



AUG 05 2022

MEMORANDUM

FOR : **The Director**
Foreign-Assisted and Special Projects Service

FROM : **The Director**
Legal Affairs Service
las.denr@gmail.com

SUBJECT : **LATEST DRAFT PROJECT PROPOSAL AND MEMORANDUM OF UNDERSTANDING (MOU) ON THE PROCUREMENT, INSTALLATION, AND OPERATION OF AIDS TO NAVIGATION (ATON) FOR THE TUBBATAHA REEFS NATURAL PARK (TRNP) PROJECT**

This refers to the Memorandum dated 30 March 2022 of the Undersecretary for Policy, Planning, and International Affairs requesting comments on the latest version of the Aids to Navigation (AtoN) Project Proposal and draft Memorandum of Understanding for the proposed project entitled "Procurement, Installation and Operation of Aids to Navigation (AtoN) for the Tubbataha Reefs Natural Park (TRNP)".

The following documents were attached to the said Memorandum:

1. Draft MOU¹ among the International Foundation for Aids to Navigation (IFAN), DENR, Palawan Council for Sustainable Development (PCSD), and Tubbataha Management Office (TMO); and
2. Project Proposal² on Aids to Navigation (AtoN): 2023-2024 | Palawan Council for Sustainable Development Staff (Attachment E. Letter from IFAN) – Letter dated 19 July 2021 from Peter Stanley, Chief Executive Officer (CEO) of IFAN.

After review of the draft MOU, here are the comments of this Office, the proposed revisions are underlined and italicized, viz:

1. **Legal basis on the authority of the DENR, PCSD and TMO to enter into the draft MOU**

This Office has previously reviewed the proposed MOU between the IFAN and PCSD on the same AtoN Project. In the Memorandum³ dated 12 November 2021, this Office has commented that the PCSD has authority to enter into the draft MOU with IFAN pursuant to Sections 16 and 19 of Republic Act (RA) 7611⁴ on the relevant functions of the PCSD in the implementation of the

¹ Copy attached as Annex "A".

² Copy attached as Annex "B".

³ Copy attached as Annex "C".

⁴ Strategic Environmental Plan (SEP) for Palawan Act, copy may be accessed at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/3542>.

Strategic Environmental Plan (SEP), and Sections 16 and 43 of RA 10067⁵ on the roles of the PCSD regarding the TRNP. Thus, this Office submits that PCSD can also enter into the subject draft MOU.

This Office also finds that the draft MOU has provided legal basis for the entering into the MOU by the DENR, subject to the requirements of Office of the President (OP) Memorandum Circular (MC) 16,⁶ s. 2017 to be discussed below. Nonetheless, this Office recommends the following formatting revisions:

The Department of Environment and Natural Resources ("DENR"), the primary agency responsible for the conservation, management, development, and proper use of the country's environment and natural resources, specifically forest and grazing lands, mineral resources, including those in reservation and watershed areas, and lands of the public domain, and the mother agency of the Palawan Council for Sustainable Development (PCSD), with office address at DENR Compound, Visayas Avenue, Diliman, Quezon City, Philippines represented by DENR Acting Secretary Jim O. Sampulna, CESO I;

With regard to the TMO, the draft MOU states that:

The Tubbataha Management Office ("TMO"), was established pursuant to Section 14 of R.A. 10067 or the Tubbataha Reefs Natural Park Act of 2009 to serve as the executive arm of the Tubbataha Protected Area Management Board (TPAMB), and carry out the day-to-day park administration, x x x represented by Protected Area Superintendent Angelique M. Songco.

This Office submits that the Tubbataha Protected Area Management Board (TPAMB), instead of the TMO, has the authority to enter into the draft MOU. Thus, it is suggested that the draft MOU be revised accordingly.

Section 13 (c) of RA 10067 provides that the TPAMB shall have the power and function to establish productive partnership with nongovernmental organizations, as follows:

- (c) Establish productive partnership, with national and local agencies, local government units, local communities, the academe, **nongovernmental organizations**, and such other institutions to ensure the conservation and management of the TRNP; coordinate and implement; (Emphasis supplied)

⁵ Tubbataha Reefs Natural Park (TRNP) Act of 2009, copy may be accessed at <https://www.officialgazette.gov.ph/2010/04/06/republic-act-no-10067/>.

