

BOT Law, and the March 2022 IRR and the September 2022 IRR

RA 6957, amended by RA 7718

Alberto C. Agra

PPP Law, Administrative Law and Local Government
Law Professor, Ateneo de Manila Law School

Certified PPP and Regulation Specialist™

PPP Law-for-All Advocate and Author

September 22, 2022



No. 7
07.26.22

Public-Private Partnership is a Priority

My Takeaways from PBBM's 1st SONA

1. Continue and expand the **Infrastructure Development (Build Build Build) Program** of President Duterte
2. Pursue **amendments to the Build-Operate-Transfer Law** to remove ambiguities and bottlenecks, and provide a more competitive and enabling environment
3. Explore **100% foreign ownership of public services** under amended Public Service Act
4. Not suspend **ongoing projects** of the previous Administration
5. Undertake **hard and soft projects** through PPPs:
 - Roads
 - Rails
 - Bridges
 - Airports
 - Seaports
 - Nuclear Energy
 - Renewable Energy
 - Economic Zones
 - Agriculture Development
 - Health Centers
 - Specialty Hospitals outside NCR
 - Fiber Optic
 - Information Technology



REPUBLIC OF THE PHILIPPINES

DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS

RIGHT PROJECT, RIGHT COST, RIGHT QUALITY, RIGHT ON TIME, RIGHT PEOPLE

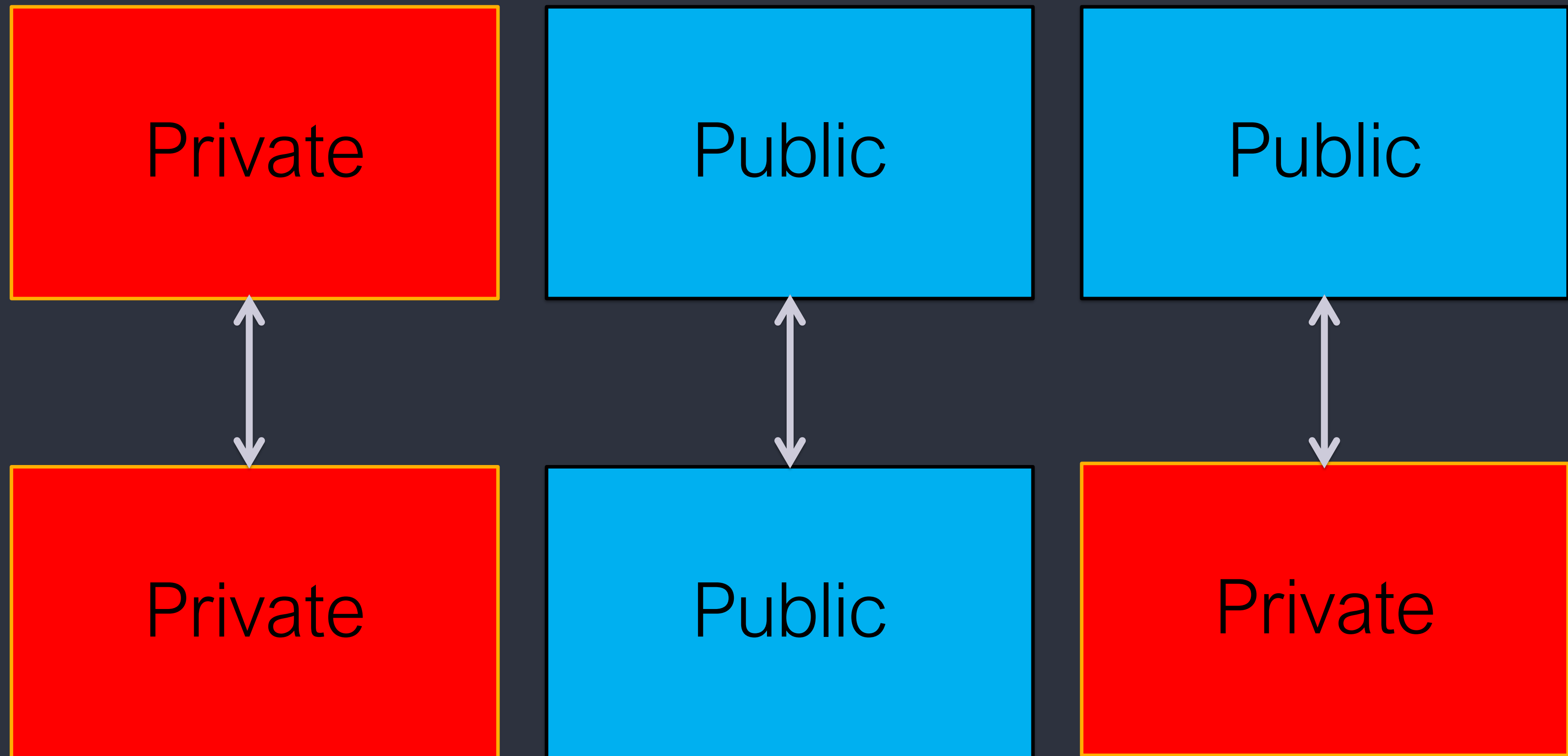
List of Priority Projects Proposed for Implementation under the Implementing Rules and Regulations of Build-Operate-Transfer law

1. Central Luzon Link Expressway (CLLEX)
2. Metro Cebu Expressway
3. Rehabilitation/Reconstruction/Improvement, Operation and Maintenance of Kennon Road
4. North Luzon Expressway East, Phase II
5. Mindoro-Batangas Super Bridge ("Floating Bridge")
6. Pacific Eastern Seaboard Expressway ("Luzon Eastern Seaboard"), Infanta - Atimonan Segment
7. Naawan-Opol-Cagayan de Oro City - Villanueva Expressway
8. Pangasinan-Nueva Ecija Expressway
9. Iloilo-Capiz-Aklan Expressway
10. Dingalan-Capas-Botolan Expressway

- North-South Commuter Railway System
- Metro Manila Subway Project
- North-South Commuter Railway System
- LRT-1 Cavite Extension
- MRT-7
- Common Station LRT-1-MRT-3-MRT-7
- Mindanao Railway Project
- Panay Railway Project
- Cebu Railway System
- Cebu Bus Rapid Transit
- Davao High Priority Bus System
- Ilocos Norte Transportation Hub
- El Nido Transport Terminal

Overview of Public-Private Partnerships (PPPs)

