



OFFICE OF THE GOVERNMENT CORPORATE COUNSEL  
PHILIPPINE ASSOCIATION OF GOVERNMENT CORPORATE LAWYERS

# The PPP Code and its **IRR**

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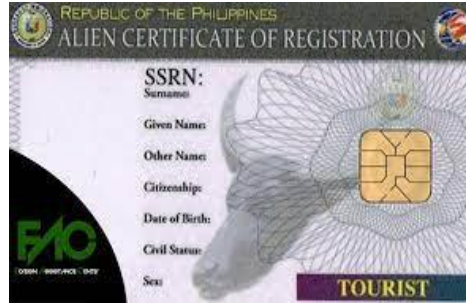
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# PPP Projects Everywhere



# Presentation Flow: 7 Ps



1  
Policies

2  
Parties

3  
Projects

4  
Partnership  
Schemes

5  
Permissions

6  
Procedures

7  
Pact



# Quizzer: True or False



1. All arrangements between a GOCC/ GICP and a Private Company are covered under the PPP Code.
2. All PPPs must be approved by NEDA.
3. Government Subsidies are allowed for all PPP projects.
4. Lowest price is the basis for awarding a project to a bidder.
5. Your resource person can be designated Secretary of a PBAC.
6. Unsolicited proposals are submitted to the GOCC/ GICP.
7. PPP Contracts cannot be amended.



# **(1) Policy**

# PPP Code and IRR



Dates	Milestones/ Activities
December 5, 2023	Republic Act No. 11966 (Public-Private Partnership Code) signed into law.
December 23, 2023	PPP Code became effective.
March 22, 2024	IRR published.
April 6, 2024	IRR became effective.

# PPP Policies



<b><i>BOT Law and IRR</i></b>	Repealed or modified accordingly <i>IRR: Repealed</i>
<b><i>NEDA JV Guidelines</i></b>	Repealed or modified accordingly <i>IRR: Repealed</i>
<b><i>AA PPP Guidelines</i></b>	Repealed or modified accordingly
<b><i>LGU PPP Ordinances</i></b>	Repealed or modified accordingly

# Special Laws



Laws	Administrative Agencies	Repealed (R)/ Modified (M) Provisions
RA 7227	Bases Conversion Development Authority	Turnkey or Build-Operate-Transfer of Major Conversion Projects (M)
RA 8292	State Universities and Colleges	Joint Ventures of Economic Assets (R)
RA 9500	University of the Philippines	Leases of Land and Joint Ventures (M)
RA 10844	Department of Information and Communications Technology	Issuance of PPP Guidelines for ICT Projects of Government Agencies (R)
PD 1112	Toll Regulatory Board	Construction, Operate and Maintain Toll Facilities (R)
PD 1113	Construction and Development Corporation of the Philippines	Right to Construct, Operation and Maintenance of Toll Facilities (R); Franchise (M)
PD 1894	Philippine National Construction Corporation	Construction, Operation and Maintenance of Extensions, Linkages, Stretches and Toll Facilities (R)



# Special Laws and PPP Guidelines



Policy	Administrative Agencies	Repealed/ Modified Provisions
PD 857	Philippine Ports Authority	Prescribe Rules for Construction, Operation and Maintenance of Ports; Lease of Land, Port, Wharf or Quay (R)
EO 74	Philippine Reclamation Authority	Delegated authority to the PRA Governing Board to approve reclamation projects (M)
EO 74 IRR	Philippine Reclamation Authority	PPP for reclamation projects (R)
---	Tourism Infrastructure and Enterprise Zone	JV Guidelines (R)
---	Metro Manila Development Authority	Alternative PPP Guidelines (R)
Various Laws	GOCCs, GIs and SUCs	Issuance of PPP Guidelines (financing, designing, constructing, operating, and maintaining) (R)



## **(1.1) PPP Defined**

# PPP defined



- A **contractual** arrangement between an **Implementing Agency (IA)** and a **Private Partner (PP)**
- to **finance, design, construct, operate, and maintain**, or any combination or variation thereof,
- **infrastructure or development projects** and services which are **typically provided by the public sector**,
- where each party **shares in the associated risks** and
- where the **investment recovery** of the PP is **linked to performance**.