⁶ Requests for Authorization to Negotiate and Sign International Agreements, and Agreements Covering Borrowings, Guarantees, and Foreign Grants; copy may be accessed at <https://www.officialgazette.gov.ph/2017/04/11/memorandum-circular-no-16-s-2017/>.

On the other hand, the TMO, through its Protected Area Superintendent (PASu), only has the power to coordinate and implement with nongovernmental organizations per Section 14 (e)⁷ of RA 10067.

In addition, the other sub-items of Section 13 of RA 10067 provide further basis for the entering into the MOU by the TPAMB, viz.:

SECTION 13. *Powers and Functions of the TPAMB.* — The TPAMB shall have the following powers and functions:

- (a) Decide matters relating to planning, resource use and protection, and general administration of the area in accordance with the management plan;
- (b) Approve budget allocations, proposals, work plans, action plans, guidelines for management of TRNP in accordance with the management plan and its policies;
x x x
- (g) Control and regulate construction, operation and maintenance of structure and utilities within the TRNP;
- (h) Monitor and evaluate the performance of the TMO and all those implementing activities and projects in the TRNP;
x x x

Considering the foregoing, the specific roles and responsibilities of the TMO in the draft MOU and Annex A-Roles and responsibilities of each Participant in the implementation of the AtoN project may be referred to as roles and responsibilities of the "TPAMB, through the TMO".

2. On funding for the AtoN Project

The following are the relevant provisions of the draft MOU regarding funding, suggested formatting revisions of some provisions are underlined:

WHEREAS, the Participants acknowledge the following:

x x x

- 2. It is presently contemplated that the budget for the Project is Two Hundred Twenty Million Nine Hundred

⁷ SECTION 14. *Tubbataha Management Office (TMO).* — There shall be a TMO to be headed by the TRNP PASu who shall serve as the chief operating officer of the entire TRNP. The TPAMB will determine the staffing pattern, qualification standards and hiring procedures for the TMO. The PASu and his/her staff shall hold office in the place to be designated by the TPAMB: *Provided*, That the TPAMB may authorize the establishment of sub-offices for purposes of convenience, safety, accessibility, economy and such other justifiable reasons; *Provided, further*, That at least a sub-office shall be established within the TRNP.

The PASu shall have full responsibility for the protection of resources within the TRNP. As such, he/she shall have the following duties and responsibilities in addition to those provided under existing laws and regulations:

- (e) Coordinate and implement with national and local agencies, local government units, local communities, the academe, nongovernmental organizations, and such other institutions to ensure the conservation and management of the TRNP; (Underscoring and emphasis supplied)

Eighty-Four Thousand, One Hundred Twelve Pesos and Five Cents (Php220,984,112.05) or Four Million, Two Hundred Forty-Seven Thousand, Two Hundred Forty-Four US Dollars and Thirteen Cents (US \$4,247,244.13; 1USD=52.03Php; inflation rate= 3.9 for 2021, 3.0 for 2022).

3. It is further contemplated that **fifty percent (50%) of the funding for the Project, or One Hundred Ten Million, Four Hundred Ninety-Two Thousand, Fifty Six Pesos and Two Cents (Php 110,492,056.02)** or Two Million, One Hundred Twenty-Three Thousand, Six Hundred Twenty-Two US Dollars and Six Cents (US \$2,123,622.06), shall be provided by the DENR by proposing its inclusion in the CY 2023-2025 Budget of the agency;

x x x

5. It is contemplated that **the remaining 50% of the funding for the Project, or One Hundred Ten Million, Four Hundred Ninety-Two Thousand, Fifty Six Pesos and Two Cents (Php 110,492,056.02)** or Two Million, One Hundred Twenty-Three Thousand, Six Hundred Twenty-Two US Dollars and Six Cents (US \$2,123,622.06), shall be provided by "IFAN" by way of donation;

x x x

15. Upon the release of the funds, the DENR shall download the money to the PCSDS for the implementation of this project, subject to governments policies and regulations. (Emphasis supplied)