Parties in PPPs

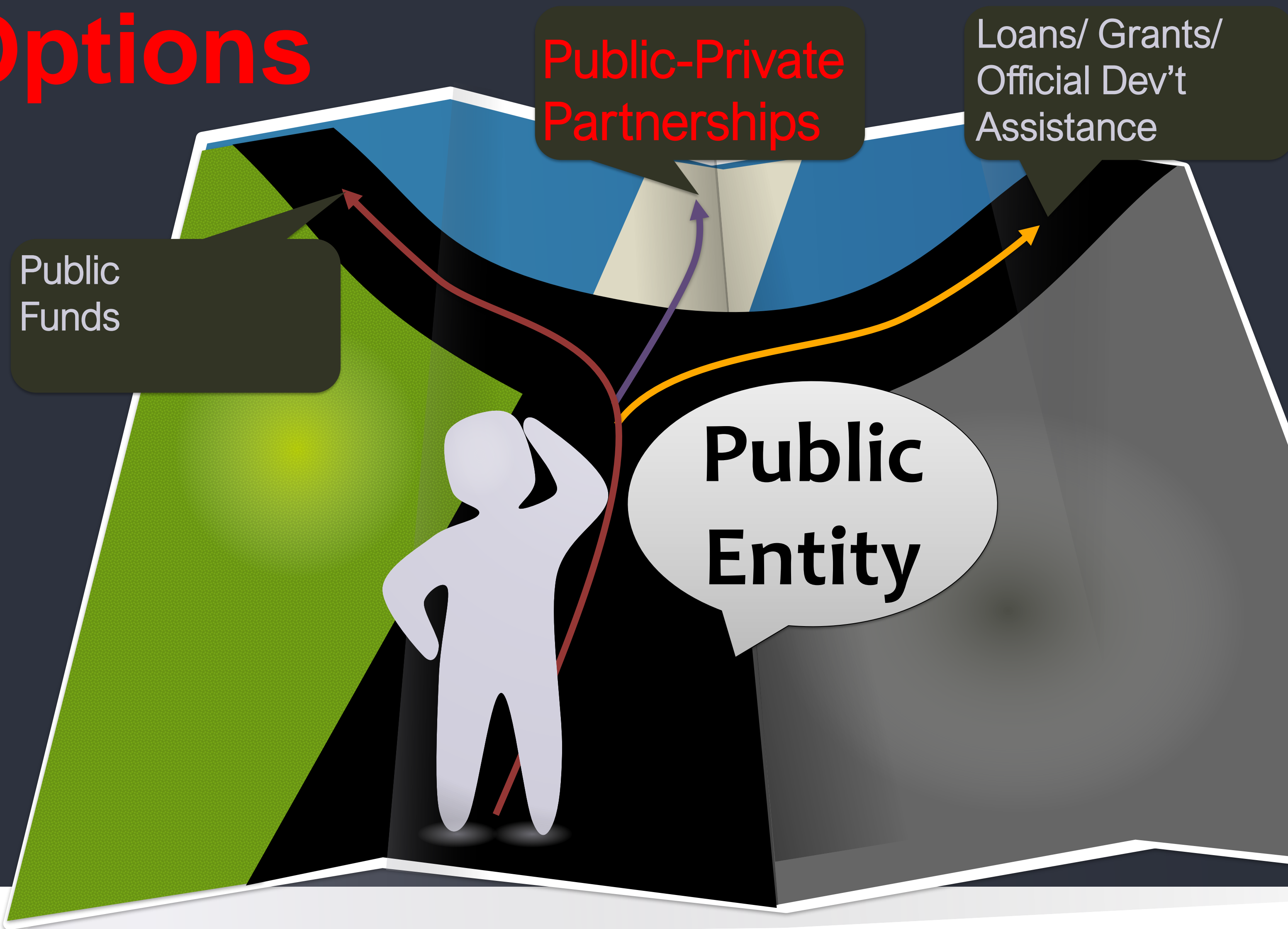




Decentralization

- Vertical
- Horizontal

Options



Nature of PPPs

Public Sector

Private Sector



Aspects:

- Project
- Design
- Finance
- Construction
- Operations
- Governance
- Risk-Allocation
- Period
- Performance
- Payments
- Liabilities
- Procedures

WHY PPP?

THE 7 MAIN VALUE DRIVERS



**IMPLEMENT
CHANGE
POLICY**



**ENCOURAGE
INNOVATION**



**SERVE THE
PEOPLE**



**PROVIDE
BETTER
VALUE-FOR-
MONEY**



**ACCELERATE
DELIVERY OF
SERVICES**



**SOLVE
RESOURCE
SCARCITY**



**SPREADING
RISKS**



AUTHOR: ALBERTO C. AGRA

BM GRAPHICS: JOB RUZGAL

PPP PROJECTS

HARD

INFRASTRUCTURE ASSETS



Road



Water



Power



Ports



Reclamation



Sports Complex



Markets



Transport Systems



Terminal



Government Buildings



Parks



Information Technology



Cemetery



Solid Waste Management



Bridges



Malls

SOFT

SOCIAL ASSETS AND SERVICES



Classroom



Hospital



Agriculture



Housing



Evacuation Center



Prisons

BUNDLED



+



Hard and Hard



+



Hard and Hard



+



Hard and Hard

AUTHOR: ALBERTO C. AGRA



+



Soft and Soft



+



Hard, Soft and Soft



+



























Hard, Hard and Soft

BM GRAPHICS: JOB RUZGAL

26+ PPP Modalities

- | | |
|-----------------------------------|---|
| 1. Build-Transfer | 14. Joint Venture |
| 2. Build-Lease-Transfer | 15. Lease or Affermage |
| 3. Build-Operate-Transfer | 16. Lease-to-Own |
| 4. Build-Own-Operate | 17. Real Property Swap |
| 5. Build-Transfer-Operate | 18. Management Contract |
| 6. Contract-Add-Operate | 19. Management Contract (No Public Funds) |
| 7. Develop-Operate-Transfer | 20. Service Contract |
| 8. Rehabilitate-Operate-Transfer | 21. Service Contract (No Public Funds) |
| 9. Rehabilitate-Own-Operate | 22. Divestment or Disposition |
| 10. Rehabilitate-Lease-Transfer | 23. Corporatization |
| 11. Rehabilitate-Transfer | 24. Subsidiary with Private Equity |
| 12. Rehabilitate-Transfer-Operate | 25. Onerous Donation |
| 13. Concession Arrangement | 26. Gratuitous Donation |
| | 27. Others |

PPP RESOURCE EXCHANGE

Modality	Government		Private Sector		
Build-Operate-Transfer					
Joint Venture					
Concession					
Management Contract					
Public Land Lease					
Policy-setting		Building			
Financing		Operating			

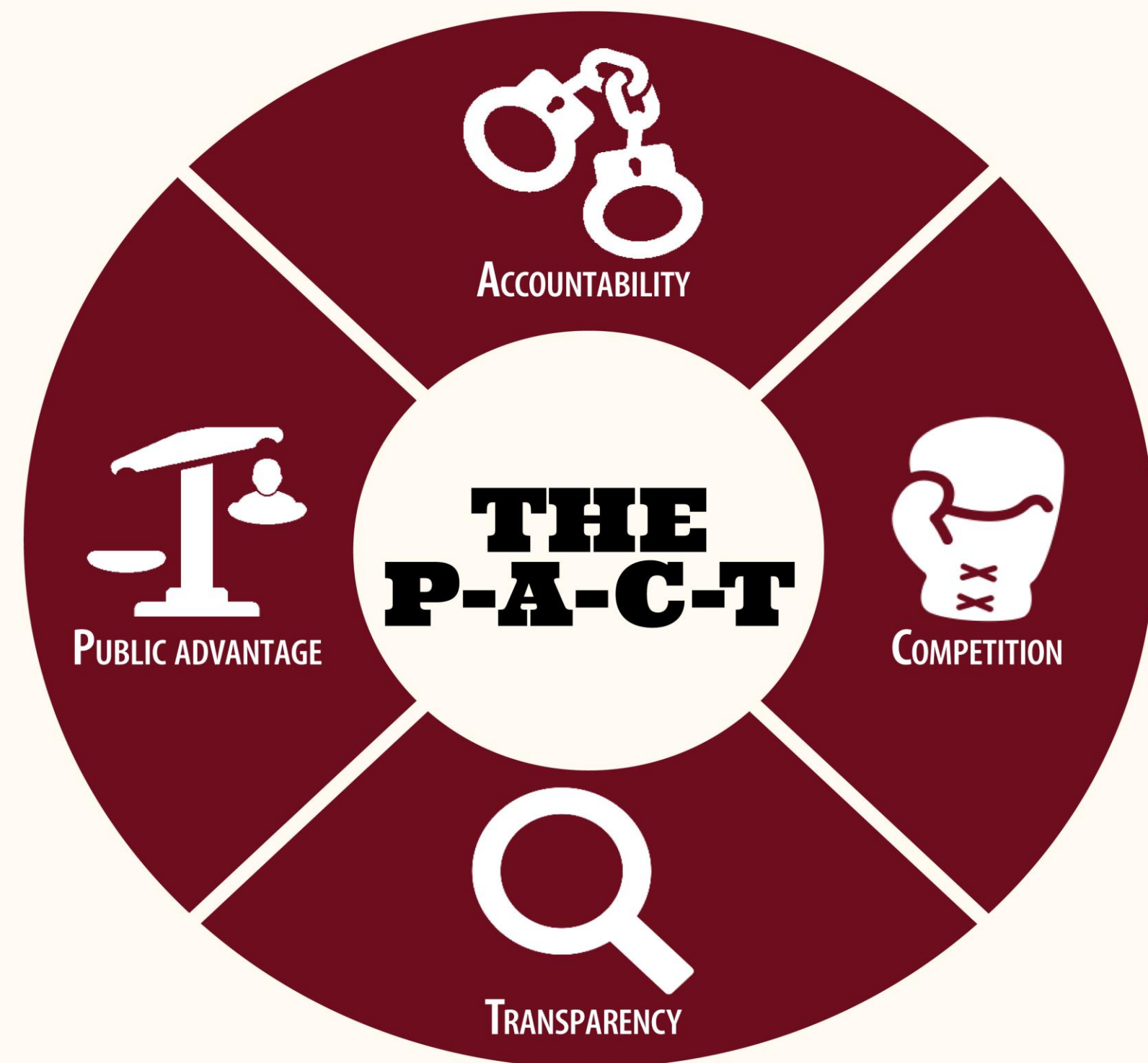
AUTHOR: ALBERTO C. AGRA

BM GRAPHICS: JOB RUZGAL

Governing Laws/ Rules

PPP Modality	Governing Law
BOT Law Variants (9+)	BOT Law
Concession	Special Laws/ Special Guidelines/ Local Ordinance
Joint Ventures	2013 NEDA JV Guidelines/ Special Guidelines/ Local Ordinance
Management and Service Contract*	GPRA/ Local Ordinance
RT, RLT, RTO	[BOT Law]/ Local Ordinance
Lease/ Lease-to-Own/ Realty Swap/ Affermage/ Donations	Civil Code/ Special Guidelines/ Local Ordinance
Divestment/ Disposition	COA Circular No. 89-296/ COA Decision 2009-064
Corporatization	Corporation Code

PPP SELECTION REQUIREMENTS



AUTHOR: ALBERTO C. AGRA

BM GRAPHICS: JOB RUZGAL

And the winner is ...

