



The PPP Code (RA 11966) *and Proposed IRR*

Atty. Alberto C. Agra

Law Professor, PPP Law, Administrative Law and Local Government Law
Advocate and Author, PPP Law-for-All
Certified PPP and Regulation Specialist

Former Acting Secretary of Justice, Acting Solicitor General, Government
Corporate Counsel, Acting Chief Regulator of MWSS Regulatory Office and
Chairman of the Philippine Reclamation Authority

14 February 2024

Presentation Flow: 7 Ps



1
Policies

2
Parties

3
Projects

4
Partnership
Schemes

5
Permissions
(Approvals)

6
Procedures

7
Pact/
Provisions



(1) Policy

PPP Policy Journey



Before

- BOT Law
- NEDA JV Guidelines
- PPP Ordinances

Today (since
12.23.23)

- PPP Code
- Repeal of laws, guidelines & ordinances

The PPP Code



Key Dates	Milestones/Activities
December 5, 2023	Republic Act No. 11966 (Public-Private Partnership Code) signed into law.
December 23, 2023	<ul style="list-style-type: none">○ PPP Code takes effect (<i>15 days from publication in Official Gazette or newspaper</i>)○ PPP Code Interim Guidelines published
March 23, 2024	Deadline to promulgate the Implementing Rules and Regulations (<i>90 days from effectivity of Code</i>)
October 4, 2024	Deadline to issue guidelines, frameworks or mechanisms for consultation, review, and approval of initial tolls, fares, fees, rentals, and other charges and adjustments thereof (<i>180 days from effectivity of IRR</i>)

Under the **PPP Code**, what happens to **PPP Policies, Contracts** and **Ongoing Activities**?



BOT Law and IRR	Repealed or modified accordingly (<i>inconsistent provisions</i>)
NEDA JV Guidelines	Repealed or modified accordingly (<i>inconsistent provisions</i>)
PPP LGU Ordinances	Repealed or modified accordingly (<i>inconsistent provisions</i>)
Existing Contracts	Governed by the agreements (<i>PPP Code supplementary application</i>)
Bidding or Challenge not yet commenced	PPP Code applicable except those that govern project approval
BOT Law: Granted Original Proponent Status	2 Options: (1) Proceed with approval process under prevailing policy or (2) Resubmit proposal under the PPP Code
Notice of Award - No Contract	PPP Code applicable (<i>if rights are infringed, policy in effect applies</i>)
Solicited: Bidding commenced	PPP Code applicable (<i>if rights are infringed, policy in effect applies</i>)
Unsolicited: Competitive challenge commenced	PPP Code applicable (<i>if rights are infringed, policy in effect applies</i>) (PPPC : e.g. of rights – bidding rules published)

What special laws are repealed by the PPP Code?



Laws	Administrative Agencies	Repealed Provisions
RA 7227	Bases Conversion Development Authority	Turnkey or Build-Operate-Transfer of Major Conversion Projects
RA 8292	State Universities and Colleges	Joint Ventures of Economic Assets
RA 9500	University of the Philippines	Leases of Land and Joint Ventures
RA 10844	Department of Information and Communications Technology	Issuance of Public-Private Partnership (PPP) Guidelines for ICT Projects of Government Agencies
PD 857	Philippine Ports Authority	Prescribe Rules for Construction, Operation and Maintenance of Ports; Lease of Land, Port, Wharf or Quay
PD 1112	Toll Regulatory Board	Construction, Operation and Maintenance of Toll Facilities
PD 1113	Construction and Development Corporation of the Philippines	Construction, Operation and Maintenance of Toll Facilities
PD 1894	Philippine National Construction Corporation	Construction, Operation and Maintenance of Extensions, Linkages, Stretches and Toll Facilities
Various	GOCCs, GIs and SUCs	Issuance of PPP Guidelines (financing, designing, constructing, operating, and maintaining)

Under the **PPP Code**, can **LGUs** still enact **PPP ordinances**?

Yes, provided ...



“Upon effectivity of this Code, **no** other **JV** guidelines, **PPP** guidelines, codes, or **ordinances, whatsoever may be enacted**, issued and/or used by any **government entity** to enter into PPPs, **except those that are enacted, issued, and/or used in accordance with this Code and its IRR.**”

(Last paragraph, Section 35, PPP Code)

- Under the **Principle of Subordinate Legislation** and **Hierarchy of Policies, local ordinances must not be inconsistent** with statutes such as the PPP Code. (**PPPC**: If inconsistent, “inoperable”)
- This is an **implied restriction** in local legislation and rule-making.
- However, the restriction under the PPP Code **cannot prohibit LGUs** from enacting PPP ordinances provided these will not be in conflict with the PPP Code. (**PPPC**: no need to enact ordinances)
- The LGUs’ **power to legislate** is founded on the **Constitution**.
- For example, LGUs can enact ordinances on **management and service contracts, corporatization and LGU subsidiaries** since these PPP schemes are not covered the PPP Code.

PPP Code and PPPP Ordinance

Comparing and Contrasting



Aspects	PPP Code	PPPP Local Ordinance
Definition of PPP	Not expressly defined (<i>PPP Project defined</i>)	Defined in terms of policy and project
PPP Project	Infrastructure or development project typically provided by government (<i>PPP Code contains no list</i>)	Developmental projects (<i>Ordinance contains a list which is inclusive; projects need not be typically provided by LGUs</i>)
Arrangements/ Modalities	<ul style="list-style-type: none"> ○ Finance, Design, Construct, and O&M ○ Joint Ventures and Leases ○ Lists 9 arrangements excluded from Code 	26+ arrangements (JV, leases, service or management contracts, corporatization, local subsidiary)
Procedures	Solicited and Unsolicited	Solicited and Unsolicited
Approvals	<ul style="list-style-type: none"> ○ Sanggunian and Local Development Council ○ NEDA-ICC if with Government Undertakings 	<ul style="list-style-type: none"> ○ Sanggunian ○ DOF/ DBM if Nat'l Gov't involved
Unsolicited Proposal (UP)	<ol style="list-style-type: none"> 1. PPP Center determines completeness of UP (PPPC: UP submitted to PPPC) 2. Becomes Original Proponent (OP) after Successful Negotiations (Stage 2) 3. Right to Match by OP 4. If multiple proposals, accept best 5. 90 to 365 days for challenge 6. Government Undertakings not allowed 	<ol style="list-style-type: none"> 1. PPP Center no such stated role 2. Becomes OP after Acceptance of UP (Stage 1) 3. Right to Match by OP 4. If multiple proposals, accept best 5. Reasonable period set by LGU 6. LGU Government Undertakings allowed



(1.1) PPP Defined

PPP Code: What is a Public-Private Partnership (PPP)?