Further, Annex A-Roles and responsibilities of each Participant in the implementation of the AtoN project states that:

Department of Environment and Natural Resources
(DENR)

x x x

2. **The proposed budget** amounting to One Hundred Ten Million Four Hundred Ninety-two Thousand Fifty-six Philippine Peso and Two Cents (PHP 110,492,056.02) shall be included in the FY 2023 proposal of the DENR-OSEC; (Emphasis supplied)

In the previously reviewed MOU, it was provided that the 50% of the funding requirement shall be provided by the PCSD through its allotted budget for CY 2023-2025. Notably, in the present subject draft MOU, the 50% of the funding requirement shall be provided by the DENR by proposing its inclusion in the CY 2023-2025 Budget of the agency, for downloading to the PCSD for the implementation of the project.

This Office submits that the DENR should identify the specific office that shall include the 50% of the funding requirement for the AtoN project in its budget proposal for CY 2023-2025. It is suggested that the Foreign-Assisted and Special Projects Service (FASPS) coordinate with the Financial and Management Service (FMS), and Policy and Planning Service (PPS) regarding

this matter. As far as this Office is aware, the different offices of the DENR have already submitted their budget proposals for CY 2023. Likewise, based on the documents submitted, there are no attached responses from the offices of the Directors for FMS and PPS.

Also, for consistency with Item 3 of the whereas clause of the draft MOU, it is suggested that Annex A-Roles and responsibilities of each Participant in the implementation of the AtoN project be revised, as follows:

Department of Environment and Natural Resources
(DENR)

x x x

2. The proposed budget amounting to One Hundred Ten Million Four Hundred Ninety-two Thousand Fifty-six Philippine Peso and Two Cents (PHP 110,492,056.02) shall be included in the FY 2023-2025 proposal of the DENR-OSEC;

This Office also reiterates its previous comment regarding the 50% of the total funding by IFAN, as follows:

This Office also notes that the draft MOU includes a proposed donation for the remaining 50% of the total funding of the Project by IFAN. This Office opines that it should be covered by another document or agreement, consistent with the Philippine and foreign law, if applicable in this case.

In this regard, it is recommended that the draft MOU be referred to the Department of Finance (DOF), National Economic and Development Authority (NEDA) and the Department of Foreign Affairs (DFA) for review of the relevant provisions on funding cited above.

Noteworthy, in Annex A-Roles and responsibilities of each Participant in the implementation of the AtoN project, it was provided that:

Department of Environment and Natural Resources
(DENR)

1. The Department of Environment and Natural Resources through its Foreign-Assisted and Special Projects Service (FASPS), shall coordinate with concerned agencies on the requirements of this undertaking, such as but not limited to Department of Foreign Affairs (DFA), Department of Finance (DoF), National Economic and Development Authority (NEDA), etc; (Emphasis supplied)

In this regard, may this Office inquire if the coordinations with NEDA and the DFA have been undertaken by the Foreign Assisted Projects Service, as previously recommended? If there were coordinations made, responses of these agencies may prove helpful for the management in considering the MOU.

3. Annexes of the draft MOU

Items 4 and 27 of the whereas clause of the draft MOU state that:

4. The Participants agree that the purpose and scope of the project is as outlined in "PCSD's" submission to "IFAN", attached as **Annex A** to this "MOU" but as the same may be amended by the said Implementation Agreement.

x x x

27. The expected roles and responsibilities of each Participant in the implementation of the project is included as **Annex A**. (Underscoring and emphasis supplied)

No "purpose and scope of the project" marked as "Annex A" was provided to this Office for review. It is suggested to attach and mark the necessary documents accordingly.

On the other hand, it is suggested to revise the marking of the "expected roles and responsibilities of each Participant in the implementation of the project" from "Annex A" to "Annex B"; considering that a supposed "Annex A", "purpose and scope of the project" was already denominated as such.

4. Item 8 of the whereas clause of the draft MOU is proposed to be revised, as follows:

8. The Participants agree that the Project shall be procured in accordance with 'The 2016 Revised Implementing Rules and Regulations of Republic Act No. 9184', otherwise known as the Government Procurement Reform Act, (Updated as of 30 June 2022) for a competitive and transparent bidding process.