Highest

- Payment to Government (BOT Law)
- Share in Revenues (JV)
- Purchase Price (Divestment)
- Rated Bid (Service/ Management Contract)
- Rental Payment to Government (Government as Lessor)

Lowest

- Government Subsidy (BOT Law)
- Tariff by End-User (BOT Law)
- Calculated Bid/ Price (Procurement of Goods and Infrastructure)
- Rental Payment by Government (Government as Lessee)

10 PPP POST-AWARD REQUIREMENTS

1. INCORPORATION



2. FINANCIAL CLOSURE



3. LGU PERMIT



4. ENVIRONMENTAL CLEARANCE



5. FRANCHISE



6. REGULATORY APPROVALS



7. RIGHT-OF-WAY



8. SUPPLY CONTRACT



9. INSURANCE



10. PEOPLE'S SUPPORT



AUTHOR: ALBERTO C. AGRA

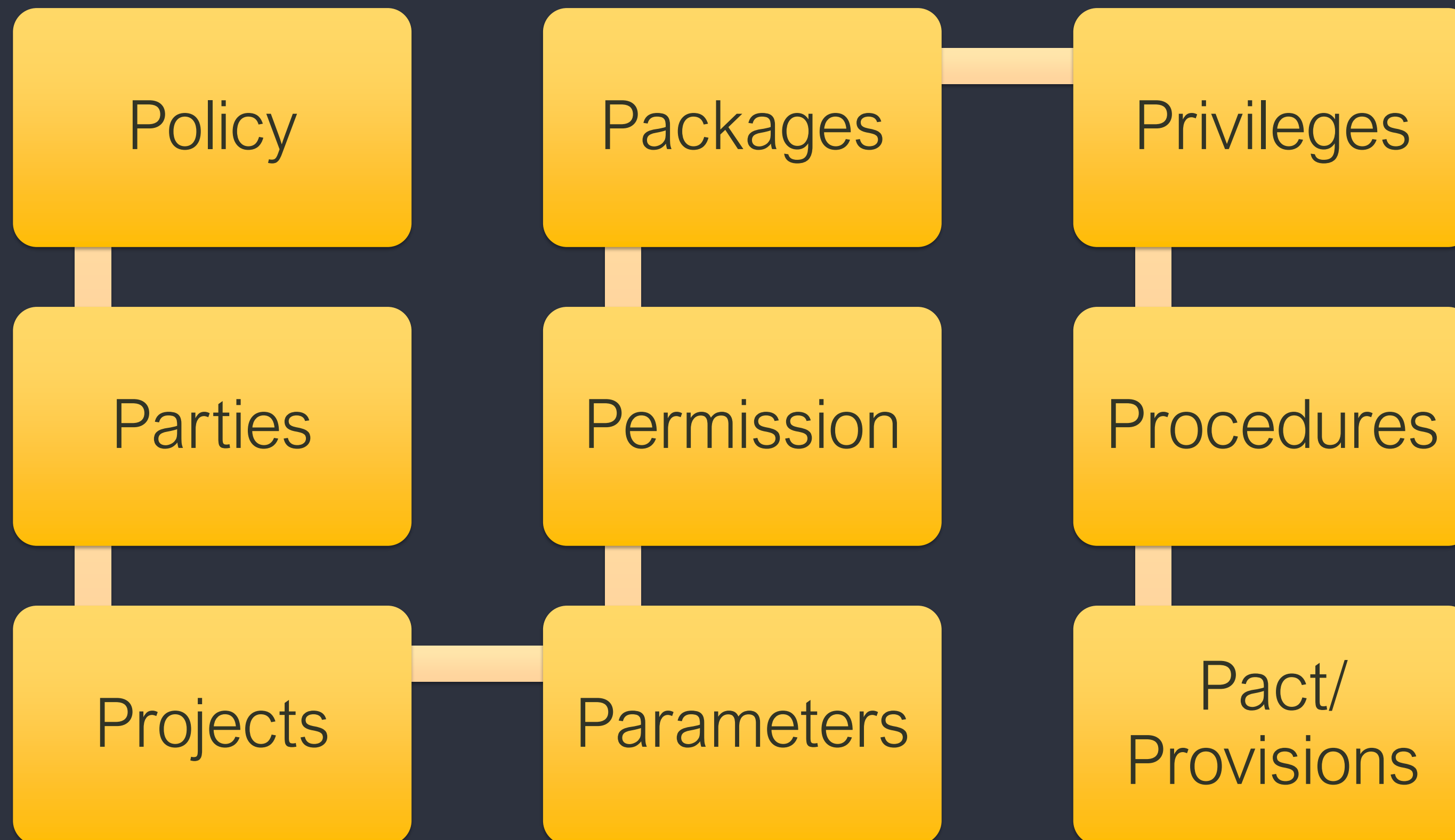
BM GRAPHICS: JOB RUZGAL

BOT Law, and 2022/ Revised IRR and September 2022 Revised IRR*

Additions
Deletions
Amendments

** Approved by the BOT Law IRR Committee (marked-up version posted in PPP Center Website on September 16, 2022)*

Flow of Presentation: 10 Ps



The Policy

Policy

- ▶ Indispensable role of the **Private Sector**
- ▶ Provision for **incentives** and support
- ▶ High quality **services to public**
- ▶ Climate of minimum Government **regulations**
- ~~▶ Reasonable returns of investments~~
- ▶ **Transparency** and **accountability** to arrive at ~~real project cost~~
- ▶ Competition
- ▶ Appropriate **risk-sharing** mechanisms
- ~~▶ Avoid conflicts of interest~~
- ~~▶ Protection from excessive payments, undue guarantees, unnecessary fiscal risks and onerous contractual obligations~~
- ~~▶ Create enabling environment for Regulators~~
- ~~▶ Closer collaboration between national and local governments~~
- ~~▶ Compliance with obligations and undertakings~~
- ▶ Welfare of **Filipinos**

The Parties

Public Parties Coverage

- ▶ Department, Bureau, Office, Commission, Authority or Agency of National Government
- ▶ Local Government Units
- ▶ Government-Owned and/ or -Controlled Corporations (and Government Instrumentalities)
- ▶ Government Financial Institutions
- ▶ State Universities and Colleges

Authorized by the appropriate Agency/ LGU pursuant to the Act or this Revised IRR

LGUs may adopt additional guidelines and procedures (not in conflict with BOT Law and IRR)

Private Parties

Project Proponents

- Individual
- Partnership
- Corporation
- Firm
 - For above, local or foreign, including consortia of local, foreign or local and foreign firms
- Cooperative

Private Parties

3 Roles

- ▶ Project Proponent (PP)
 - ▶ contractual responsibility for Project
 - ▶ with adequate financial base
 - ▶ may or may not be the C or FO
- ▶ Contractor (C)
 - ▶ undertake construction and/ or supply equipment
- ▶ Facility Operator (FO)
 - ▶ operate and maintain
 - ▶ registered with SEC or for cooperatives, Cooperative Development Authority
 - ▶ if require Public Utility Franchise, secure prior to commencement

Private Parties

3 Requirements/ Tests

Legal

Technical

Financial

Legal Requirements

If	Then
Project requires public utility franchise for operation (PP=FO)	Filipino $\geq 60\%$ If consortium, Filipinos $\geq 60\%$ interest
Project requires public utility franchise for operation (PP\neqFO)	FO Filipino $\geq 60\%$
Project not require public utility franchise	PP or FO Filipino or Foreign-Owned
Unincorporated Consortium	Undertaking of Members – Jointly and Severally Liable
Incorporated Consortium	Undertaking of Corporation – Jointly and Severally Liable
Local Contractor	licensed and accredited by the PCAB
Foreign Contractor	licensed and accredited by accreditation institution in the Contractor's country (once awarded, register with PCAB)

Technical Requirements

Experience and Track Record

Firm Experience

- PP, Consortium Members or FO
- Successfully **undertaken** a project(s) similar or related to the subject project
- May individually specialize on any or several **phases** of the project(s)
- If **consortium proponent**:
 - Evaluate based on the **individual or collective experience** of the member-firms of the consortium and of the Cs (even if the C is not a member of the consortium), **nominated affiliates, proposed FOs and or entities bound by technical agreements (subject to lock-in period)**
 - Submit **business plan** - identify members, equity interest/ contribution of each member to the consortium, list of prospective Cs

Key Personnel Experience

- sufficient experience in the **relevant aspect** of schemes similar or related to the subject project
- P, C **or Nominated Entities**

Financial Requirements

(for Detailed Engineering Design, Construction and/or O&M)

Equity

- a minimum amount of equity to the project measured in terms of the latest net worth of company, or lead company or combined net worth of all members if consortium (deducting total liabilities from the total assets less equity commitments to other projects)

~~○ PP submits:~~

- ~~• latest audited FS~~
- ~~• a sworn affidavit disclosing ongoing and new projects requiring~~
- ~~• Equit, debt financing, debt to be incurred in all projects, equity required by all projects~~