1. What is a **PPP**? The term is not expressly defined under the PPP Code. *(The IRR will most likely define this.)*
2. What is a **PPP Project**? Any public infrastructure or development projects and services implemented under the PPP Code.
3. Is there a **list of PPP Projects** under the PPP Code? None. (**PPPC**: Proposed list)
4. What is the **nature of PPP Projects**?
 - Infrastructure or development projects and services which are typically provided by the public sector.
 - Consistent and responsive to national, local, and sectoral development and investment plans.

Nature of PPPs



Aspects:

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



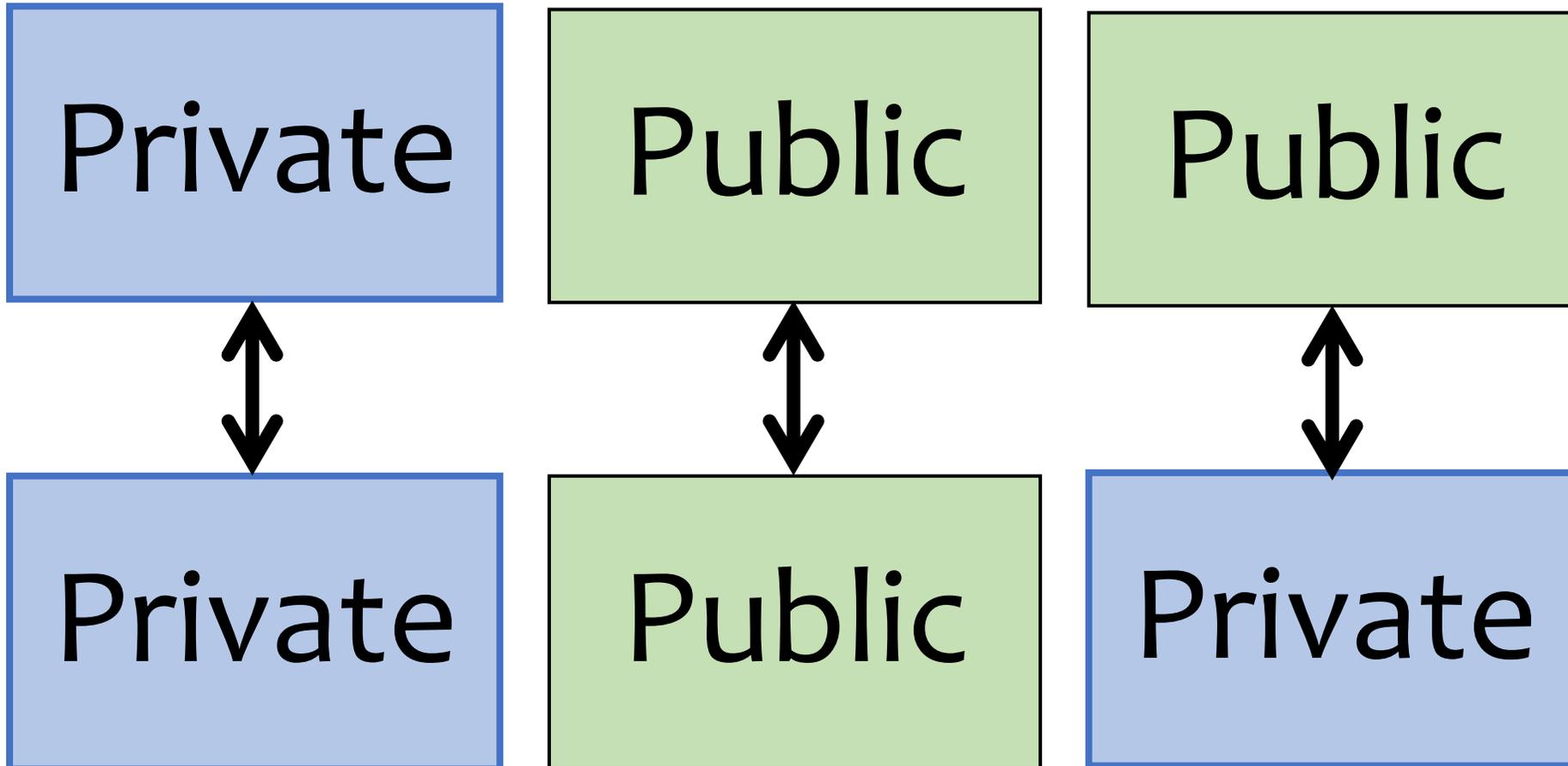
Rationale of PPP

- Indispensable role of the **private sector**, encourage private enterprise, and provide incentives to needed investments
- Enabling environment for the private sector to **mobilize its resources** to finance, design, construct, operate, and maintain infrastructure or development projects and services
- **Public interest** by providing affordable, accessible, and efficient public services
- **Financing** infrastructure and other development projects and services through all means available to effectively meet the **objectives of the government**
- LGU **local autonomy**, as self-reliant communities, more effective partners in the attainment of national goals
- **Integration** of climate resilience, sustainability, and gender and development policies and programs
- Open, fair, transparent, and competitive **selection** as the central tenet for securing private investment in PPP projects



(2) Parties

3 Levels of PPPs





Implementing Agencies (IAs)

Public Partners

National

1. National Government
2. State University and College
3. Government-Owned and - Controlled Corporation
4. (Government Instrumentality with Corporate Powers)
5. **PPPC**: Water Districts

Local

1. Local Government Unit
2. Local University and College

No IA/ Regulatory Body shall implement a PPP Project that it regulates unless it adopts a conflict mitigation and management plan.



Private Party

- **Private Partner** - private sector entity determined to be **financially, legally, and technically capable** to undertake obligations under an awarded PPP contract
- **Private Proponent** - private sector entity which has **submitted bid** in relation to a Solicited Project, or a private sector entity which has **submitted an Unsolicited Proposal**; may be **Filipino or foreign-owned**, and may engage the services of a foreign Contractor or foreign Facility Operator, subject to requirements and limitations provided under the Constitution, existing laws, rules, and regulations
- **Facility Operator** - any entity allowed and duly registered and licensed under Philippine laws, which may or may not be the Private Partner, that shall be responsible for **operating and/or maintaining a facility**
- **Contractor** - any entity allowed and duly registered and licensed under Philippine laws, which may or may not be the Private Partner, that shall be responsible for the **construction and/or supply of equipment or services** for PPP Projects
- **PPPC**: IA may require formation of Special Purpose Vehicle or Joint Venture Corporation



(2.1) Public Governance



PPP Governing Board

- **Overall policy-making body** for all PPP-related matters, including the Project Development and Monitoring Facility (PDMF)
- Responsible for setting the **strategic direction** of the PPP Program and PPP Projects
- Responsible for creating an **enabling policy** and institutional environment for PPP
- Members form part of **IRR Committee**

Composition

1. NEDA - Chairperson
2. DOF - Vice-Chairperson
3. DBM
4. DOJ
5. DTI
6. DILG
7. DENR
8. CHED
9. ES
10. PPP Center ED
11. Private Sector Representative from Infrastructure Sector

