed term.

22 (3) For projects undertaken through BT and BLT arrangements - the  
23 Project Proponent may be repaid by the Agency through Amortization as  
24 may be appropriate and reasonable.

25 (4) Where applicable, the proponent may likewise be repaid in the  
26 form of a share in the revenue of the project or other non-monetary

1 payments, such as, but not limited to the grant of commercial development  
2 rights.

3 (b) Tolls, fees, rentals and charges. The proposed tolls, fees, and charges  
4 shall be considered by the Agency in the evaluation of the bid, taking into account  
5 the reasonableness thereof to the end-users of the facility. The tolls, fees, charges  
6 and rentals that a Project Proponent may charge for the use of the facility shall be  
7 those as approved by the Board consistent with § 820104(v), resulting from the  
8 bidding, and incorporated in the contract.

9 **§ 821217. Revenue Sharing.**

10 The Agency concerned may share in the revenue from the operation of the  
11 Project Proponent in the form of either a fixed fee or a certain percentage of the  
12 gross revenue or a combination of both, provided that the same is indicated in the  
13 bidding documents and included in the contract.

14 **§ 821218. Adjustments of tolls/fees/rental/charges.**

15 The tolls, fees, rentals and charges may be subject to adjustment during the  
16 life of the contract, based on the pre-determined formula and official price indices  
17 prescribed in the “Instructions to Bidders” and the approved contract. For this  
18 purpose, prior to bidding, the concerned Agency shall secure the approval of the  
19 Board, as the case maybe, for such formula. The monitoring of the consistency of  
20 the proposed adjustments of tolls, fees, rentals and charges with the prescribed rate  
21 of return, if any, shall be undertaken by the implementing Agency. Price indices  
22 shall be based on the advice of the Bureau of Statistics and Plans or the University  
23 of Guam and other sources authorized by the Agency concerned prior to bidding.

24 **§ 821219. Audit of collections.**

25 All revenues, share and/or receipts pertaining to or accruing to the Agency  
26 derived from any project proposed under this Chapter, including expenditures or  
27 use of funds and property, owned or held in trust by, or pertaining to the

1 Government, shall be subject to examination audit by the Public Auditor including  
2 ensuring that such revenues, share and/or receipts are fully and properly accounted  
3 for and remitted to the Agency.

4 All revenues and receipts pertaining to or accruing to the Project Proponent  
5 shall be treated as private funds including interest or yield thereon, which may be  
6 remitted directly to the Project Proponent, as may be stipulated in the contract.

7 **§ 821220. Contract termination/rescission.**

8 The contract may be terminated/rescinded in the following events:

9 (a) If the Agency concerned fails to comply with any major obligation  
10 prescribed in the approved contract, and such failure is not remediable or if  
11 remediable shall remain unremedied for an unreasonable length of time, the Project  
12 Proponent may, with prior notice to the concerned Agency, specifying the turn-  
13 over date, terminate the contract. In such an event, the Project Proponent shall be  
14 reasonably compensated by the Government for equivalent or proportionate  
15 contract cost, as defined in the contract subject to (c) below.

16 (b) If the Project Proponent refuses or fails to perform any of the provisions  
17 of the approved contract with such diligence as will ensure the project's  
18 completion, operation and maintenance in accordance with the prescribed technical  
19 and performance standards or otherwise fails to satisfy any of the contract  
20 provisions including compliance with the prescribed/agreed milestone activities, or  
21 commits any substantial breach of the approved contract, the Agency shall notify  
22 the Project Proponent in writing of the same and if not corrected within the time  
23 specified, the Agency concerned may rescind the contract. In such an event, the  
24 Agency concerned may either:

25 (1) Take over the facility and assume all attendant liabilities thereof;

26 or

1 (2) Allow the Project Proponent's lenders/creditors/banks to exercise  
2 their rights and interests under the loan and collateral documents with  
3 respect to the project.

4 In any case, the Agency concerned shall likewise forfeit the performance  
5 security of the defaulting Project Proponent.