5. Item 9 of the whereas clause of the draft MOU is proposed to be revised, as follows:

9. The Participants agree to prepare and approve an 'Implementation Agreement'. The 'Implementation Agreement' shall include agreed details on the budget, roles, and responsibilities of each project stakeholder in the implementation of the project, project management and supervision, reporting, funding phasing and final project details together with any other items that the Participants consider relevant to the Project.

6. Item 10 of the whereas clause of the draft MOU states that:

10. The Participants agree that IFAN may appoint a **suitably qualified representative to participate in the bid evaluation process, to assist in the selection of a competent Bidder and to advise on compliance with IALA Standards, Recommendations and Guidelines.** (Emphasis supplied)

This Office submits that the above provision should be in accordance with Sections 8.7 and 13 of the 2016 Revised Implementing Rules and Regulations of RA 9184 (Updated as of 30 June 2022) regarding observers, as follows:

8.7. Observers

The PhilGEPS shall allow **observers, duly authorized by the BAC, to monitor the procurement proceedings on-line**: Provided, however, That **such observers do not have any direct or indirect interest in the contract to be bid** as prescribed in Section 13 of this IRR.

x x x

SECTION 13. Observers. —

13.1. **To enhance the transparency of the process, the BAC shall, during the eligibility checking, shortlisting, pre-bid conference, preliminary examination of bids, bid evaluation, and post-qualification, invite, in addition to the representative of the COA, at least two (2) observers, who shall not have the right to vote, to sit in its proceedings where:**

1. At least one (1) shall come from a duly recognized private group in a sector or discipline relevant to the procurement at hand, for example:
 - a) **For Infrastructure Projects,** national associations of constructors duly recognized by the Construction Industry Authority of the Philippines (CIAP), such as, but not limited to the following:
 - (1) Philippine Constructors Association, Inc.; or
 - (2) National Constructors Association of the Philippines, Inc.
 - b) **For Goods,** a specific relevant chamber-member of the Philippine Chamber of Commerce and Industry.
 - c) **For Consulting Services,** a project-related professional organization accredited or duly recognized by the Professional Regulation Commission or the Supreme Court, such as, but not limited to:
 - (1) Philippine Institute of Civil Engineers (PICE);
 - (2) Philippine Institute of Certified Public Accountants (PICPA); or
 - (3) Confederation of Filipino Consulting Organizations; and
2. The other observer shall come from a non-government organization (NGO).

13.2. **The observers shall come from an organization duly registered with the Securities and Exchange Commission (SEC) or the Cooperative Development Authority (CDA), and should meet the following criteria:**

- a) Knowledge, experience or expertise in procurement or in the subject matter of the contract to be bid;

- b) Absence of actual or potential conflict of interest in the contract to be bid; and
- c) Any other relevant criteria that may be determined by the BAC.

x x x (Emphasis supplied)

In view of the foregoing, it is recommended that the draft MOU be revised as follows:

10. The Participants agree that IFAN may appoint a suitably qualified representative to participate in the bid evaluation process, to assist in the selection of a competent Bidder and to advise on compliance with IALA Standards, Recommendations and Guidelines, subject to the requirements of Sections 8.7 and 13 of the 2016 Revised Implementing Rules and Regulations of RA 9184 (Updated as of 30 June 2022).
7. Item 11 of the whereas clause of the draft MOU is proposed to be revised, as follows:
 11. The Participants agree that once funding is secured, bidding processes, including pre- bidding conference, shall be conducted in accordance with the 2016 Revised Implementing Rules and Regulations of Republic Act No. 9184 (The Philippine "Government Procurement Reform Act"), Updated as of 30 June 2022.
8. Item 12 of the whereas clause of the draft MOU states that:
 12. The Participants agree that the **Department of Environment and Natural Resources (DENR) will coordinate with the Department of Finance (DoF) on the need for an approval of Special Presidential Authority (SPA) from the Office of the President for signing of the MOU, as provided under Memorandum Circular No. 16, Series of 2017.**

The relevant provisions of the MC 16, s. 2017 provides that:

NOW, THEREFORE, to enhance the coordination between and among various departments and agencies in the negotiation and signing of international agreements, and agreements covering borrowings, guarantees and foreign grants, the following are hereby ordered:

1. All heads of departments, bureaus, offices, agencies or instrumentalities of the government, including government-owned or -controlled corporations (GOCCs) and state universities and colleges (SUCs), are hereby directed to coordinate closely with the DFA prior to the negotiation and signing of international agreements as defined in EO No. 459, and/or **with the DOF prior to the negotiation and signing of agreements covering borrowings, guarantees, and foreign grants.**

2. Prior to the negotiation or signing of a treaty or executive agreement, as well as agreements covering borrowings, guarantees, and foreign grants, authorization must be secured by the lead agency from the Office of the President (OP), unless the DFA or the DOF determines that the nature or scope of the agreement does not require such authorization from the OP.
 3. Authorizations for the negotiation and signing of international agreements, or agreements covering borrowings, guarantees, and foreign grants shall be granted in writing through Full Powers, Special Authority, Letter or Memorandum signed by the President, or the Executive Secretary "by authority of the President."
 4. All heads of departments, bureaus, offices, agencies or instrumentalities of the government, including GOCCs and SUCs, are directed to strictly observe and comply with the requirements of complete staff work under MC No. 68 before requesting the abovementioned authorizations.
- x x x (Emphasis supplied)

Pursuant to MC 16, s. 2017, authorization must be secured from the Office of the President prior to the negotiation or signing of agreements covering foreign grants, such as the draft MOU, unless the DOF determines that the nature or scope of the agreement does not require such authorization from the OP.

Thus, it is submitted that prior to the signing of the draft MOU, necessary coordination should have already been made by the concerned office with the DOF whether authorization from the OP is required. If such authorization is required, negotiations with IFAN should not proceed without the same.

9. Items 20 and 21 of the whereas clause of the draft MOU are proposed to be revised to indicate that the same are roles of the DENR, through the FASPS, as follows:

20. The DENR, through the Foreign-Assisted and Special Projects Service (FASPS), together with PCSD shall oversee and monitor the milestones of this project.
21. The TMO shall provide a quarterly report to DENR, through the FASPS, and PCSD on the status of project implementation. Based on the reports submitted, the DENR and PCSDS will also provide a quarterly report to the Regional Project Monitoring Committee through the Regional Project Monitoring and Evaluation System.

Also, in Item 21, this Office submits that there is a need to clarify under what office the Regional Project Monitoring Committee, to whom the quarterly report shall be provided by the DENR and PCSDS, is connected.

Likewise, Annex A-Roles and responsibilities of each Participant in the implementation of the AtoN project is also proposed to be revised, as follows:

Department of Environment and Natural Resources
(DENR)

x x x

4. The DENR, through the FASPS, together with PCSD shall oversee and monitor the milestones of this project;
5. The DENR, through the FASPS, and PCSD will provide a quarterly report to the Regional Project Monitoring Committee through the Regional Project Monitoring and Evaluation System, based on the report submitted by the TMO; and
6. The DENR, through the FASPS, shall register and report the installed AtoN to the National Mapping and Resource Information Authority for publication/inclusion in all charts.

10. Items 23, 24 and 26 of the whereas clause of the draft MOU state that:

23. This MOU comes into effect on the date of the last signature below and remains valid and in effect for the entire duration of the project, unless (a) sooner terminated in accordance with Clause 26 below or (b) replaced by the implementation agreement referred to in Clause 9 above.

24. This MOU may be terminated by mutual written consent, or by withdrawal of either Participant, by such Participant giving 60 days written notice to the other Participant.

x x x

26. The Tubbataha Management Office (TMO) shall ensure the operationalization and data management of the AToN after the project life. **Report** generated by the project shall be copy furnished to DENR and PCSD regularly, depending on the agreed frequency of reporting. (Emphasis supplied)

This Office notes that there may have been an oversight that, instead of "Clause 26," it is "Clause 24" that is referred to under Item a, Item 23 of the whereas clause. **Thus, it is suggested that "Clause 26" be revised to "Clause 24".** In addition, formatting is suggested in Item 26, to use the plural form on "**Reports**", considering the frequency of the reporting requirement. Thus, the suggested edits are as follows:

25. This MOU comes into effect on the date of the last signature below and remains valid and in effect for the entire duration of the project, unless (a) sooner terminated in accordance with Clause 24 below or (b) replaced by the implementation agreement referred to in Clause 9 above.

x x x

26. The Tubbataha Management Office (TMO) shall ensure the operationalization and data management of the ATON after the project life. Reports generated by the project shall be copy furnished to DENR and PCSD regularly, depending on the agreed frequency of reporting.