National Economic and Development Authority (NEDA)



Board

- Approve National Projects (\geq P15B Project Cost)

ICC

- Recommend to Board (\geq P15B)
- Approve National Projects ($<$ P15B) **subject to conditions**
- Approve Local Projects with **Government Undertakings** using national government funds
- Approve **Availability Payments**
- Formulate guidelines, forms, and templates that shall be used by IAs and Approving Bodies in **reviewing and approving the PPP Project**
- Review, evaluate and **update P15B** Threshold
- Issue **Generic Preferred Risk Allocation Matrix (GPRAM)**

PPP Center



1. Assist IAs in identifying, prioritizing, developing, and maintaining a pipeline of **PPP Projects**
2. Provide project **advisory services** and technical assistance to IAs, Approving Bodies
3. Facilitate the **appraisal and approval** of PPP Projects by **NEDA**
4. Review **contracts** for National PPPs
5. Require the submission of PPP Project **documents** from IAs
6. Provide **regular monitoring** and status reports on the implementation of all PPP Projects
7. Manage and administer the **PDMF**
8. Serve as **Secretariat for IRR Committee**
9. Manage and administer the **PPP Risk Management Fund**
10. Coordinate with NEDA-ICC in formulation of **guidelines, forms, and templates** that shall be used by IAs and Approving Bodies in **reviewing and approving** the PPP Project
11. Coordinate with Regulatory Agencies in the drafting of **guidelines, frameworks, or mechanisms** for consultation, review, and approval of initial **tolls, fares, fees, rentals, and other charges**
12. Determine **completeness** of unsolicited proposals and appropriate Approving Body
13. Assist IA during **negotiations** of unsolicited proposals
14. **PPPC**: Act as procuring entity

IA Pre-qualification, Bids and Awards Committee (PBAC)



- Responsible for all aspects of pre-bidding and bidding process in solicited proposals, or the comparative bidding process in Unsolicited Proposals
- Declare failure of bidding
 - In no case shall a motion for reconsideration or an appeal from any decision by the PBAC stay or delay the bidding process.
 - No award shall however be made until a decision on any pending appeal is rendered
- **PPPC**: Composition - same as BOT Law IRR, voting and non-voting, minimum

IA PPP Units (PPPC)

- IA may create PPP Units
- Minimum Composition
 1. Senior Official
 2. Technical – Project Development
 3. Technical – Contract Management
 4. Finance
 5. Legal
- PPP Center to assist



Regulatory Agencies

Mandate (defined by Charters)

- Issue and publish **guidelines**, frameworks, or mechanisms for consultation, review, and approval of **initial tolls**, fares, fees, rentals, and other charges and adjustments thereof
- Approve and uphold the **initial tolls**, fares, fees, rentals, and other charges and adjustments thereof
- Approve any **decrease in IA revenues or profit**
- Adopt a **conflict mitigation and management plan** if will implement a PPP Project that it regulates
- Approve **Alternative Sources of Funding** like bonds

Considerations

- When **no appropriate regulatory body** – regulation by contract; LGUs may create a local rate-setting body
- Regulatory approvals must be made **prior to the approval of a PPP Project**
- Regulatory action is considered a **contingent liability event**
- **MAGA** includes unanticipated regulatory risks



Courts

- Courts (except the SC) cannot issue temporary restraining order, preliminary injunction, preliminary mandatory injunction, temporary environmental protection order, or similar **temporary or provisional reliefs or remedies**
 - Against any **IA or the PPP Center**, its officials or employees, or any person or entity, whether public or private acting under the government direction
 - Applies in all cases, disputes, or controversies instituted by any **person**, including cases filed by bidders or those claiming to have rights through such bidders
- Not apply when the matter is of **extreme urgency** involving a **constitutional issue**, such that unless a temporary restraining order is issued, **grave injustice and irreparable injury** will arise



Courts: Covered PPP-related Acts

1. Evaluation, acceptance, and rejection of UPs
2. Bidding, rebidding, or declaration of failure of bidding
3. Awarding of any PPP contract
4. Acquisition, clearance, and development of the ROW, site, or location of any PPP Project
5. Construction, operation, and maintenance of any PPP Project
6. Commencement, execution, implementation, termination, or rescission of any PPP contract
7. Undertaking or authorization of any other lawful activity necessary for such PPP Project



(3) Projects



PPP Projects

No list in PPP Code

Nature

- **Infrastructure or development projects** and services which are **typically provided** by the **public sector**
- Consistent and responsive to national, local, and sectoral **development and investment plans**
- Part of list **submitted** to appropriate oversight agencies, NEDA, RDC, Sanggunian and the PPP Center
- **PPPC**: Consolidated plan (all plans submit to NEDA within 30 days from IRR effectivity; project not in list cannot be pursued)

Characteristics

- Legal, technical, economic, financial, and commercial **feasibility** of the project
- **VfM** of the proposed project
- Optimal **risk allocation**
- Affordability of **fees** or tariffs
- **Climate resilience** and sustainability
- Social and environmental **safeguards**
- Product of **stakeholder consultation**
- **PPPC**: Included in Strategic Investment Priority Plan for incentives (mandatory incentives – included in rates/ tariffs)

HARD

INFRASTRUCTURE ASSETS

- | | |
|---|--|
|  Road |  Terminal |
|  Water |  Government Buildings |
|  Power |  Parks |
|  Ports |  Information Technology |
|  Reclamation |  Cemetery |
|  Sports Complex |  Solid Waste Management |
|  Markets |  Bridges |
|  Transport Systems |  Malls |

SOFT

SOCIAL ASSETS AND SERVICES

- | | |
|---|---|
|  Classroom |  Housing |
|  Hospital |  Evacuation Center |
|  Agriculture |  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



Eligible Types of Projects (PPPC)



- Highways
- Land transportation systems
- Transport and traffic management projects
- Port infrastructure
- Airports, air navigation, and related facilities
- Power generation and distribution
- Energy efficiency and conservation
- Telecommunications infrastructure
- Information technology networks
- Irrigation and related facilities
- Water supply, sewerage, and drainage
- Educational infrastructure
- Health infrastructure
- Land reclamation and flood control
- Industrial and tourism estates
- Government buildings
- Urban redevelopment and housing
- Heritage preservation and adaptive reuse projects
- Markets and slaughterhouses
- Warehouses and post-harvest facilities
- Public fish ports and fishponds
- Agri-fishery industrial hubs
- Environmental and solid waste management
- Climate change adaptation and disaster risk reduction
- Other infrastructure projects



Value for Money (VfM)

- Effective, efficient, and economic **use of resources**, which requires the evaluation of relevant costs and benefits, along with an assessment of risks, and of non-price attributes and/or life cycle costs, as appropriate.
- Price alone may not necessarily represent VfM
- All PPP Projects must yield sufficient VfM
- IAs shall identify, develop, and prepare their respective lists of PPP Projects guided by VfM
- Approving Body shall assess PPP Project based on VfM