6 (c) In the event that the project/contract is (1) revoked, cancelled, or  
7 terminated by the Agency in accordance with the contract through no fault of the  
8 Project Proponent or by mutual agreement; or (2) revoked or canceled by a court  
9 by final judgment through no fault of the Project Proponent, the Agency shall  
10 compensate the said Project Proponent for its actual expenses incurred in the  
11 project plus a Reasonable Rate of Return thereon not exceeding that stated in the  
12 contract, as of the date of contract termination, provided that the interest of the  
13 Government in these instances shall be duly insured with an insurance entity duly  
14 accredited by the Office of the Insurance Commissioner, provided further that the  
15 cost of the insurance coverage shall be included in the terms and conditions of the  
16 approved contract.

17 In the cases referred to in (a) and (c) above, an independent appraiser,  
18 mutually acceptable to the Agency and the Project Proponent, shall determine the  
19 amount to be paid to the Project Proponent, which determination shall be made  
20 within a period not more than one hundred eighty (180) calendar days from  
21 contract rescission or termination. The amount determined by the independent  
22 appraiser shall be binding to both the Project Proponent and the Agency.

23 In cases of emergency or when the public interest so requires, the Agency  
24 may immediately takeover the facility prior to the determination of said amount  
25 and payment thereof to the Project Proponent. Unless otherwise agreed upon by the  
26 Agency and the Project Proponent, the amount fixed by said independent appraiser  
27 shall be paid by the Agency not later than ninety (90) calendar days from said



1 independent appraiser's advice of such determination, subject to the enactment of a  
2 law or ordinance, as the case may be, appropriating such amount, if required.

3 **§ 821221. Venue for Litigation.**

4 The venue for the resolution of disputes, arbitration or litigation shall be in  
5 Guam.

6 **§ 821222. Transfer of and Warranty Over the Facility.**

7 Under Contractual Arrangements involving transfer of the facility to the  
8 Agency, the transfer or turnover will necessarily include the transfer of full legal  
9 ownership over the project in favor of the Agency, subject to any existing liens as  
10 may be agreed upon in the project agreement. The Project Proponent shall provide  
11 warranty that the facility meets the project technical specifications/agreed system  
12 features, performance standards and services in connection therewith for a period  
13 not less than one (1) year from the turnover of the facility. For this purpose, the  
14 Project Proponent shall put up a warranty security in the form of cash, letter of  
15 credit, or bank draft/guarantee issued by a reputable bank, or a surety bond issued  
16 by an entity duly registered and recognized by the Office of the Insurance  
17 Commissioner, callable on demand and acceptable to the Agency, or any  
18 combination thereof payable to the Agency concerned, the amount of which shall  
19 be determined by the Agency and shall be stipulated in the contract. The warranty  
20 security shall be made effective immediately upon transfer of full legal ownership  
21 over the project in favor of the Agency, as described above.

22 **Article 13**

23 **Investment Incentives and Government Undertakings**

24 § 821301. Sources of Financing.

25 § 821302. Investment Incentives.

26 § 821303. Government Undertakings.

27 **§ 821301. Sources of Financing.**

1 In the Construction of projects authorized under this Chapter, the Project  
2 Proponent may obtain the required financing for the Construction of the project  
3 from foreign and/or domestic sources.

4 **§ 821302. Investment Incentives.**

5 The investment incentives that the government of Guam may provide, under  
6 this Chapter, shall be those incentives authorized by the Guam Economic  
7 Development Authority and tax credits for any taxes, except income taxes, that  
8 shall require prior approval by *I Liheslaturan Guahan*. Qualified Bidders are  
9 subject to GEDA's application process of the QC Program, under 12 GCA Chapter  
10 58. Should a project authorized under this Chapter include a qualifying certificate,  
11 tax credit, or tax exemption it shall be deemed a government subsidy, and the  
12 PBAC shall evaluate such incentive in the manner prescribed under § 82402(h).

