

## **Key Changes Under the 2023 NEDA JV Guidelines (Part 2 of 3)**

Authors: *Franchette M. Acosta | Mely Ann Emerie A. Cristobal*

Approved on 24 April 2023, the National Economic Development Authority (“NEDA”) released the *2023 Revised Guidelines and Procedures for Entering into Joint Venture (“JV”) Agreements Between Government and Private Entities* (the “*2023 NEDA JV Guidelines*”). These guidelines, which took effect on 25 April 2023, provide an update to the *2013 NEDA JV Guidelines* (the “*2013 Guidelines*”).

*Update to the modes of Entering into a JV:*

### *1. Competitive Selection*

Unlike the *2013 Guidelines*, which required a two-stage competitive selection process entailing separate pre-qualification and request for proposals stages, the *2023 NEDA JV Guidelines* now also grant the Government Entity the option to conduct the selection of the JV Private Partner through a single-stage process. Under this process, bidders are asked to submit their eligibility requirements with their JV Proposals on the financial and technical aspects of the project.

### *2. Negotiated JV*

In case a Government Entity receives an unsolicited proposal for a negotiated JV, the Government Entity is now required by the *2023 NEDA JV Guidelines* to publicly disclose the receipt of such proposal by simultaneously posting information of such receipt in its website and furnishing the PPP Center a copy of such notice within ten working days from receipt of the unsolicited proposal.

Like the *2013 Guidelines*, the new guidelines continue to recognize the right of an original proponent to submit a second financial proposal before the date of opening of the financial proposals under the modified competitive challenge. In addition, the *2023 NEDA JV Guidelines* grant the Government Entity’s JV-Selection Committee (“JV-SC”) the option to apply a Best and Final Offer (“BAFO”) Method. Under the BAFO Method, in case the challenger’s financial proposal is found to be more advantageous than the financial proposal of the original proponent, the Government Entity’s JV-SC shall invite all private sector participants to submit their best and final offer or the second financial proposal.

### *Parameters and Guidelines for Entering into a JV*

Some of the key revisions include:

- Consent of the Head of the Government Entity is required for the JV to sell, transfer, mortgage, encumber, or use as collateral, the assets contributed by the Private Partner;
- Among the guidelines that the JV Partners should consider in drafting the JV Agreement and related documents include:

- i. defined and specified contribution to the JV, and capital and ownership rights;
  - ii. identified dispute mechanism to avoid deadlock or litigation; and
  - iii. specified termination/liquidation of the JV and indicated buy-out provisions.
- For JVs involving the formation of a JV Company: (a) the Government Entity shall be represented in the Board of the JV Company, with the Board composition being based on the JV Partners' proportional contribution; and (b) the JV Partners shall be entitled to receive dividends from the net profits constituting the portion of the unrestricted retained earnings of the JV Company in each year in accordance with the JV Agreement.
  - The ownership of the JV project or facility may be transferred to either the Government Entity or the Private Sector Partner after the expiration of the JV Agreement depending on its terms.
  - A JV shall remain subject to regulation by the appropriate Regulatory Body, until full divestment of the Government Entity's ownership or interest to the JV has been made.
  - No Government Entity shall implement a JV that it regulates. Regulatory Bodies implementing a project shall prepare a Conflict Mitigation and Management Plan. Said Government Entities exercising both regulatory and implementing functions must observe and uphold equal protection.

A copy of the 2023 NEDA JV Guidelines may be accessed here: <https://neda.gov.ph/2023-neda-jv-guidelines/>

*This article is intended for informational purposes only and should not be construed as legal advice.*