Minimum Parameters, Terms and Conditions (PTCs) (PPPC)



- Scope
- Contractual arrangement
- Contract term
- Rights and obligations of the IA and the Private Proponent, and penalties to be imposed for failure to deliver
- Risk allocation
- Performance standards and targets
- Government undertakings
- Repayment scheme
- Contingent liabilities
- Bid parameter
- Ceiling for debt-to-equity ratio
- Revenue share for the government, if any
- Proposed public bidding process (single stage or two-stage) (for solicited)
- Proposed period for comparative challenge process (for unsolicited)

Divergence between approved PTCs and PPP contract = void contract



(4) Partnership Schemes

Universe of PPP Arrangements



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



PPP Code-Listed Arrangements

1. Finance, Design, Construct, Operate and Maintain (*any combination or variation thereof*)
2. Joint Ventures
3. Construct, Operate and Maintain (*combination or variation thereof*) Toll Facilities
4. Lease
5. Arrangement which possesses characteristics or elements of a PPP
6. Arrangement approved by appropriate Approving Body



9 Exclusions

1. Procurement of Infrastructure Projects (GPRA)
2. Management Contracts
3. Service Contracts
4. Divestments or Dispositions
5. Corporatization
6. Incorporation of Subsidiaries with Private Sector Equity
7. Onerous Donations
8. Gratuitous Donations
9. Joint Venture Agreements involving purely commercial arrangements that neither provide nor include public infrastructure or development services (**PPPC**: e.g. malls without public service)

PPP RESOURCE EXCHANGE



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



Joint Venture

Definition

- IA (proprietary function) and the PP
- Parties pool resources comprising of capital, services, or assets, including equipment, land, or intellectual property
- Joint undertaking
- Specific investment activity
- Infrastructure or Development Project (typically provided by Public Sector)
- Within a specific period of cooperation



Joint Venture

Requirements

- Consistency with IA **mandate/ charter**
- IA and Approving Body-approved **Parameters, Terms and Conditions (PTCs)**
- Equity contribution **not exceed 50%** of Project Cost/ Outstanding Capital Stock
- Fair **valuation** of Equity Contribution
- Formation of JV not prevent the parties from entering into other JV PPP contracts with other parties or from profitably entering into other business ventures or markets, provided not compete with the first JV for the same product and geographic market
- Profit share **proportionate** to contribution (Government may get higher share/ favorable terms)
- Reversion to Government or **Divestment**



Lease

- Lease with:
 - Rehabilitate
 - O&M, and
 - Provision for Working Capital and/or Improvements
 - **PPPC**: With public service component
- Lease as component of PPP



(5) Permissions (Approvals)



Approval of National PPPs

≥ **P15B* Project Cost****

- NEDA Board Approval (120 days) (**PPPC**: meets at least 1x/ month)
- NEDA-ICC Favorable Recommendation
- If SUC, Green Lane

**NEDA-ICC can review, evaluate and update*

*** total cost to be expended to plan, develop, and construct the project to completion stage, including cost of feasibility studies, engineering and design, construction, equipment, land/ROW, taxes imposed on said cost, and development cost (**PPPC**: includes interest and financing cost; if O&M with CAPEX, government borrowing rate and present value)*



Approval of National PPPs

< P15B Project Cost

- Governing Board or Department or Agency Head (if Attached Agency has no Board) (120 days to decide, approval by inaction)
- NEDA-ICC if PPP Project:
 - Physically **overlaps** with government-approved project or developed project per national/ sectoral plans (**PPPC**: listed in Consolidated Plan)
 - **Negatively affects** economic benefits, demand, and/or financial viability of government-approved project or developed project per national/ sectoral plans (**PPPC**: same alignment/ catchment/ market group)
 - Requires financial **government undertakings** (under GAA) (**PPPC**: Subsidy, VGF)
 - Involves **Availability Payments** (under GAA)
 - With Government JV contribution which **exceeds 50%** of its entire assets (**PPPC**: of IA) based on its latest audited financial statements (**PPPC**: last 3 years)



Approval of National PPPs

Regardless of Project Cost, Clearance from ...

- PPP Center
 - Assess compliance with the approved PTCs
 - Determination of completeness of unsolicited proposals
- Statutory Counsel - compliance with applicable laws, rules, and regulations (**PPPC**: unfavorable opinion \neq prima facie evidence/ claim sufficient to sustain a judgment in favor of the issue it supports)
- DOF - National Government Undertaking under the PPP contract



Approval of Local PPPs *Regardless of Project Cost*

- Approved by **Sanggunian** (if LGU) or **Board** (if LUC) (**PPPC**: 120 days)
- Endorsement by **LDC** (*30 days, approval by inaction*)
- Approved by **NEDA-ICC** (RDC endorsed) - Government Undertakings using national government funds
- Endorsement by **National Government** (through RDC) - Local PPP Projects affecting national or sectoral development plans and national projects
- Clearance from **Statutory Counsel** - compliance with approved PTCs and applicable laws
- Clearance from **DOF** - if there is national government undertaking



Approval of Inter-LGU PPPs

May be implemented by the:

1. National government, subject to the approval process for National PPP Project
 2. Next higher level of LGU
 3. LGUs concerned, subject to the approval process for Local PPP Projects
- Approved by the local Sanggunians of the LGUs concerned
 - Respective RDCs may assist in the coordination of LGUs in the development, approval, and implementation of the Local PPP Project



Government Undertakings

Forms*

Any form of contribution and/or support, which the **Government** may extend to a PP for the implementation of PPP Projects

- VGF and other forms of subsidy
- Payment of ROW related costs
- Performance undertaking
- Additional exemptions from any tax other than those provided for by law (**PPPC**: e.g. RPT)
- Guarantee on Demand
- Guarantee on Loan Repayment
- Guarantee on Private Sector Return
- Government Equity
- Contribution of assets, properties, and rights

Nat'l Gov't to Local PPP Project**

- Guarantees on Demand
- Guarantees on Private Sector Return
- Guarantees on Loan Repayment
- VGF and other forms of Subsidy
- Monetary Payment of Contingent Liability through the PPP Risk Management Fund

All require DOF approval

* - Not allowed for Unsolicited Proposals

** - Requires NEDA-ICC approval



Not Government Undertakings

- Availability Payments
- Permits, clearances, licenses, or endorsements from national government agencies required for Local PPP Projects
- *[Allowed for Solicited Projects and Unsolicited Proposals]*