- a set-aside deposit equivalent to the minimum equity required, committed solely for the project

[Note: Not considered joint and several liability agreements, accession agreements, guarantee letters from parent companies]

Debt

PP submits bank testimonial:

- PP banking with them
- PP in good financial standing and/ or qualified to obtain credit accommodations from such banks to finance the project equivalent to the value of the debt requirement in the proposal

No stated gearing ratio

The Projects

Projects

Infrastructure or Development Projects

- Highways, including expressway, roads, bridges, interchanges, tunnels, and related facilities
- ~~Railways or rail-based projects that may or may not be packaged with commercial development opportunities~~
- ~~Non-rail based mass transit facilities, navigable inland waterways and related facilities~~
- Port infrastructures like piers, wharves, quays, storage, handling, ferry services and related facilities
- Airports, air navigation, and related facilities
- Power generation, transmission, sub-transmission, distribution, and related facilities
- Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities
- Information technology (IT) and data base infrastructure, including modernization of IT, geo-spatial resource mapping and cadastral survey for resource accounting and planning
- Irrigation and related facilities
- Water supply, sewerage, drainage, and related facilities

Projects

Infrastructure or Development Projects

- Education and health infrastructure
- Land reclamation, dredging and other related development facilities
- Industrial and tourism estates or townships, including ecotourism projects such as terrestrial and coastal/marine nature parks, among others and related infrastructure facilities and utilities
- Government buildings, housing projects
- Markets, slaughterhouses, and related facilities
- Warehouses and post-harvest facilities
- Public fish ports and fishponds, including storage and processing facilities
- Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others
- Climate change mitigation and adaptation infrastructure projects and related facilities
- Agri-fishery industrial hubs, agribusiness facilities, agricultural research facilities, agricultural estates, agrilogistics systems, contract farming, and related facilities
- Disaster risk reduction and management infrastructure projects and related facilities

Projects

Infrastructure or Development Projects

- Land transportation systems, including railways, road-based transportation systems, bus rapid transit, high priority public utility vehicle systems, active transportation, transit- oriented developments, public utility vehicle stations, transport plazas, intermodal terminals, park & ride, and related facilities
- Transport and traffic management projects, including transportation databases, automated fare & toll collection systems, traffic signaling, traffic monitoring systems, traffic enforcement systems, congestion and management systems
- Energy efficiency and conservation, renewable energy, electric vehicle charging stations with related infrastructure
- Navigable inland waterways and related facilities
- Flood control projects
- Urban development townships
- Heritage preservation and adaptive reuse projects

Priority Projects

- Agencies/ LGUs to prepare list
 - To be adopted by Approving Body
 - Published in newspaper of general circulation and international circulation, if applicable (or online)
- Lists of National Priority Projects
 - Public Investment Program (PIP)
 - Three-Year Rolling Infrastructure Program (TRIP)
 - Successor priority lists

List consistent with the Agency's/LGU's master plans

- Philippine Development Plan
- Regional Development Plans
- Provincial Development and Physical Framework Plans
- Comprehensive Development Plans
- such other plans or programs as may be mandated by the President

Guidelines for Project Approval

- Value-for-money analysis shows that PPP modality is the most viable procurement option
- Proposed project is technically feasible
- Proposed project is optimal based on a value engineering/value analysis study
- Outputs of the project are clearly specified
- ~~Outputs of the project do not restrict competition~~
- Project is economically viable
- Agency's/LGU's plans for mitigating social and environmental impacts
- Project Cost is sufficient to achieve the technical requirements (~~key performance indicators/ targets~~ general performance standards to meet social and environmental standards)
- Operating costs are sufficient to achieve the operational requirements

Guidelines for Project Approval

- Project is financially viable for investors at the project level
- Project's cash flows are healthy
- Project's cash flows sufficient to service debt obligations
- Risk allocation complies with the Generic Preferred Risk Allocation Matrix
- Firm payments are justified by the Agency/LGU
- Proposed bid parameter generates the most value-for money for the public
- Proposed bid parameter ~~shall not deter competition~~ fosters competition, fairness and transparency
- Agency/LGU has the capability to deliver its assumed obligations for the project
- ~~Proposed Parameters, Terms and Conditions (PTCs) are consistent with the Act and this Revised IRR~~

Completeness of Proposed Projects

- NEDA to publish requirements
- Agency/ LGU release up-to-date information
- Complete Feasibility Study (*Note: Pre-FS or Business Plan not allowed/ inadequate*)
- Economic and Financial Models that are traceable (contain data not older than 3 years)
- PTCs [*Note: replaces “Minimum Design, Performance Standards/ Specifications, and Economic Parameters”*]

Revenue-Based PPP Project

- scheme where the project proponent is authorized to charge and collect, in whole or in part,
- from the public reasonable
- user fees or tariffs
- where applicable, the project proponent may likewise be repaid in the form of a share in the revenue of the project

The Parameters

Parameters, Terms & Conditions (PTCs)

- Scope of the project
- Contractual Arrangement
- Contract term
- Rights and Obligations, undertakings, and applicable liquidated damages of the Agency/ LGU and Project Proponent
- Proposed Risk Allocation
- ~~Requirement to submit performance reports by the Project Proponent to the Agency/LGU and to the PPP Center~~
- General Performance Standards and Key performance indicators, targets, and measurement
- Government Undertakings
- Bid parameter that does not deter competition
- ~~Requirement to disclose to the Agency/LGU and the appropriate Approving Body by the Project Proponent of its loan agreement~~

Parameters, Terms & Conditions (PTCs)

- Ceiling for debt-to-equity ratio
- Revenue share and/or assets for the government, if any
- Reasonable Rate of Return (RRoR) for unsolicited proposals and negotiated contracts
- Proposed structure of tolls/fares/fees/rentals/charges
- ~~• Grounds for termination~~
- Firm and contingent liabilities
- Risk Allocation
- Materiality threshold amount and/or compensation cap
- ~~• Acceptable conditions for lenders' step-in rights~~
- ~~• Conditions for acceptable permitted security interest~~
- ~~• A condition prohibiting the incorporation of onerous and one-sided provisions in the contracts *[Note: A contract is onerous if the cost of the project outweighs the advantages the government and the public will receive from the project]*~~

Reasonable Rate of Return (RRoR)

- ~~Accruing to the Project Proponent~~ ~~at the Project Level~~ [Under March IRR, “Equity IRR”; *Under 2012 IRR, RoR is based on what a Project Proponent shall be entitled to or “Project IRR”*]
- Reflects prevailing cost of capital (maximum of 12% if negotiated contract, public utility project which are monopolies)
- ~~○ Adjusted RRoR – IRR of project or to shareholders after adjusting the project's free cash flows to reflect the value of all Government Undertakings and risks such as:~~
- ~~○ value of assets, right of way, franchise, personnel, IP, revenues accruing to Proponent due to undertaking, guarantees, subsidies, credits, incentives, cost savings~~

~~No Additional PTCs~~

~~(In Draft Contract and Negotiations)~~

- ~~Altering the approved risk allocation~~
- ~~Conflict or supersede the PTCs approved by the Approving Body~~
- ~~The incremental fiscal impact being disadvantageous to the government~~
- ~~Altering the definition of contingent liabilities or expanding the types of contingent liabilities~~
- ~~Worsening the approved viability indicators from the government's perspective~~

~~Changes allowed:~~

- ~~○ Prior to submission of bids (prior to bid bulletin)~~
- ~~○ Prior to submission of comparative proposals~~

~~Effect if violate:~~

~~Executed contract is null and void~~

The Permission

Approving Bodies

- ▶ Head of Agency
 - ▶ based on PTCs (also changes)
 - ▶ Government Undertakings in draft contract not approved not binding against the Republic
- ▶ NEDA, NEDA-ICC or Local Development Council
- ▶ Statutory Counsel (contract review and opinion; 20 days)
- ▶ Department of Finance (project involves funds of national government, and local projects requiring ICC review/ approval)
- ▶ Bids and Awards Committee

PPP Pre-Qualification, Bids and Awards Committee

Voting

- At least a third ranking regular official of the Agency/LGU – Chairperson
- A legal officer (Secretary)
- An officer knowledgeable in finance
- An officer knowledgeable in management/operation of the project

Provisional/ Non-Voting

- 1 technical officer knowledgeable with the technical aspects or requirements of the project
- 1 technical officer knowledgeable with aspects or requirements of the project from a concerned Regulator
- 2 representatives from the private sector:
- Representative from the Commission on Audit
- Representative from Philippine Competition Commission
- Representative from the PPP Center for national projects
- Representative from the local DILG for local projects

Approving Bodies for Projects (and as Co-Grantors)

National Projects (Approval)

- ▶ up to Php 300M: NEDA-ICC
- ▶ more than Php 300M: NEDA Board for approval upon the recommendation of ICC
- ▶ regardless of amount, negotiated projects shall be submitted to the NEDA Board for approval upon recommendation by the NEDA-ICC