# 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



# Rationale of PPP

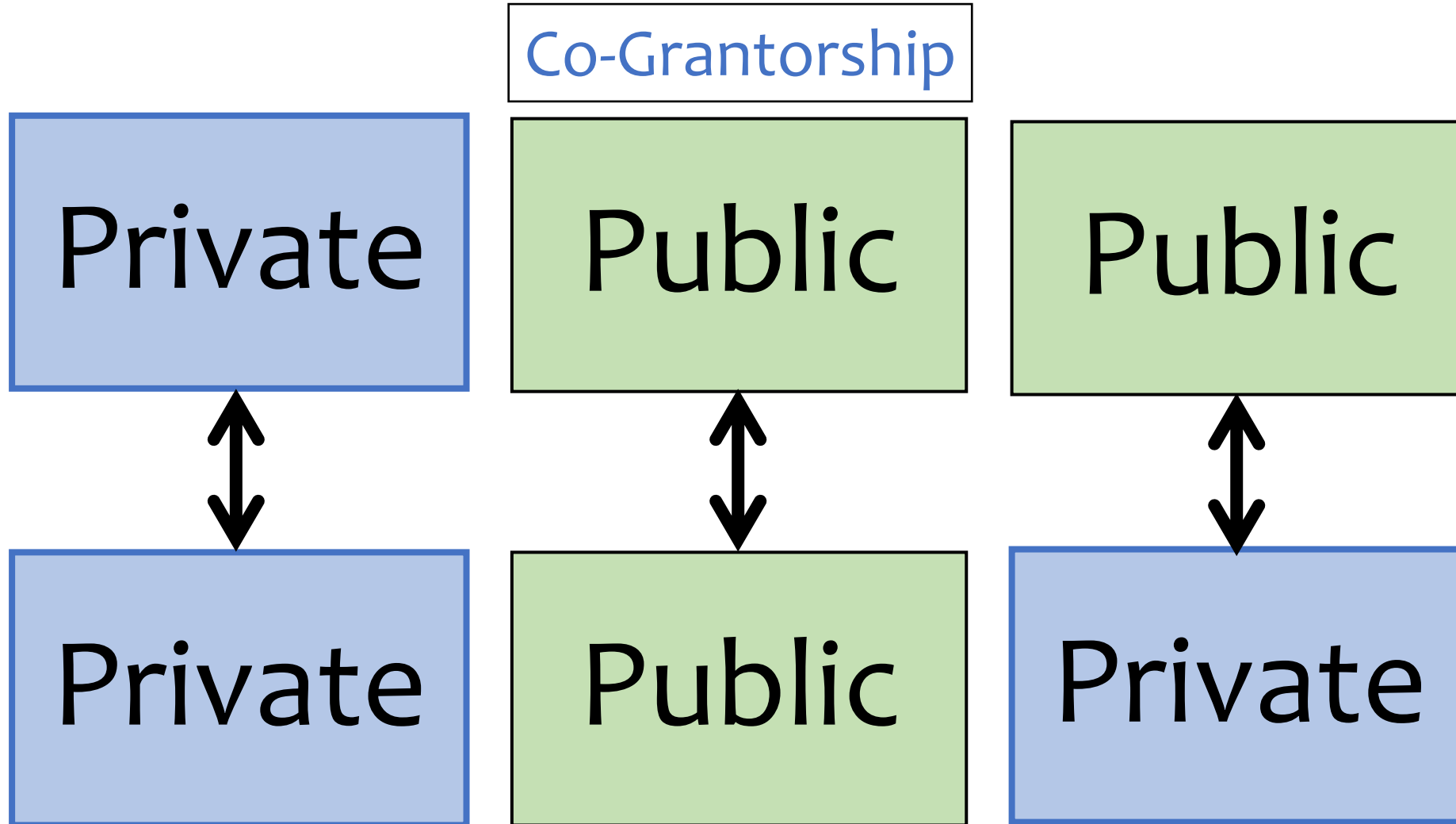
- **Better quality of PPP Projects** at lower costs
- **LGU local autonomy**, as self-reliant communities, more effective partners in the attainment of national goals
- **Integration** of climate resilience, sustainability, and gender and development policies and programs
- Open, fair, transparent, and competitive **selection** as the central tenet for securing private investment in PPP projects
- Subject partnerships that have **not been submitted through the administrative process** defined as PPPs under the Code under its jurisdiction and rules





## **(2) Parties**

# 3 Levels of PPPs





# 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. Water Districts
6. Government Financial Institutions
7. Economic Zones

## **Local**

1. Local Government Unit
2. Local University and College



# Co-Grantorship: **Inter-National IAs**

- Joint Implementation
  - National PPP Projects that encompass beyond jurisdictional boundaries
  - Bundling of similar projects can:
    - benefit from economies of scale
    - increase the viability of a proposed PPP Project
- If 3 or more National IAs, approved by IAs or NEDA-ICC