13 **§ 821303. Government Undertakings.**

14 With prior approval by *I Liheslatura*, the Government may provide any form  
15 of direct or indirect support or contribution, such as, but not limited, to the  
16 following, subject to the conditions for Unsolicited Proposals as specified under §  
17 821001 hereof:

18 (a) Cost Sharing - This shall refer to the Agency concerned bearing a  
19 portion of capital expenses associated with the establishment of an  
20 infrastructure development facility, such as, the provision of access  
21 infrastructure, right-of-way, transfer of ownership over, or usufruct, or  
22 possession of land, building or any other real or personal property for direct  
23 use in the project and/or any partial financing of the project, or components  
24 thereof, provided, that such shall not exceed fifty percent (50%) of the  
25 Project Cost, and the balance to be provided by the Project Proponent. Such  
26 government share may be financed from direct government appropriations.

1 (b) Credit Enhancements - This shall refer to direct and indirect  
2 support to a development facility by the Project Proponent and/or Agency  
3 concerned, the provision of which is contingent upon the occurrence of  
4 certain events and/or risks, as stipulated in the contract. Credit enhancements  
5 are allocated to the party that is best able to manage and assume the  
6 consequences of the risk involved. Credit enhancements may include, but  
7 are not limited to, government guarantees on the performance, or the  
8 obligation of the Agency under its contract with the Project Proponent,  
9 subject to existing laws on indirect guarantees. Indirect Guarantees shall  
10 refer to an agreement whereby the Government or any of its Agencies  
11 assumes full or partial responsibility for or assists in maintaining the  
12 financial standing of the Project Proponent or project company in order that  
13 the Project Proponent/company avoids defaulting on the Project Loans,  
14 subject to fulfillment of the Project Proponent/company of its undertakings  
15 and obligations under the project agreement.

16 (c) Direct Government Subsidy - This shall refer to an agreement  
17 whereby the Government, or any of its Agencies will:

18 (1) defray, pay for or shoulder a portion of the Project Cost or  
19 the expenses and costs in operating or maintaining the project;

20 (2) condone or postpone any payments due from the Project  
21 Proponent;

22 (3) contribute any property or assets to the project; *or*

23 (4) waive charges or fees relative to business permits or licenses  
24 that are to be obtained for the Construction of the project, all without  
25 receiving payment or value from the Project Proponent and/or Facility  
26 operator for such payment, contribution or support.

1 (d) Direct Government Equity - This shall refer to the subscription by  
2 the Government or any of its agencies of shares of stock or other securities  
3 convertible to shares of stock of the project company, whether such  
4 subscription will be paid by the money or assets.

5 (e) Performance Undertaking - This shall refer to an undertaking of a  
6 department, bureau, office, commission, authority, agency in assuming  
7 responsibility for the performance of the Agency's obligations under the  
8 contractual arrangement including the payment of monetary obligations, in  
9 case of default. These undertakings may be subject to payment of risk  
10 premium to the Government, or any other authorized agency.

11 (f) Legal Assistance - This shall refer to the extension of  
12 representation by government lawyers to a Project Proponent but only in  
13 cases, hearings, or inquiries where the Agency and Project Proponent are  
14 party-defendants/respondents therein including the adoption by such  
15 government lawyers of positions and strategies consistent with upholding the  
16 validity of the approved contractual arrangement.

17 The Agency may offer any one or more Government Undertakings relative  
18 to a project, which shall be submitted to the Board for the purposes of obtaining  
19 approval for the project and the contract; *provided*, that the grant of such  
20 Government Undertaking has been first approved by *I Liheslatura*.

## 21 **Article 14**

### 22 **Coordination and Monitoring of Projects**

23 § 821401. Coordination and Monitoring by GEDA.

24 § 821402. Timelines.

25 § 821403. Public Private Partnership Units.

26 § 821404. Reporting.

27 § 821405. Rule-making authority.

1           **§ 821401. Coordination and Monitoring by GEDA.**

2           The Guam Economic Development Authority (GEDA) shall be responsible  
3 for the coordination and monitoring of projects implemented under Contractual  
4 Arrangements or schemes authorized under this Chapter. Project monitoring will  
5 be undertaken to ensure that the project complies with this Chapter, including the  
6 proponent's required regulatory clearances from the government. For this purpose,  
7 concerned Agencies shall periodically submit to GEDA information on the status  
8 of projects implemented by them. In addition, all concerned Agencies shall submit  
9 to GEDA a copy of all Unsolicited Proposals that they receive and all other related  
10 documents. GEDA is also hereby mandated to guide the Agency in the preparation  
11 and development of the project. At the end of every fiscal year, GEDA shall report  
12 to the *I Maga Lahi* and *I Liheslatura* on the progress of all projects implemented  
13 under this Chapter.