Local Projects (Confirmation)

- ▶ up to Php 20M: MDC
- ▶ above Php 20M up to Php 50M: PDC
- ▶ up to Php 50M: CDC
- ▶ above Php 50M up to Php 200M: RDC
- ▶ above Php 200M: NEDA-ICC

*Amounts expended by
public and private sector*

Confirmation

- Purpose: validating the consistency of the proposed project with existing master plans and development plans
- Expressed Confirmation
 - within 60-day period from upon written request and submission of all requirements
 - confirmation by inaction if no confirmation within 60 days
- Sanggunian approval after confirmation

COA Audit

Scope

- Pursuant to Government Auditing Code
- revenues, share and/or receipts pertaining to or accruing to the Agency/LGU
- expenditures or uses of funds and property, owned or held in trust by, or pertaining to the Government
- Compliance with contract
- Compliance with law and rules

[Note: “All revenues and receipts pertaining to or accruing to the Project Proponent shall be treated as private funds” deleted]

~~Powers~~

~~Purpose: ensure that revenues, share and/or receipts pertaining to or accruing to the Agency/LGU derived from any project proposed under the Act are fully and properly accounted for and remitted to the Agency/LGU~~

- ~~1. audit and examine~~
- ~~2. visitorial power over non-government entities such as the Project Proponent pursuant to the Government Auditing Code~~
- ~~3. access to all project-related documents~~

The Packages

BOT and its Variants

- ▶ Build-and-transfer (BT)
- ▶ Build-lease-and-transfer (BLT)
- ▶ Build-operate-and-transfer (BOT)
- ▶ Build-own-and-operate (BOO)
- ▶ Build-transfer-and-operate (BTO)
- ▶ Contract-add-and-operate (CAO)
- ▶ Develop-operate-and-transfer (DOT)
- ▶ Rehabilitate-operate-and-transfer (ROT)
- ▶ Rehabilitate-own-and-operate (ROO)
- ▶ Others approved by President

- *Functions assumed by the PP*
- *Short names do not expressly state 2 components: Designing and Financing*

Build-and-Transfer

Undertaking: financing and construction of an infrastructure or development facility

Payment of Fees: paid on an agreed schedule the total investments expended on the project, **plus a reasonable rate of return**

Repayment: through Amortization as may be appropriate and reasonable

Legal Title to Facilities: turned over to the government agency or LGU concerned after completion

Transfer to Agency/ LGU: Full and legal ownership; facility must be operable; 3rd party to assess residual value; Project Proponent to provide **Transfer and Warranty Securities**

Build-Operate-and-Transfer

Undertaking: financing and construction of an infrastructure facility, and its operation and maintenance

Payment of Fees: charge on facility users of tolls, fees, rentals, and charges

Repayment: collection of reasonable tolls, fares, fees, and charges for a fixed term

Legal Title to Facilities: during operation period, the facility belongs to the project proponent, who then transfers the facility to the government agency or LGU concerned at the end of the fixed term

Transfer to Agency/ LGU: Full and legal ownership; facility must be operable; 3rd party to assess residual value; Project Proponent to provide **Transfer and Warranty Securities**

Build-Own-and-Operate

Undertaking: financing, construction, ownership, operation and maintenance of an infrastructure or development facility

Payment of Fees: collection of tolls, fares, fees, rentals or other charges from facility users

Repayment: collection of reasonable tolls, fees, and charges for a fixed term

Legal Title to Facilities: ownership is retained by the project proponent

Build-Transfer-and-Operate

Undertaking: construction, including financing, of an infrastructure facility, and its operation and maintenance

Payment of Fees: as provided under the agreement

Repayment: First Option – Amortization as may be appropriate and reasonable (through Tolls, fees, rentals and charges, management fee); Second Option - collect tolls, fees, rentals and charges for a fixed term)

Legal Title to Facilities: once the facility is commissioned satisfactorily, title is transferred to the government agency or LGU concerned, with the project proponent assuming cost overrun, delay and specified performance risks; the private entity, however, operates the facility on behalf of the implementing agency/LGU under an agreement

Build-Lease-and-Transfer

Undertaking: financing and construction of an infrastructure or development facility; government (lessee) leases from private sector (lessor)

Payment of Fees: lease payment

Repayment: through Amortization as may be appropriate and reasonable

Legal Title to Facilities: ownership of the facility is automatically transferred to the government agency or LGU concerned after the lease period

Transfer to Agency/ LGU: Full and legal ownership; facility must be operable; 3rd party to assess residual value; Project Proponent to provide

Transfer and Warranty Securities

Rehabilitate-Operate-and-Transfer

Undertaking: refurbishing, operation and maintenance of an existing facility; or the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country

Payment of Fees: charge on facility users of tolls, fees, rentals, and charges; as provided in the agreement

Repayment: collection of reasonable tolls, fees, and charges for a fixed term

Legal Title to Facilities: as long as the operator is not in violation of its Franchise, it can continue to operate the facility in perpetuity; no time limitation imposed on ownership

Transfer to Agency/ LGU: Full and legal ownership; facility must be operable; 3rd party to assess residual value; Project Proponent to provide **Transfer and Warranty Securities**

Rehabilitate-Own-and-Operate

Undertaking: refurbishing, operation and maintenance of an existing facility; private proponent will own the facility

Payment of Fees: collection of tolls, fees, rentals or other charges from facility users; as provided in agreement

Repayment: collection of reasonable tolls, fees, and charges for a fixed term

Legal Title of Facilities: as long as the operator is not in violation of its Franchise, it can continue to operate the facility in perpetuity; no time limitation imposed on ownership

Contract-Add-and-Operate

Undertaking: addition to an existing infrastructure facility which it is renting from the government

Payment of Fees: as provided in the agreement

Repayment: collection of reasonable tolls, fees, and charges for a fixed term

Legal Title to Facilities: there may or may not be a transfer arrangement in regard to the facility, but the project proponent operates the expanded project over an agreed franchise period

Develop-Operate-and-Transfer

Undertaking: development of adjoining property is integrated into the agreement for new infrastructure project which is to be built by a private proponent

Payment of Fees: enjoyment of benefits that the investment creates such as higher property or rent values

Repayment: collection of reasonable tolls, fees, and charges for a fixed term

Transfer to Agency/ LGU: Full and legal ownership; facility must be operable; 3rd party to assess residual value; Project Proponent to provide
Transfer and Warranty Securities

The Privileges

Government Undertakings/ Incentives

- ▶ Direct Government Guarantee
- ▶ Cost-sharing (deleted)
- ▶ Direct Government Subsidy
- ▶ Direct Government Equity
- ▶ Credit Enhancement
- ▶ Performance Undertaking
- ▶ Legal Assistance
- ▶ Security Assistance
- ▶ Financing and Investment Incentives
- ▶ Availability Payments
- ▶ Viability Gap Funding

Total government undertakings shall not exceed 50% of the total project cost or the debt of the Project Proponent incurred for the project, whichever is lower.

Direct Government Guarantee

An agreement whereby the government or any of its agencies or local government units assume responsibility for the **repayment of debt** directly incurred by the project proponent in implementing the project in case of a **loan default**.

Cost-Sharing (deleted)

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

Direct Government Subsidy

Forms: Government, or any of its Agencies/LGUs will:

- defray, pay for or shoulder a portion of the Project Cost
- defray, pay for or shoulder a portion of the expenses and costs in operating or maintaining the project
- bear a portion of capital expenses associated with the establishment of an Infrastructure or Development Facility
- contribute any property or assets to the project (provision of access infrastructure, right-of-way, transfer of ownership over, or usufruct, or possession of land, building or any other real or personal property for direct use in the project)
- in the case of LGUs, waive or grant special rates on real property taxes on the project during the term of the contractual arrangement
- waive charges or fees relative to business permits or licenses that are to be obtained for the Construction of the project

Direct Government Subsidy

Guidelines

- All without receiving appropriate compensation from the PP and/or FO
- not exceed 50% of the total Project Cost if Government defrays portion of cost and bear portion of capex
- Difference between tolls, etc. and amount approved by Regulator not considered a subsidy
- ~~○ If unsolicited, government payments is a subsidy and prohibited~~
- may be financed from direct government appropriations and/or from official development assistance (ODA) of foreign government or institutions (~~sunk costs not included if solicited~~)
- contribution of assets or property
 - value of the direct government subsidy shall be determined by a government financial institution or independent property appraiser before the project is submitted to the Approving Body
 - compensation shall be considered as appropriate if the value of the compensation is at least equal to the value of the contribution or undertaking as determined by a government financial institution or independent property appraiser

Guidelines for Grant of Usufruct

- *Use of Government Financial Institutions and Independent Property Appraisers* - To determine the value of the usufruct of government assets, the original proponent shall procure, at its own cost, the services of a government financial institution *and BSP-/SEC-accredited Independent Property Appraisers*
- *Conduct of Valuation* - The valuation of the usufruct shall be conducted on a date/s, which is mutually agreed upon by both parties, provided that it shall be done during the negotiation stage but not later than the publication of the invitation for comparative proposals. The valuation ~~determined by the government financial institution~~ shall be valid and binding upon both parties.
- *Compensation Amount* - the amount of compensation for the usufruct of assets shall be based on the appraised value of the asset ~~as determined by the government financial institution~~. Such amount, including interests, if any, shall be paid in Philippine pesos on a date set forth under the contract.
- *Interest Rate* - Non-payment of compensation on or before the agreed date shall incur interest at a rate stated in the contract, taking into consideration relevant rules and regulations on interest. In case the parties fail to agree on the applicable interest rate, or in default thereof, the prevailing risk-free rate shall apply.

