



SIXTEENTH CONGRESS OF THE REPUBLIC)
OF THE PHILIPPINES)
First Regular Session)

'13 SEP 11 P6 34

SENATE
S. B. No. 1653

RECEIVED BY... *for*

Introduced by Senator Maria Lourdes Nancy S. Binay

EXPLANATORY NOTE

Swiss Challenge or Price Matching in public bidding has long received recognition as a process beneficial to the government.

Stripped to its essentials, the concept is simple. A private sector group comes up with a proposal to undertake a project or simply purchase an idle asset from the concerned government agency. If the concerned government agency finds merit to the proposal, it invites the general public to offer the best price on the proposal through public bidding. However, in recognition of the initiative of the original proponent, it is given a right to match the best price offered by the bidders. If it can match the offer, the project/asset is given to the original proponent.

Through the above scheme, the government is guaranteed of the best price in the market for the proposal. Notwithstanding this, the Swiss Challenge scheme is only provided for under the BOT Law as Amended specifically under Section 4(a) thereof. There are Opinions of the Department of Justice ("DOJ") and Decisions of the Commission on Audit, which allow the use of Swiss Challenge or Price Matching Scheme,

In DOJ Opinion No. 55 Series of 2003 rendered to the Department of Finance ("DOF") and the Privatization and Management Office ("PMO"), the DOJ recognized the legality of the practice of a Swiss Challenge even outside the BOT Law as Amended.


In DOJ Opinion 93-2004, the DOJ reiterated Opinion No. 55 s. 2003 as a guide to the Social Security System's legal question regarding a Swiss Challenge procedure that it voluntarily adopted for its sale Equitable PCI Bank Shares to the Banco De Oro.

The only Supreme Court case on Swiss Challenge outside the BOT Law involves the subject of DOJ Opinion 93-2004, which is the case of *Osmena vs. Social Security System*.¹ The Supreme Court however did not rule on the issue of Swiss Challenge.

As it stands, there is a legal uncertainty regarding the applicability of Swiss Challenge to projects or proposals outside the BOT Law as Amended. This uncertainty can discourage initiatives from the private sector as they are not given any incentive as original proponent to pursue their proposal. To remedy this uncertainty and to encourage private sector


¹ 533 SCRA 313 (2007)

participation even for those projects outside the BOT Law as Amended, the passage of this Bill is strongly recommended.


MARIA LOURDES NANCY S. BINAY
Senator

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AN ACT RECOGNIZING SWISS CHALLENGE OR PRICE MATCHING SCHEME TO
ENCOURAGE PRIVATE SECTOR PARTICIPATION IN VARIOUS GOVERNMENT
PROJECTS NOT COVERED BY THE BOT LAW AS AMENDED

1 *Be it enacted by the Senate and House of Representatives of the Philippines in Congress*
2 *assembled:*

3
4 **SECTION 1.** *Declaration of Policy.* The State recognizes the indispensable role of the
5 private sector, encourages private enterprise, and provides incentives to needed investments.
6 Towards this end, the State continues to enter to public-private partnership designed to tap
7 private capital for the good of the public.

8
9 **SECTION 2.** *Definition of Terms.* As used in this Act, the following terms are defined as
10 follows:

11
12 a. Swiss Challenge – Swiss challenge is a form of public procurement which
13 requires a government agency which has received an unsolicited bid for a public
14 project or services to be provided to government, to publish the bid and invite
15 third parties to submit proposals on the subject of the unsolicited bid. The
16 entity, which submitted the unsolicited bid can match or better the best bid
17 which comes out of the Swiss challenge process.²

18
19 b. Original Proponent– Any natural or juridical person submitting an
20 unsolicited proposal to the appropriate government agency to undertake a
21 project or to purchase.

22
23
24 **SECTION 3.** *Unsolicited Proposals.* Unsolicited proposals for projects or services
25 submitted by the private sector may be considered by the government agency or local
26 government unit concerned: Provided, That, (1) such projects are not part of the list of
27 priority projects and (2) no direct government guarantee, subsidy or equity is required.

28
29 **SECTION 4.** *Swiss Challenge or Price Matching.* Unsolicited proposals shall be subject to
30 Swiss Challenge Procedures as discussed hereunder. Upon receipt of a proposal which meets
31 the requirements under Section 3, the government agency or local government unit shall

² This is a slightly modified version of the footnoted definition of Swiss Challenge in the Supreme Court En Banc Decision in *Suplico vs. NEDA, G.R. No. 178830, July 14, 2008.*

1 invite by publication, for three (3) consecutive weeks, in a newspaper of general circulation,
2 comparative or competitive proposals. In the event that another proponent submits a better
3 proposal, the original proponent shall have the right to match that price within thirty (30)
4 working days. Once matched, the government agency or local government unit shall award
5 the contract to the original proponent.

6
7 **SECTION 4. *Negotiated Agreement.*** If no other proposal is received after sixty (60)
8 working days from the time of the invitation by publication, the government agency or local
9 government unit may directly negotiate with the proponent and enter into an agreement.

10
11 **SECTION 5. *Applicability to Unserviceable Property or Idle Assets of the Government.*** The
12 Swiss Challenge or Price Matching procedures discussed herein shall apply to the disposition
13 or divestment of unserviceable property or idle assets of the Government. The government
14 agency/local government seeking to dispose unserviceable or idle assets of the Government
15 shall secure the approval of the Commission on Audit (COA).

16
17 **SECTION 5. *Implementing Rules and Regulations.*** The Department of Justice in
18 coordination with the Department of Budget and Management and the COA shall issue the
19 necessary implementing rules and regulations within ninety (90) days from the approval of
20 this Act.

21
22 **SECTION 6. *Separability Clause.*** Should any part or provision of this Act be declared
23 unconstitutional or invalid, other parts or provisions hereof not otherwise affected thereby
24 shall remain in full force and effect.

25
26 **SECTION 7. *Repealing Clause.*** All laws, decrees, orders, rules and regulations, other
27 issuances, or parts thereof inconsistent with the provisions of this Act are hereby repealed or
28 modified accordingly.

29
30 **SECTION 8. *Effectivity.*** This Act shall take effect fifteen (15) days after its publication in at
31 least two (2) newspapers of general circulation.

32
33 Approved,