14           **§ 821402. Timelines.**

15           GEDA shall monitor the compliance of the Agencies with the timelines  
16 prescribed in this Chapter.

17           **§ 821403. Public Private Partnership Units.**

18           Each concerned Agency may create a Public Private Partnership (PPP) Unit  
19 headed by a senior official of the Agency and shall designate that senior official as  
20 PPP Project Development Officer (PDO), who shall be responsible for planning,  
21 overseeing, and monitoring projects authorized under this Chapter. The PDO shall  
22 closely coordinate with GEDA.

23           **§ 821404. Reporting.**

24           A report including the salient features of and a copy of each contract,  
25 involving a project entered into under the provisions of this Chapter, shall be  
26 submitted to *I Maga Lahi* and *I Liheslatura* for its information, within fifteen days  
27 of its signing.



1           (d) *Indefinite Delivery Contract Assignment (IDCA) or Assignment*  
2     *Contract* – Refers to the consulting assignment wherein pre-qualified  
3     firms/consortia would be invited to develop a specific, well-structured  
4     bankable PPP project, the selection of which will be made on a competitive  
5     basis, using Fixed Budget Selection (FBS) method based on the evaluation  
6     of a Bio-data Technical Proposal on the basis of a specific TOR.

7           (e) *Pre-Feasibility Study* - Refers to a preliminary assessment of likely  
8     project viability, including basic project analysis with orders of magnitude  
9     for financial and economic analysis, and which ensures a solid basis for  
10    undertaking a feasibility study.

11          (g) *Project Development and Monitoring Fund (PDMF)* – Refers to  
12    the revolving fund made available for the preparation of pre-investment  
13    studies, project documentations, guidance and assistance in the tendering  
14    process of PPP projects of Implementing Agencies in accordance with this  
15    Article.

16          (h) *Project Proponent* – Refers to the private sector entity or  
17    individual which shall have contractual responsibility to undertake the PPP  
18    Project as indicated in the Project Contract.

19          (i) *Project Study Committee* – Refers to the committee to be created  
20    by the Administrator of GEDA responsible for preparing the terms of  
21    reference (TOR) for IDCA, reviewing the reports and deliverables of the  
22    consultants/transaction advisors, and recommending to the Administrator the  
23    payment of the corresponding consulting fees.

24          (j) *Public – Private Partnership (PPP) Projects* –Refers to projects  
25    pursued under any of the PPP schemes allowed under this Chapter.

1 (k) *Consultancy Bids and Awards Committee* - Refers to a committee  
2 created by the Administrator responsible for the selection of the Transaction  
3 Advisor/Consultant for IDCA.

4 (l) *Technical Assistance Agreement (TAA)* – Refers to the agreement  
5 entered into by and between the Administrator and the IA for the availment  
6 of the PDMF.

7 (m) *Transaction Advisor* – Refers to the entity chosen through a  
8 competitive process from the pool of pre-qualified entities that shall provide  
9 transaction advisory services for the development of PPP projects.

10 (n) *Unsolicited Projects* - Refer to project proposals submitted by the  
11 private sector, not in response to a formal solicitation or request issued by  
12 the IA, to undertake Infrastructure or Development Projects which may be  
13 entered into by IA subject to the requirements/conditions prescribed under  
14 this Chapter.

15 **§ 821502. Project Development and Monitoring Fund (PDMF).**

16 (a) Objective. The general objective of the PDMF is to fund and facilitate  
17 pre-investment activities of potential PPP projects such as undertaking the pre-  
18 feasibility and feasibility studies and develop a robust pipeline of viable and well-  
19 structured PPP projects for agencies. Specifically, the PDMF may be utilized for,  
20 but not limited to, the following:

- 21 (1) Preparation of project pre-feasibility and feasibility studies;  
22 (2) Project structuring;  
23 (3) Preparation of bid documents & draft contracts;  
24 (4) Transaction advisory; and  
25 (5) Assistance in the tendering process, including bid evaluation and  
26 award of PPP projects through competitive selection.