11. Items 28 of the whereas clause of the draft MOU states that:

28. This MOU shall be governed by **English law**. Any disputes regarding the interpretation or implementation of this MOU will first attempt to be resolved only by consultation between the Participants and, if not resolved, **will be referred to an arbitration tribunal subject to the rules of the London Maritime Arbitrators Association (LMAA) (but with only one arbitrator appointed)**.

As in our previous review of the draft MOU, **this Office submits that the propriety of the provision may be best reviewed by the DOF/DFA.**

12. The designation of Peter Stanley of IFAN in the first page of the draft MOU is suggested to be revised from "*Chief Executive Director*" to "*Chief Executive Officer*", to be consistent with his designation in the signatory page.

13. The draft MOU and Annex A-Roles and responsibilities of each Participant in the implementation of the ATON project seem to interchangeably use the terms PCSD and Palawan Council for Sustainable Development Staff (PCSDS). It is suggested to check the usage of such terms if indeed interchangeably used.

14. The Letter dated 19 July 2021 from Peter Stanley, CEO of IFAN, attached to the Memorandum dated 30 March 2022, states that:

We will need a Memorandum of Understanding between us. This should take the form of a number of Articles e.g., Purpose and Scope of the Project, **Information Exchange**, Reference to an Implementation Agreement, **Confidentiality, Logo and Intellectual Property Rights**, Official Correspondence addresses, **Waiver** and Dispute Resolution, Date of Start, Modification and Termination. (Emphasis supplied)

This Office finds that the draft MOU does not provide provisions on Information Exchange, Confidentiality, Logo and Intellectual Property Rights, and Waiver. The same may be provided by the concerned Office.

In view of the foregoing, this Office suggests that the observations made be addressed by the concerned offices before the draft MOU be submitted to the management for consideration.

15. Item 6 of the whereas clause of the draft MOU states that:

6. The Participants agree that the contractor/supplier to be selected in the implementation of the Project must be a **certified "Industrial Member in good standing" of the 'International Association of Marine Aids to Navigation and Lighthouse Authorities ("IALA") and as further detailed in the Implementation Agreement (IA).** (Emphasis supplied)

It is suggested that such a requirement that the contractor/supplier is a certified "Industrial Member in good standing" of the IALA should be included in the Terms of Reference (TOR) to be used in the procurement of the Project.

16. It is suggested to update the signatory of the draft MOU for the DENR to the new Secretary.

It is submitted that this legal review is limited to the review of the documents presented and relevant laws and rules mentioned, and does not pass upon the business arrangements or the propriety of entering the MOU, which should be submitted to the DENR Management's sound discretion.

For your consideration.


NORLITO A. ENERAN, LL.M., CESO III

List of Annexes:

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| ANNEX "A" - | Draft MOU among the International Foundation for Aids to Navigation (IFAN), DENR, Palawan Council for Sustainable Development (PCSD), and Tubbataha Management Office (TMO); |
| ANNEX "B" - | Project Proposal on Aids to Navigation (AtoN): 2023-2024 Palawan Council for Sustainable Development Staff (Attachment E. Letter from IFAN) - Letter dated 19 July 2021 from Peter Stanley, Chief Executive Officer (CEO) of IFAN; and |
| ANNEX "C" - | Memorandum MOU Review dated 12 November 2021. |

Copy furnished:

The Undersecretary
Legal, Administration, Human Resources and
Legislative Affairs

The Undersecretary
Policy, Planning, and International Affairs

The Assistant Secretary
Legal Affairs

The Assistant Secretary
Policy, Planning and Foreign Assisted and
Special Projects

The Director
Financial and Management Service

The OIC, Director
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