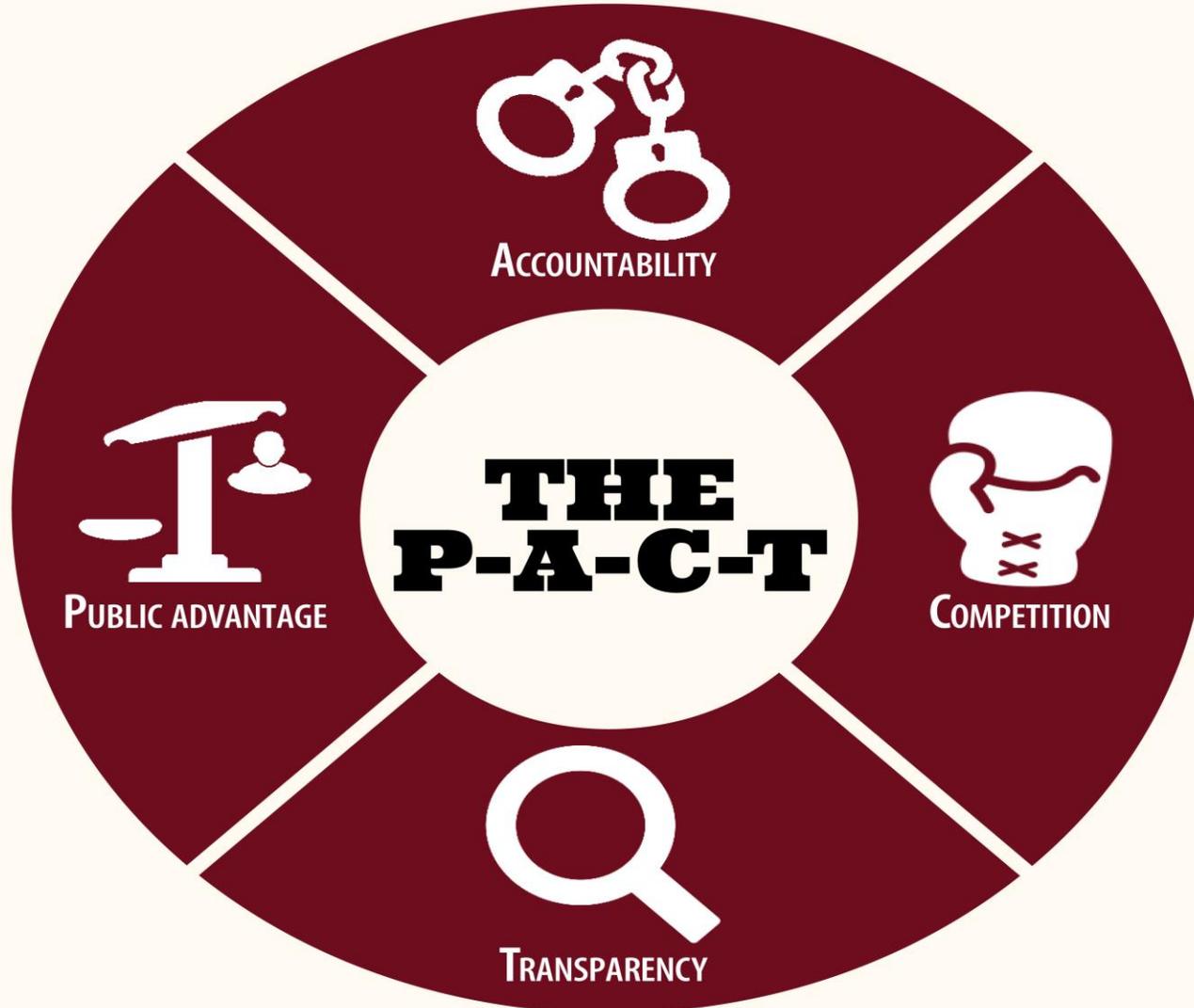


(6) Procedures

PPP SELECTION REQUIREMENTS



1. Open
2. Fair
3. Transparent
4. Competitive





Solicited Project

- Public bidding initiated by IA
 - Stages: Single-Stage or Two-Stage (qualification requirements and/ then bid proposals)
 - Manner: Manual or Electronic
- Private Partner/ Awardee
 - Satisfies all pre-qualification and eligibility requirements
 - Submitted the most responsive bid to the bid parameter proposed by the IA (next most responsive)
 - Complied with PTCs
 - Allows substitution in composition of pre-qualified PP prior to bid submission (substitute has equal or better qualified)

Solicited Project: Most Responsive Bid



Highest

- Payment to Government (Revenue-based)
- Share in Revenues (JV)
- Rental Payment to Government (IA as Lessor)

Lowest

- Government Subsidy/ Support
- Tariff by End-User
- Rental Payment by Government (IA as Lessee)



Solicited Project

Failed Bidding

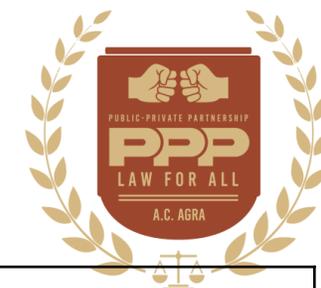
- No bids are received
- No complying bids
- Winner bidder refuses to accept award

Single Complying Bid

- After advertisement
 - >1 bidder applied for pre-qualification but only 1 met the pre-qualification requirements
 - 1 bidder applied for and met the pre-qualification requirements
- After pre-qualification
 - >1 bidder, only 1 submitted a bid
 - >1 bidder submitted bids but only 1 compliant

Effect: IA may negotiate on financial proposal

PPP Code Interim Guidelines: Processing of Solicited Proposals



Scenarios	Governing Policy and Activities
<i>General Rule:</i> If bidding rules already published prior to effectivity of PPP Code (12.23.2023)	Bidding Rules shall apply (<i>not PPP Code, not Interim Guidelines</i>)
<i>BOT Law:</i> Project submitted to but pending approval by Approving Body (AB)	Project Approval: BOT Law applicable (P300M/ P200M thresholds) Other requirements: PPP Code applicable
<i>NEDA JV Guidelines and LGU Ordinance:</i> Project submitted to but pending approval by AB	National Projects: \geq P15B – NEDA Board per ICC rules that will be issued Local Projects: Sanggunian and Local Development Council approvals
Project returned by AB and not resubmitted by the Implementing Agency (IA) for approval	National Projects: \geq P15B – NEDA Board per ICC rules that will be issued Local Projects: Sanggunian and Local Development Council approvals
Project submitted by the IA to the AB after 12.23.2023	National Projects: \geq P15B – NEDA Board per ICC rules that will be issued Local Projects: Sanggunian and Local Development Council approvals



Unsolicited Proposal

Stage 1

- Submission of UP by PP to IA (**PPPC**: UP submitted to PPPC)
 - IA (**PPPC**: PPPC) can entertain similar proposals [*within 10 days from UP*] (**PPPC**: after 10th day, other UPs not considered)
- Submission to PPP Center (**PPPC**: simultaneous or subsequent)
- Determination by PPP Center [*10 days*]
 - UP completeness (**PPPC**: if incomplete, final and non-appealable)
 - Appropriate Approving Body (then endorses to IA)
- Decision to process UP by IA (*or to reject UP if project not aligned with IA development plans or IA is developing a similar project*) (**PPPC**: Letter of Acceptance to state mechanics and commencement date of negotiations)