1 (b) Governing Principles. In the use of the PDMF, the following principles  
2 shall be observed:

3 (1) The capacity of the IA to identify, package/structure PPP projects,  
4 and manage the bidding process should be developed / strengthened;

5 (2) Project management skills and technical capacity of the IA to  
6 successfully undertake and monitor PPP projects shall be enhanced;

7 (3) Best practices, including compliance with established  
8 environmental sustainability, social and gender sensitivity safeguards shall  
9 be adopted;

10 (4) The revolving feature of the fund shall be strictly observed to  
11 provide a sustainable stream of utilizable funds for the PDMF's objectives.

12 (c) Administration. The GEDA Board shall be responsible for setting the  
13 policy and implementation guidelines for the use of the PDMF, and for approving  
14 PDMF applications. The Administrator will oversee the administration and  
15 management of the PDMF.

16 (d) Revolving Feature of the PDMF and Administrative Fee.

17 (1) The PDMF shall be a revolving fund. On successful completion of  
18 the bidding process, the project development cost would be recovered from  
19 the successful bidder plus an administrative fee of 10%. Said administrative  
20 fee shall be used to ensure the sustainability of the revolving fund.

21 (2) However, there are some cases where the reimbursements will  
22 need to be recovered directly from the IA through the normal budgetary  
23 process, to wit:

24 (i) The IA will repay the project development costs incurred in  
25 full, plus the administrative fee, when due to reasons within IA's  
26 responsibility, the IA fails to bid out the project; conclude the bidding  
27 process; and/or sign the contract with the winning bidder.

1 (ii) The IA will refund 50% of the cost incurred for project  
2 development, plus the administrative fee, when due to reasons beyond  
3 IA's responsibility or control, the IA fails to bid out the project after a  
4 series of failed re-biddings; conclude the bidding process; and/or sign  
5 the contract with the winning bidder.

6 (iii) The cost of conducting such pre-feasibility or feasibility  
7 study will be reimbursed by the IA, thru the budgetary process, to the  
8 PDMF when the pre-feasibility or feasibility study of a Project  
9 approved for PDMF funding demonstrates that the project will not be  
10 feasible; or the project fails to obtain GEDA Board approval and will  
11 no longer be pursued.

12 (f) Use of the PDMF.

13 (1) The PDMF shall only be used for the preparation of pre-feasibility  
14 studies, feasibility studies, preparation of tender documents and draft project  
15 contracts, provision of assistance in the tendering process, including bid  
16 evaluation and award of PPP projects.

17 (2) The contract value for each transaction advisory assignment will  
18 vary depending on the nature and complexity of the services to be required.

19 (g) Temporary Funding.

20 The Administrator shall submit to *I Liheslatura* a one-time general fund  
21 appropriation request for Fiscal Year 2014 no later than June 30, 2012 for purposes  
22 outlined in subsection (a). The money appropriated in this subsection shall be  
23 considered a loan from the General Fund to the PDMF and shall be repaid to the  
24 General Fund within five calendar years with interest. Such loan shall bear interest  
25 at a rate equal to 3 percent.

26 **§ 821503. PDMF Process.**

1 (a) The IA shall identify PPP projects and apply for PDMF financing. It  
2 shall, as a minimum, attach to its application, the following:

3 (i) Project concept;

4 (ii) Indicative Terms of Reference (TOR), including cost estimates;

5 and

6 (iii) Letter nominating the IA's representatives to the SBAC, PSC and  
7 TWG.

8 (b) The Administrator shall undertake the screening/evaluation of the PDMF  
9 application based on a set of eligibility criteria.

10 (c) The Administrator shall make a recommendation to the GEDA Board. If  
11 the Board approves the application, the IA shall execute a Technical Assistance  
12 Agreement with GEDA. If the GEDA Board disapproves the application, the  
13 following shall apply:

14 (i) The IA may submit a written request for reconsideration to the  
15 Administrator. The request shall include additional information and data that  
16 will justify the re-evaluation of the PDMF application.