# Co-Grantorship: National IA and LGU



- Joint Committee or
- NEDA ICC and Sanggunian/ LUC Board





# 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



# Private Party

- **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



## **(2.1) Public Governance**

# PPP Governing Board



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



# PPP Governing Board

- **Overall policy-making body** for all PPP-related matters
- Responsible for setting the **strategic direction** of the PPP Program and PPP Projects
- Responsible for creating an **enabling policy** and institutional environment for PPP
- Promulgate PPP **policy matter opinions**
- Issue the **IRR** (Members form part of IRR Committee)

Prescribe guidelines on:

- improving **ease of doing business**
- **reviewing and approving Local PPP Projects**
- **negotiations** for unsolicited proposals
- monitoring the **compliance of the parties with PPP contracts**
- determination of **Termination Payments** and related reportorial requirements
- **Project Development and Monitoring Facility**
- **LGU PPP Risk Management Fund**



# Approving Bodies



NEDA  
Board

NEDA  
ICC

Cabinet  
Secretary

GOCC/ GI  
Board

Sanggunian

LUC Board

# National Economic and Development Authority (NEDA) Board



- Approve National Projects ( $\geq$  P15B Project Cost)

## Investment Coordination Committee (ICC)

- Recommend to Board ( $\geq$  P15B )
- Approve National Projects ( $<$  P15B) **subject to conditions**
- Approve Local Projects with **Government Undertakings** using national government funds (disapproval shall not be construed as a disapproval of the Local PPP Project)
- 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** (prudence & reasonableness)
- 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 **Project Development Management Fund**
8. Manage and administer the **PPP Risk Management Fund**
9. Serve as **Secretariat for IRR Committee**
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 IAs during **negotiations** of unsolicited proposals
14. Issue **non-policy matter opinions**
15. Act as **Procurement Agent**

# Pre-qualification/ Quali, Bids and Awards Committee (PBAC) Composition (Min.)



## National IAs

1. Chairperson – At least a third ranking IA official
2. Secretary – A legal IA officer
3. IA officer knowledgeable in finance
4. IA officer knowledgeable in procurement
5. IA officer knowledgeable in the management/ operation in the technical aspects or requirements of the PPP Project

Nos. 2-5: can be external consultants/ entities



# Regulatory Agencies

## PPP Code

No **IA** shall implement a PPP Project **that it regulates**:  
Provided, That any regulatory body which shall implement a PPP Project pursuant to its mandate shall adopt a **conflict mitigation and management plan**.

## IRR

A **Regulatory Body, exercising quasi-judicial functions**, shall not be allowed to undertake PPP Projects in the **sector or industry that it is mandated to regulate** except where there are **no available alternative IAs** which have the capacity to undertake such projects.



# Regulatory Agencies

*TRB, CAAP, LTFRB, etc.*



## 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 action is considered a **contingent liability event**
- **MAGA** includes unanticipated regulatory risks



# Department of Finance (DOF)

- The processing of **ODA agreements** shall adhere to policies, rules, and procedures, and/or guidelines applied for the purpose, including those issued by or that may be issued by the DOF
- The Approving Body/ LDC may consult with the DOF prior to approval in respect of the feasibility of the **Government Undertakings and/or Availability Payments**
- Reviewing Body for National PPP Projects and Local PPP Projects with National Government Undertaking or Availability Payments (**initial comments on PPP Contract and clearance**)
- IA may also involve the DOF to assist in the **negotiation process**
- DOF must be informed of **changes to PTCs** of draft PPP Contract



# 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



## **(3) Projects**



# 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**
- Part of list **submitted** to appropriate oversight agencies, NEDA, RDC, Sanggunian and the PPP Center
- Included in the **Consolidated List of Investment Programs (CLIPs)**
- All PPP Projects which will **interconnect or interface** with a local or national facility shall be required to submit a MOA containing an interconnection and/or interface plan

Infrastructure or Development Projects and Services - construction, improvement, rehabilitation, repair, and/ or maintenance of facilities or provision of services for **use by the public** that underlie and enable, sustain, and enhance the economic and social development of the country.