Unsolicited Proposal

Stage 1

- Detailed Evaluation of UP and PP Qualifications by IA (90 days to *approve; approval by inaction*) (**PPPC**: submitted PTCs are the items which are deemed approved)
 - Absence of prohibited Government Undertakings
 - Consider ROW
- Acceptance (or Rejection) of UP by IA
 - If multiple UPs (**PPPC**: submitted to PPPC), IA accepts (**PPPC**: 90 days) most advantageous UP (*viability, project scope and terms, investment recovery scheme, government risks, and PP qualifications*) (**PPPC**: If IA does not act, 1st UP deemed approved)



Unsolicited Proposal

Stage 2

- Good faith Negotiations between IA and PP with accepted UP with assistance of PPP Center [*≇150 days*]
 - PTCs
 - Successful (or failed) Negotiations
 - PP becomes Original Proponent (OPS valid for *≇1 year*)
- Submission of UP (and approved PTCs) to Approving Body for approval (or rejection) (*120 days to decide; approval by inaction*)



Unsolicited Proposal

Stage 3

- Comparative Challenge by IA if Approving Body approves UP/ PTCs [90 to 365 days]
 - Manual or electronic
 - Publication of Invitation [within 7 days from approval]
 - Right to Match by OP [30 days]
 - Award to:
 - OP:
 - if no challenger (**PPPC**: wait for lapse of minimum of 90 days)
 - if able to match proposal of challenger
 - Winning Challenger - if OP not able to match



Unsolicited Proposal

Limitations/ Prohibitions

- Any change in the composition of the OP that will affect its majority ownership
- Inclusion of Government Undertakings
- IA advances payment for ROW acquisition and related costs
- Valuation of usufruct of assets, properties and rights
- Winning PP: Reimbursement of Development Cost for past 3 years not exceed 6% of Project Cost

PPP Code Interim Guidelines: Processing of *Unsolicited Proposals* commenced under **BOT Law**



Scenarios	Governing Policy and Activities
<i>General Rule:</i> If rules for challenge already published prior to effectivity of PPP Code (December 23, 2023)	Rules for Challenge will apply (<i>not PPP Code, not Interim Guidelines</i>)
I. If Project submitted to Implementing Agency (IA) by 12.23.23 and IA has not issued Letter of Acceptance to Private Proponent (PP)	PP has 60 days to complete submission <ul style="list-style-type: none"> ○ National Projects: Follow ICC rules that will be issued ○ Local Projects: PPP Center must determine completeness of UP, and Sanggunian and Local Development Council approvals
II. If PP granted Original Proponent Status (OPS) but UP not yet submitted for approval by Approving Body (AB)	<ol style="list-style-type: none"> 1. Revoke OPS 2. Commence Negotiations <ul style="list-style-type: none"> ○ National Projects: Follow ICC rules that will be issued ○ Local Projects: Issue Notice - Set mechanics - Designate representatives – (Hire consultants) - Negotiate; PPP Center must determine completeness of UP, and Sanggunian and Local Development Council approvals
III. If PP granted OPS, Project returned by AB to IA, and Project not yet resubmitted by IA to AB	<ul style="list-style-type: none"> ○ National Projects: ≥P15B – NEDA Board per ICC rules that will be issued ○ Local Projects: PPP Center must determine completeness of UP, and Sanggunian and Local Development Council approvals
IV. If PP granted OPS and UP pending approval by AB	PP has 2 options: <ol style="list-style-type: none"> 1. Proceed with approval process 2. Resubmit UP (notify IA within 30 days from IRR effectivity)

PPP Code Interim Guidelines:

Processing of *Unsolicited Proposals* commenced under *NEDA JV Guidelines/ Others*



Scenarios	Governing Policy and Activities
<i>General Rule:</i> If rules for challenge already published prior to effectivity of PPP Code (December 23, 2023)	Rules for Challenge will apply <i>(not PPP Code, not Interim Guidelines)</i>
Project submitted to but pending approval by Approving Body (AB)	<i>Follow ICC rules that will be issued by NEDA-ICC</i>
If Private Proponent (PP) granted Original Proponent Status (OPS) but UP not yet submitted for approval by AB	Implementing Agency (IA) shall either: 1. Revoke OPS 2. Commence Negotiations <i>Follow ICC rules that will be issued</i>
If Project submitted to IA by 12.23.23 and IA has not issued Letter of Acceptance to PP	PP has 60 days to complete submission <i>Follow ICC rules that will be issued</i>

PPP Code Interim Guidelines: Processing of **LGU Unsolicited Proposals** (UPs) under P4 Ordinance



Scenarios	Governing Policy and Activities
I. If rules for challenge already published prior to effectivity of PPP Code (December 23, 2023)	Such challenge rules will apply (<i>not PPP Code, not Interim Guidelines</i>)
II. If UP pending approval by Approving Body	<ul style="list-style-type: none"> a. PPP Center must determine completeness of UP b. UP must be endorsed by Local Dev't Council c. Sanggunian to decide in writing d. PPP Center to be furnished copy of decision
III. If Private Proponent granted Original Proponent Status (OPS) but UP not yet submitted for approval by Approving Body	<p>LGU Options:</p> <ul style="list-style-type: none"> 1. Revoke OPS 2. Commence Negotiations <ul style="list-style-type: none"> ○ Issue Notice - Set mechanics - Designate representatives – (Hire consultants) - Negotiate ○ Comply with II [a] to [d] above ○ If successful, OPS reconfirmed

Completeness Checklist



1. Complete Feasibility Study

- Project Description, Expected Outcomes and Key Success Indicators, Analysis of Technical Solutions, Stakeholder Analysis, Project Costs, Legal Due Diligence, Demand Analysis, Proposed Tariff Structure, Financial Analysis, Economic Analysis, Project Safeguards, Risk Allocation, Value for Money Analysis, Contractual Options

2. Economic Model

- Assumptions, Economic Benefits and Costs, Calculation of Economic Viability

3. Financial Model

- Assumptions, Balance Sheet, Income Statement, Cash Flow, Calculations on Financial Viability and Bankability, Value-for-Money, Public Sector Comparator

4. PTCs

- Project Scope, Contractual Arrangement, Term, Bid Parameter, Targets, Obligations, Revenues

1. Cover Letter

2. Company Profile

3. Complete Feasibility Study (*same as solicited*)

4. Economic Model (*same as solicited*)

5. Financial Model (*same as solicited*)

6. PTCs (*same as solicited*)

7. 3rd Party Valuation Report (of Compensation, Equity Contribution of Parties, Reclaimed Land)