17 (ii) The Administrator shall review the request for reconsideration and  
18 submit recommendation to PDMF Board based on additional information  
19 and justification submitted by the IA.

20 (iii) The decision of the PDMF Board on the request for  
21 reconsideration shall be final and executory and that no further request for  
22 reconsideration shall be entertained by the Administrator.

23 (d) The Administrator shall establish (i) a Project Study Committee (PSC) to  
24 oversee the work of the Transaction Advisor/Consultant; (ii) a Special Bids and  
25 Awards Committee (SBAC) to be responsible for the selection/recruitment of the  
26 Transaction Advisor/Consultant; and (iii) a Technical Working Group (TWG) to  
27 support the SBAC.

1 (e) The Administrator shall sign the consulting contract with the selected  
2 Project Development Consultants/Transaction Advisors with conformity of the IA.

3 (f) The selected Consultants/Transaction Advisors shall conduct the pre-  
4 investment studies, prepare draft tender documents, and provide PPP transaction  
5 advisory services.

6 (g) The IA shall be responsible for obtaining the approvals, permits,  
7 authorizations and the like from appropriate authorities for approval.

8 (h) If approved, a public bidding for the PPP project shall be conducted and  
9 it shall be in accordance with this Chapter.

10 (i) The winning bidder shall reimburse all the project related cost and  
11 availments from the PDMF.

### 12 **§ 821503. Screening and Evaluation of PDMF Applications**

13 (a) The screening/evaluation of each PDMF application will be based on a  
14 set of criteria related to the project, sector and the IA.

15 (b) The proposed project should be pursued under any of the PPP schemes  
16 allowed under this Chapter.

17 (c) Any contrary provision herein notwithstanding, for unsolicited proposals  
18 where a project proponent has already been granted “original proponent” status,  
19 the PDMF can be utilized only for transaction advisory services to the IA/LGU.  
20 Project preparation for unsolicited proposals is not included.

### 21 **§ 821504. Post-Board Approval Activities and Project Implementation**

22 (a) Technical Assistance Agreement (TAA). Once a PDMF application is  
23 approved by the GEDA Board, the Administrator and the IA shall enter into a  
24 Technical Assistance Agreement (TAA), provided that:

25 (i) The PDMF funding support to be extended pursuant to the PDMF  
26 Guidelines shall be expressly stipulated.

1 (ii) The obligations of the IA/LGU to ensure successful  
2 implementation of the technical assistance shall be specified.

3 (b) Project Study Committee (PSC). After the TAA is signed, the  
4 Administrator initiates the establishment of a Project Study Committee (PSC). The  
5 PSC shall be composed of representatives from the Administrator, and the IA. The  
6 PSC shall, among others:

7 (i) Review the TORs and bidding documents for the selection of  
8 consultants/transaction advisors;

9 (ii) Evaluate the deliverables of the consultants/transaction advisors;  
10 and

11 (iii) Endorse payments to the consultants/transaction advisors out of  
12 the PDMF.

13 (c) Special Bids and Awards Committee (SBAC). A Special Bids and  
14 Awards Committee (SBAC) will be created for the selection of  
15 consultants/transaction advisors and other consultants required for the preparation  
16 of the PPP project. The SBAC will be composed of representatives from the  
17 Administrator, and the IA.

18 (d) Technical Working Group (TWG). A Technical Working Group (TWG)  
19 will be created to support the SBAC in the selection of consultants/transaction  
20 advisors and other consultants required for the preparation of the PPP project. The  
21 SBAC will be composed of representatives from the Administrator, and the IA.

22 (e) Recruitment of Transaction Advisors. The PDMF will fund the  
23 recruitment of consultants/transactions advisors to conduct the pre-investment  
24 activities mentioned in Section IV of these Guidelines. The recruitment process  
25 will start after the PDMF Board has approved the application of the IA and a  
26 Technical Assistance Agreement (TAA) has been executed between the  
27 Administrator and the IA.

1 (f) The selection of the consultants/transactions advisors that shall be  
2 utilized for a particular PPP Project shall follow a two-stage selection process:

3 (i) Stage 1 is the pre-qualification, selection and retention of a panel  
4 of consulting firms under an indefinite delivery contract (IDC) facility for a  
5 3-year period from the date of signing of the contract, (without  
6 commitment) using Quality Based Selection (QBS) method. The  
7 Administrator can update said panel of consulting firms periodically.