## PPP PROJECTS




# 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

- |  |  |
|--|--|
|  + <br>Hard and Hard |  + <br>Soft and Soft   |
|  + <br>Hard and Hard |  +  + <br>Hard, Soft and Soft |
|  + <br>Hard and Hard |  +  + <br>Hard, Hard and Soft |

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# 29+ Eligible Types of Projects

1. Highways, including expressways, roads, bridges, interchanges, tunnels, viaducts, and related facilities
2. 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 and ride, and related facilities
3. Transport and traffic management projects, including transportation databases, automated fare and toll collection systems, traffic signaling, traffic monitoring systems, traffic enforcement systems, congestion and management systems, and related facilities
4. Port infrastructure like piers, wharves, quays, storage, handling, roll-on roll-off facilities, and other related facilities





## 29+ Eligible Types of Projects

5. Maritime infrastructure like navigable inland waterways, shipping and ferry services, shipping vessels or components thereof, shipping and freight enterprises, and related facilities
6. Airports, air navigation, and related facilities
7. Power generation, transmission, sub-transmission, distribution, including hydropower plants, and related facilities
8. Downstream oil and gas industry facilities, and other energy-related facilities
9. Energy efficiency and conservation, renewable energy, and electric vehicle charging stations, and related facilities
10. Telecommunications, backbone network, terrestrial, aerial, and space infrastructure, and related service facilities





## 29+ Eligible Types of Projects

11. Information technology networks and database infrastructure, geo-spatial resource mapping, cadastral survey for resource accounting and planning, and related facilities
12. Irrigation and related facilities
13. Water supply, sewerage, drainage, waste water and water treatment, desalination, and related facilities
14. Educational infrastructure, including technological equipment used to facilitate learning and teaching, and related facilities
15. Health infrastructure, hospitals, clinics, research facilities, clinical laboratories, and other related facilities
16. Multi-purpose water resources projects covering a combination of irrigation, power, water supply, flood control, and related facilities



## 29+ Eligible Types of Projects

17. Land reclamation, dredging, flood control projects, and related facilities
18. 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
19. Government buildings, convention centers, and other related facilities
20. Urban redevelopment, townships, and housing projects
21. Heritage preservation and adaptive reuse projects
22. Markets, slaughterhouses, trading posts, and related facilities
23. Warehouses and post-harvest facilities
24. Public fish ports and fishponds, including storage and processing facilities



## 29+ Eligible Types of Projects

- 25. Agri-fishery industrial hubs, agribusiness facilities, agricultural research facilities, agricultural estates, agrilogistics systems, contract farming, and related facilities
- 26. Cold chain systems or centers, and related-facilities
- 27. Prisons, lease of security-related government assets, O&M of military facilities and equipment, and other national defense or security-related facilities
- 28. Environmental and solid waste management related facilities such as but not limited to waste collection, transportation and disposal facilities, transfer stations, composting plants, material recovery, landfill, and tidal barriers, among others

# 29+ Eligible Types of Projects



29. Climate change adaptation and mitigation and disaster risk reduction and management infrastructure projects, biodiversity conservation projects, and related facilities
30. Other Infrastructure or Development Projects and Services, as may be authorized by the IA pursuant to the Code and this IRR, and following applicable laws, rules, and regulations

(Related facilities may include commercial spaces within the project scope)



# 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



## **(4) Partnership Schemes**

# Universe of 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 RESOURCE EXCHANGE



Delineation of Functions  
("Division of Labor")

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





# PPP Code-Covered Arrangements

PPP as defined/ satisfies elements or as may be approved by Approving Body

1. Joint Ventures
2. Toll operation agreements or supplemental toll operation agreements, or any contractual arrangements involving the Construction, O&M, or a combination or variation thereof, of toll facilities
3. Lease
4. BOT, BT, BLT, BOO, BTO, CAO, DOT, ROT and ROO
5. Operate and Maintain



# 10 Exclusions

1. Procurement of Infrastructure Projects (GPRA)
2. Exclusively ODA-Funded Infrastructure Projects
3. Management Contracts which do not possess PPP elements (excludes O&M PPP contracts)
4. Service Contracts (coal service, petroleum, mining, renewable energy and per COA and DBM)
5. Divestments or Dispositions (taking away, depriving, withdrawing of an authority, power or title over a government asset)



# 10 Exclusions

6. Corporatization or transfer of government assets into a public corporation
7. Incorporation of Subsidiaries with Private Sector Equity
8. Onerous Donations (subject to burdens, charges, or future services equal to or more in value than the thing donated)
9. Gratuitous Donations (disposed by a person without charge, in favor of another who accepts it)
10. JV Agreements and leases involving **purely commercial arrangements** that neither provide nor include public infrastructure or development services



## **(5) Permissions**



# Approval of National PPPs

## $\geq$ *P15B Project Cost*

- NEDA Board Approval (120 days) (**non-delegable**)
- NEDA-ICC favorable Recommendation to NEDA Board
- If SUC and no Government Undertaking, Green Lane



# Project Cost

**Total cost** to be expended to **plan, develop, and construct the PPP Project to completion stage**, including cost of Feasibility Studies, engineering and design, construction, equipment, land or right-of-way (ROW), taxes imposed on said cost, and development cost. For this purpose, “completion stage” shall refer to completion of Construction, as defined under the Code and this IRR. For avoidance of doubt, interest charges and other financing costs incurred during Construction shall be considered as part of the Project Cost.