8. Gender Responsive Checklist

9. Location Map

10. Right of Way Acquisition/ Resettlement Plan

11. Draft Contract

12. Unsolicited Proposal Assessment Forms



(7) Pact and Provisions

20 Important PPP Code Provisions



1. Risk Allocation
2. Sources of Financing
3. Financial Close
4. Investment Recovery Schemes
5. Tolls, Fares, Fees, Rentals and Other Charges
6. Availability Payments
7. Reasonable Rate of Return
8. Land Value Capture Strategies
9. Contingent Liability
10. Viability Gap Funding
11. Guarantees
12. Subsidy
13. Government Undertakings
14. Divestment
15. Wind-Up and Transfer Measures
16. Alternative Dispute Resolution
17. Material Adverse Government Action
18. Variation, Expansion or Extension
19. Termination
20. Accountability/ Liability



Risk Allocation

- **Equitable and optimal risk allocation** between/ among the PPP Parties
- **Each party** shares in the associated risks
- NEDA-ICC shall publish the **Generic Preferred Risk Allocation Matrix (GPRAM)**
- **All PPP contracts** to be entered into by the IA shall adhere to the principles stipulated under the GPRAM, to the extent applicable
- Any **deviations** to the preferred risk allocation shall be justified by the IA and approved by the appropriate Approving Body
- Adoption of **contract management and risk mitigation plans** (*execution plan, all risks assumed by the government under the PPP contract, risks assumed by the IA, risk mitigating measures, estimated costs to be incurred, target timeline to have each measure in place, and the appropriate action plan by the IA to manage each type of risk*)



Sources of Financing

Private

- Debt and Equity
- Project Finance

Government

- Direct government appropriations
- Official Development Assistance

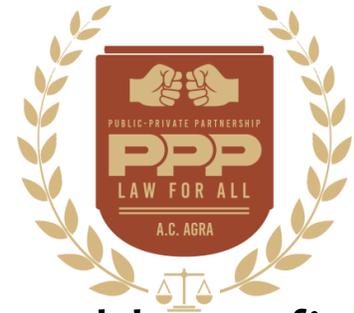
Alternative

- Green Financing
- Corporate or Project Bonds and Securities
- Other forms of capital market financing



Financial Close

- Specific milestone in a PPP contract where the PP successfully secures all necessary project and **financing agreements**
- The achievement of such milestone confirms that all prior **conditions have been met**, allowing the PP to **draw down** the financing to commence work on the PPP Project
- Period stated in **PPP contracts**
- **Failure** to achieve Financial Close within such period, without the fault of the government, shall subject the PP to **penalties** under the signed PPP contract



Investment Recovery Schemes

Private Partner shall be allowed to recover its investments and earn reasonable profit

1. Revenue-based - refers to a scheme where the PP is authorized to charge and collect, in whole or in part, from the users **reasonable tolls, fares, fees, rentals, and other charges** subject to appropriate regulation; Where applicable, the PP may likewise be repaid in the form of a share in the revenue of the PPP Project
2. Availability-based - refers to a scheme where the IA commits to make **predetermined payments**, which do not take the form of charges paid by the users of the works or of the service, but of regular payments by the IA in **exchange of delivering an asset or service** in accordance with the PPP contract.
3. Supplementary/ Other investment recovery schemes:
 - a) Commercial **development rights**
 - b) Grant of a portion or **percentage of a reclaimed land**, subject to the constitutional requirements on land ownership and fair valuation

Tolls, Fares, Fees, Rentals and Other Charges



- **Initial** tolls, fares, fees, rentals, and other charges and adjustments thereof shall be as stipulated in the PPP contract (for revenue-based investment recovery scheme)
- **Regulatory Agencies** to issue **guidelines, frameworks, or mechanisms** for consultation, review, and approval of said initial tolls, fares, fees, rentals, and other charges and adjustments thereof
 - Approve the initial tolls, fares, fees, rentals, and other charges and adjustments thereof, on the basis of service quality, key performance indicators, the principles of fairness, transparency, predictability, and protection of public interest while providing for a Reasonable Rate of Return on capital or investment by the Private Partner
 - Uphold the approved initial tolls, fares, fees, rentals, and other charges and adjustments thereof during the implementation of the PPP Project
 - Where the IA fails to implement the initial tolls, fares, fees, rentals, and other charges and adjustments thereof as stipulated in the PPP contract, the Private Partner shall be allowed to recover the difference through measures consistent with the PPP contract and applicable laws, rules, and regulations
- In the case of Local PPP Projects, the IA may also opt to create and establish a **local rate setting body**
- **Changes** in tolls, etc. must be approved by Approving Body



Availability Payments

- Predetermined payments by the IA to the PP in exchange of delivering an asset or service in accordance with the PPP contract.
- Not construed as a Government Undertaking, Guarantee on Demand, Subsidy, or government contribution
- Approval by NEDA-ICC needed (even if < P15B)



Reasonable Rate of Return (RRoR)

- **Net gain of an investment** over a specified time period, expressed as an annualized percentage as prescribed by the appropriate Approving Body and reflected in the PPP contract
- Where the realized rate of return exceeds the prescribed RRoR, the **excess** shall be remitted to the National Treasury (“Clawback”)
- Prescribed by **Approving Body** (PPPC: what is required under the law as defined vs. negotiated/ proposed)
- Considered by Regulatory Agency in assessment of **public interest**
- *(PPP Code Interim Guidelines: not apply until IRR issued)*

Reasonable Rate of Return (RRoR) (PPPC)



Applicability

- Applicable only for solicited with 1 complying bid
- Not applicable for:
 - Solicited with multiple complying bids
 - Unsolicited proposals

Remittance

- Trust account during monitoring period
- Withdrawal from Trust Account for Reinvestment if $< \text{RRoR}$
- Remittance at end of contract
- IA monitoring on an annual basis

Land Value Capture Strategies



A set of mechanisms used to **recover and re-invest land-based value increases** that arise in the catchment area of public infrastructure investments



Contingent Liability

- An obligation that may arise from events specified in a PPP contract, the occurrence, timing, and amount of which are **uncertain**
 - Regulatory action
 - Force majeure
 - Breach of government warranties
 - Material Adverse Government Action (MAGA)
 - Others
- Payment of CL from PPP Risk Management Fund



Viability Gap Funding (VGF)

- Extended by the government to make an **economically viable** revenue-based PPP Project financially viable
- ROW and resettlement shall not be considered as VGF



Guarantees

- ***On Demand*** - an agreement where the IA undertakes to assume the **market demand risks** associated with the PPP Project
- ***On Loan Repayment*** - an agreement where the IA guarantees to assume responsibility for the **repayment** of debt directly incurred by the PP in implementing the PPP Project in case of a loan default
- ***On Private Sector Return*** - an agreement where the IA guarantees to provide a **predetermined rate of return** on the investment of the PP



Subsidy

An agreement where the IA will:

1. Defray, pay for, or shoulder a portion of the **Project Cost** or the expenses and costs in operating or maintaining the project
 - ≠ 50% of Project Cost
 - Not a subsidy if Gov't receives payment or remunerated by PP
2. Bear a portion of **capital expenditures** associated with the establishment of an infrastructure or development project and services
 - ≠ 50% of Project Cost
3. Contribute any **property or assets** to the project
 - Allowed for JVs
4. Waive charges or fees relative to **business permits or licenses** that are to be obtained for the Construction of the project
 - Not a subsidy if Gov't receives payment

Includes **VGF** which may be extended by the government to make an economically viable revenue-based PPP Project financially viable



Divestment

By IA

- Divest ownership, rights or interest in a PPP Project (*full or partial*)
- Approval of Approving Body

By PP

- Divest ownership, rights or interests in a PPP Project
- Approval of IA
- After a holding or lock-in period as indicated in the PPP contract
- New PP must have equal or better qualifications as previous PP



Wind-Up and Transfer Measures

- Mechanisms and procedures for the **transfer of assets** to the IA
- **Transfer of technology** required for the operation of the PPP Project
- **Training of the personnel** of the IA or of a successor in the O&M of the PPP Project
- The provision, by the PP, of a **warranty** that the PPP Project meets the project technical specifications, agreed system features, and performance standards and services for a certain period after the transfer of the PPP Project to the IA
- In case of JVs, the **compensation** to which the PP may be entitled in case of buy-out and transfer of assets to the IA



Alternative Dispute Resolution

- Include provisions on the use of dispute avoidance and ADR mechanisms (*Republic Act No. 9285 otherwise known as the “Alternative Dispute Resolution Act of 2004*)
- Contracting parties shall be given complete freedom to choose which ADR mechanisms

Material Adverse Government Action (MAGA)



- Any act of the government which the PP had no **knowledge** of, or could not be reasonably expected to have had knowledge of, prior to the effectivity of the PPP contract, and that **occurs after the effectivity** of the PPP contract, other than an act which is authorized or permitted under the PPP contract, which:
 - specifically **discriminates** against the sector, industry, or project, and
 - has a **significant negative effect** on the ability of the PP to comply with any of its obligations under the approved PPP contract
- MAGA may include **unanticipated regulatory risks**
- CL covered by National/ LGU Risk Management Fund



Termination

PPP contract shall:

- Define **all events** that may lead to its termination, including but not limited to, either party event of default, force majeure and other no-fault termination events, and other termination events, as may be agreed upon by the parties to the PPP contract.
- Provide for **remedies**, curing periods, lender step-in rights, remittance procedures, default interest rates, and written notice requirements agreed upon by both parties
- Indicate the **Termination Payment** (amount payable by the government or the PP on the occurrence of an event or series of events)

Restrictions

- No termination without **exhausting** the corresponding remedy or curing period
- **Termination** shall take place only upon failure to remedy or cure the default in accordance with the PPP contract



“Amendments”

PPP Contract Variation, Expansion or Extension

1. Changes in the agreed **schedule** or **parametric formula** to calculate tolls, fares, fees, rentals, and other charges and adjustments thereof, as stipulated in the PPP contract
2. Decrease in the **IA’s revenue or profit share** derived from the project, except as may be allowed under a formula approved by the relevant regulatory or Approving Body
3. Change in the approved **scope of works**, decrease in the performance standards, deferment of committed service levels or change in the contractual arrangement
4. Extension in the **contract term**
5. Increase in the **financial liabilities** of the government under the PPP Project



“Amendments”

Approving Body

- Must approve the “amendments”
- May impose limitations on amendments during approval process of project

IA Head

- Approve other forms of “amendments”

Requirements

- No Approval = Void Amendment
- Approval before implementation of amendment
- Splitting of Amendments not allowed



Accountability

- All **PPP contracts** - clearly **define the scope** of each party's accountability under the PPP contract
- **IA Head** shall at all times be accountable to PPP Projects
- **PP** shall likewise be held accountable for the works it has delivered and services it has rendered for a PPP Project
- PPP Projects shall be subject to the **Government Auditing Code of the Philippines** and the 2009 COA Revised Rules of Procedures



Liability

- Imprisonment (3 – 6 years) and fine (P1M – P5M)
 - **Downgrading** the category of the Project Cost for purposes of evading the required approvals
 - Submitting of any **false information** or falsified documents
 - Neglecting or refusing to act upon an UP within the **prescribed period**
 - Performing any act which restricts **transparency** or tend to restrain the natural rivalry of parties or operates to stifle or suppress competition in the PPP process
 - **Withdrawing a bid**, after it shall have been declared the winner, or refusing award, without just cause for the purpose of forcing the IA to award the PPP contract to another bidder
 - **Violating provisions** on Approval of Projects, Solicited and Unsolicited Proposals, JVs, Amendments, Divestment, Conflict of Interest, Confidentiality of Information
- Anti-Graft and Corrupt Practices Act



Next Steps

IRR

- 90 days from PPP Code effectivity
- Public Consultations
- Possible Contents
 - More definitions
 - Procedures for approval of PPP Projects
 - Requirements for Unsolicited Proposals
 - Evaluation of bid proposals and protests
 - Framework for supervision and monitoring of PPP Projects
 - Mechanism for setting the RRoR
 - List of Government Undertakings

Guidelines

1. Guidelines, forms, and templates that shall be used by IAs and the appropriate Approving Bodies
2. Guidelines, frameworks, or mechanisms for consultation, review and approval of said initial tolls, fares, fees, rentals, and other charges and adjustments thereof
3. Approval of Government Undertakings
4. Negotiation of PTCs for Unsolicited Proposals
5. Processing of LDC endorsements
6. Determination of Termination Payments
7. Use of PDMF
8. Management of Contingent Liabilities
9. Set-up of Local PPP Risk Management Fund
10. PPP Audit Guide (COA)

PPP Code: Rules in Rule-Making

Suggested Guide for IRR Committee



IRR Committee can:

- Supply details and add definitions (*Supplementary or Implementing Rule*)
- Spell out how the PPP Code will be implemented (*Supplementary or Implementing Rule*)
- Set out procedures for solicited and unsolicited projects (*Procedural Rule*)
- Issue a Contingency Rule (e.g. *increasing the P15B threshold for National Projects requiring NEDA Board approval*) since the PPP Code provides the contingency

IRR Committee cannot:

- Change, amend or issue rules which are in conflict with the PPP Code and other statutes (*Subordinate Legislation*)
- Issue a rule which is not germane/related to the PPP Code
- Issue a rule which is unreasonable
- Issue Penal Rules (*whereby a violation of the IRR will be considered an offense since this is not authorized under the PPP Code*)
- Promulgate the IRR without public consultation (*since this is required under the PPP Code*)



-  www.albertocagra.com
-  09175353823
-  alberto agra
-  alberto.c.agra@gmail.com

Together, let us learn-unlearn-relearn.

Thank you.