Direct Government Equity

This shall refer to the subscription by the Government or any of its agencies or Local Government Units of **shares of stock or other securities** convertible to shares of stock of the project company, whether such subscription will be paid by the money or assets.

Credit Enhancement

This shall refer to support to a development facility by the Project Proponent and/or Agency/LGU concerned, the provision of which is **contingent upon the occurrence of certain events and/or risks**, as stipulated in the contract. Credit enhancements are allocated to the party that is best able to manage and assume the consequences of the risk involved. Credit enhancements may include, but are not limited to, government guarantees on the performance, or the obligation of the Agency/LGU under its contract with the Project Proponent.

Performance Undertaking

This shall refer to an undertaking of a department, bureau, office, commission, authority, agency, GOCC, or LGU in **assuming responsibility for the performance** of the Agency's/LGU's obligations under the contractual arrangement including the payment of monetary obligations, in case of default. These undertakings may be subject to payment of risk premium to the Government or LGU, or any other authorized agency.

Legal Assistance

This shall refer to the extension of representation by **government lawyers** to a Project Proponent but only in cases, hearings, or inquiries where the Agency/LGU and Project Proponent are party-defendants/respondents therein including the adoption by such government lawyers of positions and strategies consistent with upholding the validity of the approved contractual arrangement.

Security Assistance

This shall refer to the deployment of **government security forces**, either from the Philippine National Police (PNP) or the Armed Forces of the Philippines (AFP) in the vicinity of the project site to provide security during the implementation of the project up to completion.

Financing and Investment Incentives

- Construction: Financing from foreign and/ or domestic sources
 - Prior to signing a loan agreement to finance a project, the Project Proponent shall obtain the consent of the Agency/LGU (conditions precedents, termination, proposed cure and refinancing)
- Project Cost
 - >P1B– entitled under Omnibus Investments Code
 - \leq P1B – may avail of incentives subject to evaluation (promoting long-term growth and sustainable development, and the national interest)
- Disclosed and included in the financial and economic models submitted to the appropriate Approving Body during the project approval stage.

Availability Payments

- predetermined payments by the Agency/LGU
- to the project proponent
- in exchange of delivering an asset or service in accordance with the contract.
- availability payments shall not be construed as direct government subsidy
- Can be a form of repayment

Viability Gap Funding

- Type of subsidy
- in the form of financial support that the government may provide
- to a revenue-based PPP project
- with the objective of making fees affordable
- while improving the commercial attractiveness of the project
- excluding costs of right-of-way, resettlement, and real estate taxes

The Procedures

2 PACT-Compliant Routes

Solicited (Government as “Originator”)

- ▶ competitive bidding
- ▶ must be included in the List of Priority Projects
- ▶ may have all the Privileges

Unsolicited (PP as “Originator”)

- ▶ Not in List of Priority Projects (unless Project involves a new concept or technology)
- ▶ No Direct Government Guarantee, subsidy [Cost-sharing subsumed] or equity required
- ▶ Swiss challenge (right to match)

Solicited Mode (Public Bidding)

- ▶ Project ID and Preparation
- ▶ Approval by Approving Body
 - ▶ No approval through inaction
 - ▶ If disapproved, Agency/ LGU informed
 - ▶ Agency/ LGU may resubmit (reasons for disapproval must be addressed; treated as a new project)
- ▶ Advertisement/ Invitation to Pre-Qualify and Bid (within 6 months)
- ▶ Preparation of Pre-Qualification Documents
- ▶ Pre-Qualification of Bidders (qualified or disqualified [right to appeal]; bidding process suspended pending resolution)

Solicited Mode (Public Bidding)

- ▶ Issuance of Tender Documents
- ▶ Bid Submission and Evaluation
 - ▶ Agency/ LGU may opt for Simultaneous or Single-Stage Qualification and Bidding (3 envelopes – qualification, technical and financial)
- ▶ Submission of Statement
 - ▶ accepts the qualification criteria
 - ▶ waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the concerned Agency/LGU or its PBAC
 - ▶ without prejudice to the right of a disqualified or losing bidder to question the lawfulness of its disqualification or the rejection of its bid

Solicited Mode (Public Bidding)

Bid Submission

Technical Proposal

- Acceptance/Compliance statements with regard to all terms and conditions in the tender documents
- Operational feasibility of the project
- Technical soundness/preliminary engineering design, including proposed project timeline
- Preliminary environmental assessment

○ Project Cost

○ Bid Security

PROJECT COST (as estimated by the Agency/LGU or proposed by the Project Proponent)	REQUIRED BID SECURITY
less than PhP 5.0 billion	2.0% of the Project Cost
less EQUAL TO OR MORE than PhP 5.0 billion to less than PhP 10.0 billion	1.5% of the Project Cost or PhP 100 million, whichever is higher
PhP 10.0 billion and more	1.0% of the Project Cost or PhP 150 million, whichever is higher

Financial Proposal

- Proposed Project Cost, operation and maintenance cost, and all other related costs
- Project financing scheme, which may include the amount of equity to be infused, debt to be obtained for the project, and sources of financing
- Financial bid

Solicited Mode (Public Bidding) Evaluation

First Envelope Evaluation

- Technical soundness
- Operational feasibility
- Environmental Standards
- Project Financing

Second Envelope Evaluation

- assessment and comparison of the financial proposals of the bidders

Agency/LGU reserves the right to reject any or all bids, waive any minor defects therein and accept the offer it deems most advantageous to the Government

Direct Negotiations

- If **after advertisement**:
 - Only 1 PP applies + meets pre-qualification requirements then submits compliant bid
 - > 1 PP applied for pre-qualification + Only 1 meets pre-qualification requirements then submits compliant bid
- If **after pre-qualification** of > 1 PP:
 - Only 1 submits bid
 - Only 1 found compliant
- ICC shall determine the RRoR prior to the negotiation
- Scope of negotiation - limited to the financial proposal of the **lone complying bidder**

Winning Bidder/ Financial Aspect

- ▶ **Lowest** proposed toll, **fare**, fee, rental or charge at the start of project operation, if a pre-agreed parametric tariff adjustment formula is prescribed in the bid document
- ▶ **Lowest** present value of government subsidy to be provided for the period covered by the contract
- ▶ **Highest** present value of proposed payments to Government, such as: concession fees, lease/rental payments, fixed/guaranteed payments, and/or variable payments/percentage shares of revenue for the period covered by the contract
- ▶ Any other appropriate financial bid parameter as may be approved by the Approving Body

Solicited Mode (Public Bidding)

- ▶ Recommendation to Decision to Notice of Award which requires submission of:
 - ▶ prescribed performance security
 - ▶ proof of commitment of the required equity contribution
 - ▶ proof of firm commitments from reputable financial institution to provide sufficient credit lines
 - ▶ in the case of a consortium, the agreement indicating that the members are jointly and severally liable for the obligations of the winning bidder under the contract
 - ▶ in case a special purpose company (SPC) is formed for purposes of undertaking the project, proof of registration
- ▶ Public Dissemination of Bidding Results (PHILGEPS, Agency/ LGU website)

Solicited Mode (Public Bidding)

- ▶ Execution/ Approval of Contract
 - ▶ Agency/ LGU and Project Proponent, that was pre-qualified and awarded with the project, shall be the signatory to the contract
 - ▶ If Project Proponent fails to sign, bid security forfeited
 - ▶ Agency/ LGU to consider the bidder with the next ranked complying bid (if fails to sign, bid security forfeited)
- ▶ Once signed, presumption arises that Project serves public interest
 - ▶ Regulator shall grant in favor of the PP a franchise
 - ▶ *(Note: Recovery of difference from government if issuance of franchise results in decrease in tolls removed in IRR)*
 - ▶ If final approval of franchise by Regulator shall result in decrease in amount of tolls/ fares/ rentals
 - ▶ Government shall ensure Proponent recovers difference
 - ▶ Difference not considered a Direct Government Subsidy

Unsolicited Proposals

3 Conditions must be met

1. The project:
 - a. involves a new concept or technology as determined by the Agency/LGU and/or
 - b. is not part of the List of Priority Projects (if listed, allowed if with new technology)
2. No Direct Government Guarantee, subsidy or equity is required
3. The Agency/LGU concerned has invited by publication, for 3 consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of 60 working days.
4. Any component of an approved project not eligible

New Technology

- New or pioneering ~~and untried in the Philippines~~
- Any of the following: Green, smart, emerging, or state-of-the-art technology, or any other similar or related concepts/ technologies
- Information disclosed
 - sufficient detail so as to allow proper evaluation
 - details of the new concept or technology
 - cost-benefit analysis comparing the new concept or technology with traditional ones
- Positive impact on the implementation and operations of the project
 - reduction of construction costs
 - reduction of O&M costs
 - reduction of adverse or unfavorable negative environmental impact
 - reduction of social/economic disturbances either during construction or operation phase
 - acceleration of project execution
 - improvement of safety
 - enhancement of project performance
 - extension of economic life
 - improvement in productivity or quality of produce
 - increase in use of materials with a high domestic content.