For **O&M PPP Projects without initial capital expenditures**, the present value of costs incurred in delivering the contracted service, including any reinvestment requirements shall be considered as the Project Cost. For this purpose, “initial capital expenditures” shall refer to capital expenditures expended during Construction, as defined under the Code and this IRR. The government borrowing rate shall be the discount rate used in determining the present value of costs incurred in delivering the contracted service, including any reinvestment requirements.



# Approval of National PPPs

## < P15B Project Cost

- Governing Board, Department or Agency Head (if Attached Agency has no Board) (120 days to decide, approval by inaction)
- NEDA-ICC if PPP Project (**non-delegable**):
  - Physically **overlaps** with government-approved project or developed project per national/ sectoral plans (**same alignment/ catchment**)
  - **Negatively affects** economic benefits, demand, and/or financial viability of government-approved project or developed project per national/ sectoral plans (**PPP project caters to affected markets/ groups**)
  - Requires financial **government undertakings** (under GAA)
  - Involves **Availability Payments** (under GAA)
  - With Government JV contribution which **exceeds 50%** of its entire assets based on its latest audited financial statements (**and valuation reports by 3<sup>rd</sup> party Appraisers, development plans, financial performance reports, and management reports**)



# Government Undertakings

*Not allowed for Unsolicited Proposals*

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

- Viability Gap Funding and other forms of subsidy
- Payment of ROW related costs (allowed if gov't received appropriate compensation but not lower than value of costs)
- Performance undertaking (**undertaking by government other than the IA in assuming responsibility for the performance of the Implementing Agency's obligations under the contractual arrangement including the payment of monetary obligations, in case of default**)





# Government Undertakings

*Not allowed for Unsolicited Proposals*

- Additional exemptions from any tax **specifically provided for the PPP Project through a legal issuance** other than those provided for by law
- Guarantee on Demand
- Guarantee on Loan Repayment
- Guarantee on Private Sector Return
- Government Equity (allowed for JVs)

# Government Undertakings

## *Not allowed for Unsolicited Proposals*



- Contribution (allowed for JVs) of assets, properties, and rights (compensation shall be considered appropriate if the value of the compensation is at least equal to the value of the contribution or undertaking as determined by a Third-party Appraiser)
- Monetary payment of Contingent Liability through the PPP Risk Management Fund of the national government, in the case of Local PPP Projects
- Credit Enhancements (support to PPP Project and Service contingent upon the occurrence of certain events and/or risks, e.g. government guarantees on the performance, or the obligation of the IA)



# 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]*



# Complete Feasibility Study

1. Problem Definition/ Objectives
2. Project Description
3. Project Context
4. Sectoral Program
5. Regional and Spatial Context
6. Expected Outcomes and Key Success Indicators
7. Analysis of Technical Solutions
8. Project Costs
9. Legal Due Diligence
10. Demand and Supply/ Market Analysis
11. Market Sounding Feedback (for Solicited)
12. Proposed Tariff Structure
13. Financial Analysis
14. Economic Analysis
15. Social and Environmental Analysis
16. Risk Allocation
17. VfM Analysis (for Solicited)
18. Contractual Arrangement Options
19. Job Creation Information
20. Land Acquisition/ Resettlement Action Plan
21. Heritage Impact Assessment
22. Geotechnical Report
23. Description of Products or Services to be provided
24. Description of the Geographic and Catchment Area

# Parameters, Terms & Conditions (PTCs)



1. Project Scope
2. Contractual Arrangement
3. Contract Duration
4. Rights and Obligations of Parties
5. Performance Standards and Key Performance Indicators
6. Safeguards for Government and Public
7. Investment Recovery Schemes
8. Revenue share, if any
9. Government Undertakings
10. Proposed Risk Allocation
11. Contingent Liabilities
12. Bid Parameter
13. Ceiling for Debt-to-Equity Ratio
14. Proposed Public Bidding Process – single or 2-stage (if solicited)
15. Proposed Period for Comparative Challenge (90 days to 1 year)