8 (ii) Stage 2 is the actual selection of a particular consulting firm from  
9 the IDC facility panel of firms to develop a specific, well-structured  
10 bankable PPP project under an IDC Assignment (IDCA). The selection shall  
11 be made on a competitive basis, using a Fixed Budget Selection (FBS)  
12 method.

13 (g) A consulting contract will be negotiated and signed between the IDCA  
14 Consultants (selected from among the panel of IDCF consulting firms) and the  
15 Administrator, with the conformity of the IA/LGU. Normally, the contract will be  
16 divided into phases, namely, pre-feasibility project preparation and the transaction  
17 execution. There will be a provision in the contract allowing contract termination  
18 after pre-feasibility if the PPP project is found not viable. If there is an acceptable  
19 feasibility study, the contract may cover only transaction execution up to and  
20 including the signing of the PPP contract agreement with the winning bidder.

21 Disclaimer

22 **§ 821505. Approval of Funding, Not Project.**

23 The approval to avail of the PDMF Fund as contained in § 821503(c) hereof  
24 shall in no case be construed as an implied or expressed approval for the PPP  
25 project itself. Neither shall the completion of the pertinent preparatory studies as  
26 contained in § 821503(g) carry with it any implied endorsement to or approval of  
27 the Government.

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1 that will reduce energy consumption. These retrofits shall commence as  
2 appropriate due to the usual circumstances mandating replacements due to normal  
3 wear and depreciation.

4 (c) Leased Facilities. In the case of government leased buildings, and prior  
5 to the retrofitting or installation of permanent systems which shall remain with the  
6 leased facilities subsequent to the expiration of the lease, a cost benefit analysis  
7 shall be conducted to determine the feasibility of retrofitting the leased premises in  
8 consideration of savings to be realized relative to the term of the lease. If the  
9 retrofit or installation is determined not to be cost effective, then the mandate  
10 pursuant to this chapter shall not be applicable.

11 (d) Applicable Sustainable energy efficient and environmentally sound  
12 designs and practices for Government Buildings. To the extent practicable, all  
13 eligible types of projects as identified pursuant to Section 820202 of article 2 of  
14 this chapter are mandated to be constructed and/or renovated using a certified  
15 recognized sustainable design measurement system(s) which promote a whole-  
16 building approach to sustainability by recognizing performance in at least five key  
17 areas of human and environmental health: sustainable site development, water  
18 savings, energy efficiency, materials selection and indoor environmental quality. In  
19 addition, all new government buildings and structures shall, to the extent  
20 practicable, include provisions that will incorporate Rainwater Harvesting methods  
21 that will effectively promote water conservation. Rainwater Harvesting is the  
22 accumulating, processing and storing, of rainwater for reuse, before it reaches the  
23 aquifer.

24 (e) Prior to any renovation and/or construction 1 on of all eligible types of  
25 projects as identified pursuant to Section 820202 of article 2 of this chapter, and  
26 prior to the issuance of a building permit, the contractor shall provide the Guam  
27 Energy Office with the design and scope of work for review to ensure it adequately



1 includes or provides for the requisite standards in favor of sustainable energy  
2 efficiency and environmentally sound practices. The Guam Energy Office shall  
3 conduct its assessment, and when it is determined the design and scope of work  
4 meets the requisite standards, issue a letter acknowledging its compliance which  
5 shall be included in the contractor's building permit application.

## 6 **Article 17**

### 7 **Final Provisions**

8 § 821701. Effective Date.

9 § 821702. Separability Clause.

#### 10 **§ 821701. Effective Date.**

11 This Chapter shall effective sixty (60) calendar days upon enactment *or*  
12 upon the promulgation of rules and regulations pursuant to § 821405 of this  
13 Chapter, whichever is later.

#### 14 **§ 821702. Separability Clause.**

15 In the event any of the provisions of this Chapter is declared void or  
16 unenforceable by final judgment of a court, the other provisions unaffected thereby  
17 shall remain in full force and effect.”