Unsolicited Proposals

When Complete?

- cover letter (description of the project, its expected output and outcome, implementation period, and general description of the new concept or technology)
- company profile of the Project Proponent or the business plan of the proponent consortium
- feasibility study
- draft contract
- financial and economic model (traceable) used by the Project Proponent
- pre-qualification requirements
- proposed PTCs
- documentary evidence of compliance (no Direct Government Guarantee, subsidy or equity and publication)
- proprietary information (sealed envelope)

Unsolicited Proposals

- ▶ Submission of Complete Proposal
 - ▶ Acknowledge receipt of Unsolicited Proposal (UP) (7 calendar days)
 - ▶ Letter of Completeness to PP and PPC (35 calendar days)
 - ▶ If UP incomplete, letter informing of lacking information/ requirements (PP can resubmit; will be treated as new submission)
- ▶ >1 UP for same or similar project prior to acceptance
 - ▶ Reject all
 - ▶ Bid out project
 - ▶ Proceed: Evaluate proposal based on 1st in time approach
 - ▶ Agency/ LGU informs all and their ranking based on date of submission
 - ▶ 1st UP evaluated and determined if compliant/ complete
 - ▶ 2nd UP evaluated only if 1st UP is incomplete/ not compliant
 - ▶ When awarded, unopened UPs will be returned (notice)

Unsolicited Proposals

- ▶ Evaluation of Proposal (120 calendar days) - Agency/ LGU to: (sequence clear)
- ▶ Qualify PP for Project
- ▶ Evaluate:
 - ▶ Confirm the existence of the new concept or technology
 - ▶ Validate the absence of any direct government guarantee, subsidy, or equity
 - ▶ Assess the appropriateness of the contractual arrangement and reasonableness of the proposed risk allocation
 - ▶ Review the proposed PTCs for the project
 - ▶ Ensure the technical, financial, and economic viability of the project
 - ▶ Evaluate the proposed RROR
- ▶ Act
 - ▶ Accept– Notice; Grant of Original Proponent Status; Endorse to Approving Body (30 calendar days)
 - ▶ Reject - Notice stating reason; Return all documents

Unsolicited Proposals

- ▶ Approval of the Project (prior to Negotiation)
- ▶ Confirmation by ICC/ Sanggunian
 - ▶ National Projects (60 calendar days)
 - ▶ ICC endorses to TWG (validate completeness and qualification of project)
 - ▶ ICC confirms grant of OPS (notice issued) then proceed with evaluation of merits; or rejects (return documents and revoke OPS; Agency/ LGU may entertain other proposals)
 - ▶ Local Projects (60 calendar days)
 - ▶ Sanggunian may create TWG; same function as ICC
- ▶ Approval by Approving Body
 - ▶ Validate PP qualifications
 - ▶ If accepted, evaluation of the Proposal
 - ▶ Based on Detailed Guidelines
 - ▶ Issue Notice with approved PTCs with advice to commence negotiations
 - ▶ If rejected, issue notice with reasons (Approving Body can extend period to comply)
 - ▶ 90 calendar days

Unsolicited Proposals

Revocation of OP Status

- Grounds/ Instances

- ~~Return of proposal~~

- It is found that the facts disclosed are incomplete, incorrect, misleading, untrue, inaccurate, or different from what was represented
 - Any non-compliance or violation of the BOT Law and this Revised IRR
 - Non-confirmation by ICC/ Sanggunian
 - Failure of Negotiations
 - Withdrawal of Project Proponent or Consortium Member prior to project approval

- Effects

- The Agency/LGU may accept new unsolicited proposals involving the same or similar project
 - Original proponent may resubmit a new or revised proposal.

- If UP conflicts with Government Projects

- Government not precluded to pursue
 - No court (except SC) shall issue TRO, prel. Injunction or prel. mandatory injunction
 - ~~OP cannot file injunction/ seek TRO~~

Unsolicited Proposals

- ▶ Negotiation with Original Proponent (sequence clear)
 - ▶ Notice to Commence Negotiation (commencement date, authorized representatives and mechanics; 7 calendar days)
 - ▶ Negotiation Stage (good faith; complete and conclude in 80 calendar days)
 - ▶ Negotiation period may be extended per rules of PPP Governing Board
- ▶ Outcome
 - ▶ Failure of Negotiation (irreconcilable differences; reject proposal and revoke OPS)
 - ▶ accept a new Unsolicited Proposal
 - ▶ bid out the project as a solicited proposal
 - ▶ undertake the project on its own
 - ▶ Successful Negotiation (signed certification stating that the negotiated terms comply with the PTCs approved by the Approving Body) *[Note: must proceed with Stage 3]*

Unsolicited Proposals

- ▶ Action of Approving Body on Negotiated PTCs
 - ▶ validate compliance with approved PTCs
 - ▶ If not comply, failure of negotiations
- ▶ Approval of Project Proposal and Contract by Agency/ LGU
 - ▶ Review by DOF if national funds will be involved (issue opinion within 20 working days) stating explicit approval of the proposed Government Undertakings within which, not binding on Republic)
 - ▶ Review by Statutory Counsel (issue opinion within 20 working days)
 - ▶ Agency/ LGU Review and Approve
- ▶ Qualification and Tender Documents Prepared
 - ▶ Draft contract final and non-negotiable by comparative proponents
 - ▶ Proprietary Information (confidential; not part of tender documents)

Unsolicited Proposals

- ▶ Invitation for Comparative Proposals
 - ▶ published at least once every week for 3 consecutive weeks, in online media and in at least 1 newspaper of general circulation (For projects costing at least PhP 500 million, the invitation may also be published at least once in at least 1 online media and newspaper of international publication) and posted continuously in the websites of the Agency/LGU and PPP Center
 - ▶ State time and place where tender documents can be obtained; 60 days to submit comparative proposals (beyond deadline, no proposal can be accepted)
 - ▶ Posting of Bond on 1st day of publication
 - ▶ Qualification of Comparative Proponents (same criteria for OP)
 - ▶ Submission of Proposal (3 envelopes – qualification, technical and financial)
 - ▶ Evaluation of Proposals (3 stages – sequential)

Unsolicited Proposals

- ▶ Disclosure of Price Proposal (in Tender Documents or upon opening of financial proposals of comparative proponents)
- ▶ Exercise or Right to Match
 - ▶ If no comparative proposal or no complying bid – award to OP
 - ▶ If there is and price proposal is better than OP's, OP has right to match
 - ▶ If OP matches, OP gets award; If OP does not match, challenger gets
- ▶ Determination of Winning Proponent
 - ▶ If winning comparative proponent fails to enter into the contract, consider 2nd ranking with better offer than OP – OP given right to match; if offer not better than OP – award to OP)

Special Purpose Company (SPC)

Agency/ LGU may require formation

- SPC that will be created shall assume and accede to all the rights and obligations of the winning Project Proponent
- the winning Project Proponent subscribes to and pays for a significant/principal shareholding or controlling interest in the SPC
- in the case of a consortium, all members thereof shall present proof of contractual or other legally binding ties to or relationships with the SPC for the development and implementation of the project in accordance with their submitted business plan
- an accession undertaking is executed by the SPC and the Project Proponent in favor of the Agency/LGU making the SPC principally liable for the performance of the winning Project Proponent's obligations
- ~~○ SPC shall be prohibited from engaging in other concessions, businesses, or undertakings not approved by the Approving Body which may conflict with the approved project or otherwise lead to anti-competitive behavior or abuse of dominant position.~~
- SPC may engage in other concessions/ businesses with approval of Approving Body and Regulatory Body

Project Execution

- ▶ Issuance of Notice to Commence Implementation
- ▶ Preparation and Approval of Detailed Engineering Design
- ▶ Project Construction
- ▶ Performance Security for Pre-Construction and Construction Works, and Operations (Requires replenishment of performance security when it falls below the amount required in the contract and/or Project Cost increases)
- ▶ Review of Project Construction, Operation and Maintenance by Agency/ LGU, PPP Center and COA)
- ▶ Milestones Compliance
 - ▶ Failure by or delay may result to:
 - ▶ imposition of liquidated damages
 - ▶ contract rescission
 - ▶ forfeiture of the performance security
- ▶ Repair and Maintenance