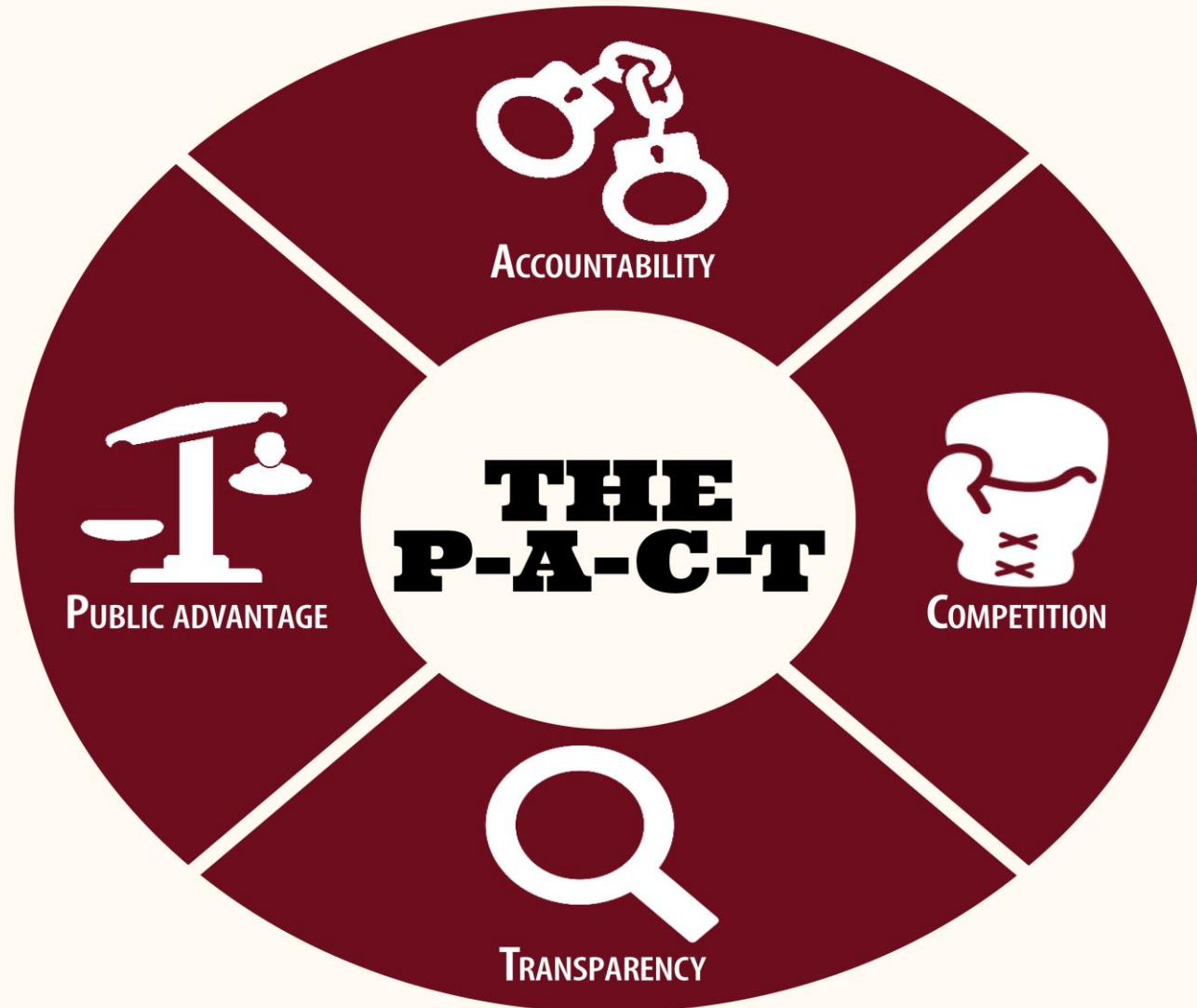


## **(6) Procedures**

# PPP SELECTION REQUIREMENTS



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





# Solicited Project: **Tender Documents**

- Instructions to Bidders
- Draft PPP contract reflecting the PTCs as approved by the appropriate Approving Body
- “Bid Form” reflecting the required information to properly evaluate the bid proposal
- Forms of bid and performance securities
- Requirements and timelines/ milestones of agencies concerned in granting of franchise, if applicable
- Other documents as may be deemed necessary by the IA





# 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)

**MRB:** bid that conforms, in all material respects, to the bid solicitation requirements and approved bid parameters, and the one that is most advantageous to the government



# Solicited Project

## Failure of Bidding

- No bids are received
- No eligible bidder
- No complying bids
- Winner bidder refuses to accept award
- IA unable to execute PPP Contract
- Non-agreement on resulting terms after negotiations when single complying bid

## 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



# Award and PPP Contracts

- PBAC submits recommendation to award to IA Head
- IA renders decision on recommendation
- If approved, Notice of Award issued
- Execution of Contract within period of validity of bid security
- IA issues notice that all NOA conditions complied with
- Authorized signatories of IA and PP execute PPP Contract



# Grant of Franchise

- After PPP Contract execution, PP applies for Administrative or Local Franchise
- Regulatory Body:
  - determines compliance by PP of guidelines (and, where applicable, considering its prior clearance or approval of the maximum acceptable Tariff set by the IA before the bidding)
  - grant in favor of the PP an Administrative or Local Franchise to operate the facility and collect the Tariff stipulated under the PPP Contract, including adjustment formula, if any.



# Unsolicited Proposal: Completeness

1. Complete Feasibility Study
2. Traceable Economic and Financial Models
3. Minimum Parameters, Terms and Conditions
4. Certification that USP has no Government Undertakings
5. Valuation Report
6. Proposed IA
7. Information on the qualifications of the Private Proponent
8. Draft PPP Contract
9. Project Site Plan
10. If UP involves ROW, ROW and resettlement plan

Information: not older than 3 years from submission (for valuation report, not older than 1 year)

# Unsolicited Proposal (USP): 7 Stages

## PPP Code and IRR



- USP Completeness
- Appropriate Approving Body
- If complete, endorsed to Implementing Agency (IA)
- No decision = USP incomplete

- Successful (or failed) negotiations
- If successful, PP conferred Original Proponent Status (OP) valid for 1 year
- USP and PTCs submitted to Approving Body for approval (120 c. days)\*
- If Local PPP, LDC endorsement (30 c. days)\*

- Awarded to OP (no challenger or OP able to match superior offer) or Challenger (OP not match)
- NOA subject to conditions (20 days)

(1) Private Proponent (PP) prepares USP

(2) PPP Center checks USP (10 c. days)

(3) IA undertakes Detailed Evaluation (2x90 c. days)\*

(4) IA and PP negotiate (30 – 80, ≠150 c. days)

(5) IA conducts Competitive Challenge (90-365 c. days)

(6) IA issues Notice of Award (NOA) (7 c. days)

(7) IA and PP execute PPP Contract (5 c. days from notice)

PP submits to PPP Center

IA accepts or rejects

Right to Match by OP

PP compliance with conditions

\* = approval by inaction



## (7) Pact

# PPP Contract



- The law between the parties and the parties shall perform their respective **prestations, obligations, and undertakings** thereunder with **utmost good faith** with the end in view of **attaining the objectives** hereof.
- Once a PPP Contract is executed by the PP and the IA, a presumption arises that the **public interest** will be served by the implementation of the PPP Project covered thereby, and immediately upon application by the PP in accordance with the guidelines of the Regulatory Body concerned.



# Mandatory Provisions in a PPP Contract



1. specific contractual arrangement, term, and scope of work
2. minimum performance standards and specification
3. KPIs (to measure the progress or success of the PP), targets, and procedures for measuring and reporting results
4. implementation milestones, including those for securing other approvals and the project completion date
5. cost recovery scheme via proposed tolls, fares, fess, rentals, and other charges, as the case may be
6. obligation of the PP to disclose loan or financing documents

# Mandatory Provisions in a PPP Contract



7. liquidated damages
8. performance security requirements, including their validity and top-up mechanism procedures, contemplated under this IRR
9. minimum insurance coverage as may be required for the project, such as Contractors' all risk, motor vehicle, workmen's compensation, third party liability, force majeure, or comprehensive general liability insurance, as may be applicable
10. acceptance tests and procedures
11. warranty period and procedures (after transfer) and warranty security
12. lock-in periods, as applicable

# Mandatory Provisions in a PPP Contract



13. grounds for and effects of contract termination, including formula for termination payment
14. conditions and procedures for lender step-in rights
15. conditions for acceptable permitted security interest
16. manner and procedures for the resolution of corruption
17. procedures for resolving disputes as detailed in this IRR
18. wind-up and transfer measures
19. compliance with all other applicable laws, rules, and regulations

# Mandatory Provisions in a PPP Contract



- 20. total cost of the project, project specifications and features
- 21. Gender, social, disability and environment safeguards
- 22. provisions on the use of dispute avoidance and ADR mechanisms
- 23. ownership or retention of patents, technology and consultant reports
- 24. monitoring, evaluation and reporting scheme/ plan for all safeguard-related mandatory provisions of the PPP Contract
- 25. a period within which Financial Close shall be achieved by the PP



# 21 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. 3 Guarantees
12. Subsidy
13. Government Undertakings
14. Divestment and Lock-in
15. Government Takeover
16. Wind-Up and Transfer Measures
17. Alternative Dispute Resolution
18. Material Adverse Government Action
19. Variation, Expansion or Extension
20. Termination
21. Accountability/ Liability