The Pact and Key Provisions

Draft Contract

- [Parties and Preambulatory Clauses]
- specific contractual arrangement, term, and scope of work
- project technical specifications and system features
- implementation milestones including those for securing other approvals, project completion date
- cost recovery scheme via proposed tolls, fees, rentals and charges
- liquidated damages
- performance and warranty bonds
- minimum insurance coverage
- acceptance tests and procedures
- warranty period and procedures (after transfer)
- Lock-in periods
- grounds for and effects of contract termination including modes for settling disputes
- Conditions and procedures for lender step-in rights
- Conditions for acceptable permitted security interest
- the manner and procedures for the resolution of warranty against corruption
- compliance with all other applicable laws, rules, and regulations
- key performance indicators, targets, and procedures for measuring and reporting results
- obligation of the Project Proponent to disclose loan or financing documents agreement
- performance security requirements, including their validity and top-up mechanism procedures
- procedures for resolving disputes
- manner and procedures for the resolution of warranty against corruption

Contract Variation

Conditions

- No impact on the PTCs
- No increase in the agreed fees, tolls and charges
- No decrease in the Agency's/LGU's revenue or profit share derived from the project
- No reduction in the scope of works or performance standards
- No fundamental change in the contractual arrangement
- No extension in the contract term
- No additional Government Undertaking
- No increase in the financial exposure of the Government under the project

Requirements

- Variation not exceed Approving Body-approved cap 10% of the original Project Cost
- Any extension of the contract term shall not serve as a substitute to compensate the Project Proponent, in any manner whatsoever, without the written approval of the Approving Body
- Performance security shall be proportionately increased in the case of any government-approved variation

Liquidated Damages

When Due: Project Proponent fails to:

- Satisfactorily complete the work on or before completion date
- Meet the operating performance standard
- Perform any of its obligations

Contract must define:

- Persistent breach (an accumulation of a significant number of breaches over a stated period of time; an accumulation of payment deductions from the performance security)
- Cap on amount

Obligation of Project Proponent

- Pay
- Performance security for construction works or for operations, as the case may be, may be applied

Without prejudice to the right of the Agency/LGU concerned to rescind or terminate the contract

Tolls, Fares, Fees, Rentals & Charges

- reasonableness to the end-users of the facility
- ~~• Contract shall include a fixed initial/base tolls/fees/rentals/charges, as applicable, and as approved by the appropriate Regulator~~
- ~~• Regulator retains the power to approve or disapprove adjustments to tolls/ fees/ rentals/ charges~~
- ~~• Project Proponent shall not be automatically entitled to an increase in the tolls/fees/rentals/charges, unless duly authorized and approved by the Regulator~~
- ~~• Agency/LGU shall not be liable for the non-approval by the concerned Regulator of any application of increase or adjustment~~
- Project to charge tolls etc.
 - approved by Approving Body
 - resulting from bidding
 - incorporated in contract
- If Regulator disapproves, proponent recovers difference
- Subject to adjustment
 - based on approved formula
 - based on pre-bidding advice from Regulator
- Proponent can recover difference

Accession/ Divestiture

- Project Proponent may divest or accede its ownership and/or rights to a project
- divestiture or accession shall be after the holding or lock-in period
- new Project Proponent has equal or better qualifications as with the previous Project Proponent
- If not follow above:
 - disqualification of the Project Proponent
 - cancellation of the contract
 - forfeiture of the Project Proponent's bid or performance security

Contract Termination/ Rescission

- Failure to comply with any obligation prescribed in the contract, and such failure is not remediable or if remediable shall remain unremedied for an unreasonable length of time, will result in contract termination ~~or rescission~~
- Grounds:
 - Government event of default
 - Project Proponent event of default
 - Force majeure and other no-fault termination events
 - Other termination events
- Contract must state:
 - Remedies
 - curing periods
 - lender step-in rights
 - written notice requirements
 - termination shall take place only upon failure to remedy or cure the default
 - Termination payment based on PPP Governing Board Guidelines (~~which excludes debt guarantees, payment for expected returns, payment of profits of commercial business units~~)
 - Project shall not be terminated for an event of default without exhausting the corresponding remedy or curing period

Termination ~~or Rescission~~

- Failure to comply and such failure cannot be remedied > termination

- Grounds

- Party default (other party may choose to terminate ~~or rescind~~ per contract)

- Force Majeure

- Termination events

- PPP Governing Board to issue guidelines on termination payment (~~specified guiding principles removed~~)

- Government may take possession prior to payment of termination payment (~~Proponent precluded from using non-delivery of termination payment as reason for handover of asset~~)

Take-Over of Government

- Grounds for Immediate Take-Over: Emergency or Public Interest
- Temporary Take-Over
 - Collection of tolls/fees/charges by the Agency/LGU to held in trust for the Project Proponent less the actual operating costs incurred by the Agency/LGU
 - Project Proponent cannot claim compensation during take-over
 - concession or cooperation period shall be suspended until the facility or operation thereof is returned to the Project Proponent
- Permanent: Project Proponent shall be entitled to claim compensation
- ~~○ Proponent precluded from using non-delivery of termination payment as reason for handover of asset~~

Arbitration and Dispute Resolution

- Mechanisms: Arbitration or Litigation
- Stated in Contract
- Venue: Philippines or mutually agreed venue
- ~~○ Acts and decisions of Regulators shall not be subject to arbitration~~

Conflict of Interest

- regulatory agencies or bodies implementing a project shall prepare a conflict mitigation plan
- In case a conflict of interest arises, the concerned parties shall inhibit themselves from the performance of their duties in connection to the project

Disclosure

~~and Consent of~~ **Loan Agreement** or **Financing Documents**

- ~~⊖ Consent from Agency/ LGU of proposed conditions precedent, proposed termination of loan agreement, proposed cure with lender that may increase Agency/ LGU liabilities and refinancing agreement~~
- ~~⊖ Withholding of consent by Agency/ LGU if grossly disadvantageous to government~~
- Furnish Agency/ LGU with copy of loan or financing documents (confidential)

of Contracts

- All contracts under BOT Law are public documents
- Agency/ LGU to submit to PPP Center who can make public the contracts **unless prohibited by law, proprietary or pose threats to national security or public safety**

Liabilities: Firm

Foreseeable and definite liabilities, as described in the provisions of a contract. These include, but are not limited to, milestone payments, amortization payments, availability payments, viability gap funding, variation payments, and payment for settlement of undisputed claims.

Criteria

- The project passes the criteria for technical viability, economic feasibility, social acceptability, and climate change resiliency
- The project offers value for money and that the proposed firm liabilities are supported by a financial model
- The fiscal impact of the firm liabilities is sustainable based on the assessment of the DOF
- The Agency proposing a project under the Act and this Revised IRR must commit to bidding the project competitively and with the goal to keep firm payments to a minimum
- Payments are in local currency
- Payments are conditional, subject to the Project Proponent achieving availability targets

Liabilities: Contingent

Liabilities that may be incurred from events specified in a contract, the occurrence, timing, or amount of which are uncertain. These include, but are not limited to MAGA, force majeure, breach of government warranties, and failure to deliver contractual obligations.

Rules

- Contingent liabilities shall be set only for risks that the national or local government, whichever is applicable, is best able to control
- Agency/LGU shall submit a risk mitigation plan for approval by the Approving Body
- Both the draft and the final contract shall be consistent with the approved PTCs related to contingent liabilities
- All contingent liabilities to be assumed by the government shall be transparent in terms of specific risk events
- For force majeure risks, contingent liabilities above the insurance proceeds shall be shared equally between parties to the contract
- The PTCs related to contingent liabilities shall consist of condition to negotiate a remedy or cure for a risk event, term for curing period, parameters for compensation for damages or losses, condition to include step-in rights, and parameters for payments if terminated

Material Adverse Government Action (MAGA)

Includes:

- any act of the ~~executive branch~~ Government
- Project Proponent had no knowledge of, or could not reasonably be expected to have had knowledge of, prior to the effectivity of the contract ~~other than what is permitted in contract~~
- That occurs after the effectivity of the contract, that:
 - specifically discriminates against the ~~Project Proponent sector/ industry/ project~~; and
 - has a material adverse effect on the ability of the Project Proponent to comply with any of its obligations under the ~~approved~~ contract.

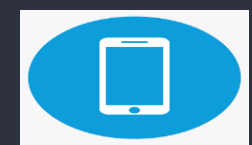
~~Excludes (not MAGA):~~

- ~~○ acts of the Agency/LGU~~
- ~~○ acts of the Approving Body~~
- ~~○ acts of the executive branch, made in the exercise of regulatory powers~~
- ~~○ acts of the legislative branch~~
- ~~○ acts of the judicial branch~~

- Materiality
- Amount threshold
- Manner of recourse
- Cap if monetary compensation



www.albertocagra.com



09175353823



alberto agra



alberto.c.agra@gmail.com

Thank you.