# 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
- 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



# 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”)
- **Setting of RROR shall:**
  - Only be applicable to **single complying and responsive bids for a Solicited Project**
  - Consider **prevailing market conditions, risks** to be assumed by the PP, and **duration** of the project
- Prescribed by **Approving Body** and stated in **PPP Contract**
- Considered by Regulatory Agency in assessment of **public interest**



# RRoR: Trust Account

- **Purpose** of retaining excess cash when the realized RoR exceeds the RROR
  1. When the realized rate of return **exceeds** the prescribed RROR the PP will **deposit excess cash** into the trust account in such amount as to cause the realized RoR to equal RROR
  2. When the realized **RoR falls below RROR**, the PP may **draw from the trust account** in such amount as to cause the realized RoR to equal RROR or the total amount remaining in the trust account, whichever is lower:  
*Provided, That at all times, the trust account is funded only by sources coming from provision.*
- At the **end of the PPP Contract**, the above provisions shall also be implemented.
- After which, the trust account balance will be **remitted to the National Treasury**.





# 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



# 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



# Subsidy

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



# Government Takeover

## Temporary

- During a temporary takeover, the IA shall retain the tolls, fares, fees, rentals, and other charges from the PPP Project and shall be responsible for the corresponding costs to rectify, operate and maintain the PPP Project
- Contract term shall be suspended until the PPP Project or operations thereof is returned to the Private Partner
- When returned to PP
  - Compensation due to the PP
  - Adjustment of KPIs to the extent that defects in the PPP Project cannot be rectified
  - Warranty in favor of the PP that the PPP Project is capable of meeting the KPIs as adjusted

## Permanent

- Private Partner shall be entitled to claim Termination Payments
- Minimum period to be defined in the PPP Contract from the date of receipt by the Private Partner of a written takeover notice shall be deemed to be a permanent takeover



# 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



# 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



# Audit

## IA/ Government

- All **revenues**, share, and/or receipts pertaining to or accruing to the IA or to the government, derived from any PPP Contract
- including expenditures or uses of funds and property, owned or held in trust by the Government
- shall be subject to examination/audit by **COA**,
- for purposes of ensuring that such revenues, share, and/or receipts are **fully and properly accounted for and remitted** to the IA or the government

## Private Partner

- All revenues and receipts pertaining to or accruing to the PP in a PPP arrangement
- may be remitted directly to the PP
- as may be stipulated in the contract and subject to applicable laws, rules, and regulations



# “Amendments”

## *PPP Contract Variation, Expansion or Extension*

- a. 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
- b. 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
- c. Change in the approved **scope of works**, decrease in the performance standards, deferment of committed service levels or change in the contractual arrangement
- d. Extension in the **contract term**
- e. Any variation that will result in an increase in the **financial liabilities** of the government under the PPP Project
- f. Any allowable amendments and waivers which have same effect or consequence as (a) to (e)



# 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 USP 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



# Void/ Non-Binding

- Executed PPP contract contains provision/s which are **contrary with the approved PTCs** and are **grossly disadvantageous to the government**
- Failure to secure the **approval of the variation/ expansion/ extension** from the Head of the IA and/or the appropriate Approving Body
- Any **Government Undertaking and Availability Payment** commitments to be sourced and funded under GAA stated in the draft PPP contract not approved by the Approving Body and not cleared by the DOF shall not be binding against the government.
- Any **temporary restraining order**, preliminary injunction, preliminary mandatory injunction, temporary environmental protection order, or similar temporary or provisional reliefs or remedies issued in violation of this section is void and of no force and effect.
- If after due hearing the **court** finds that the award of the contract is null and void, the court may, if appropriate under the circumstances, award the contract to the qualified and winning bidder or order a rebidding of the same



# Role of OGCC and GOCC/ GI Lawyers

## OGCC






- Review and issue clearance of final draft PPP contract (that will be released to bidders/ comparative proponents) for compliance with applicable laws and rules
- Serve as a Non-Voting Member of PBAC
- Assist in Negotiations
- Must be informed by IA of changes in:
  - Qualification/ Pre-qualification requirements
  - PTCs of the draft PPP Contract
- Render legal assistance to a Private Partner when co-defendant with IA
- Assist in the drafting of the MOA for the interconnection and/or interface plan (IAs with local or national facility or infrastructure/ development project)

## GOCC/ GI Lawyers

- Act as Secretary of PBAC
- Be part of IA Negotiation Panel

## Private Lawyers

- Be engaged as lawyers by government officials and PBAC members when sued (civil, criminal or administrative)

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*Thank you.*

