3 Ps: Government Contracting Mechanisms

Public-Private Partnerships, Procurement, and Privatization

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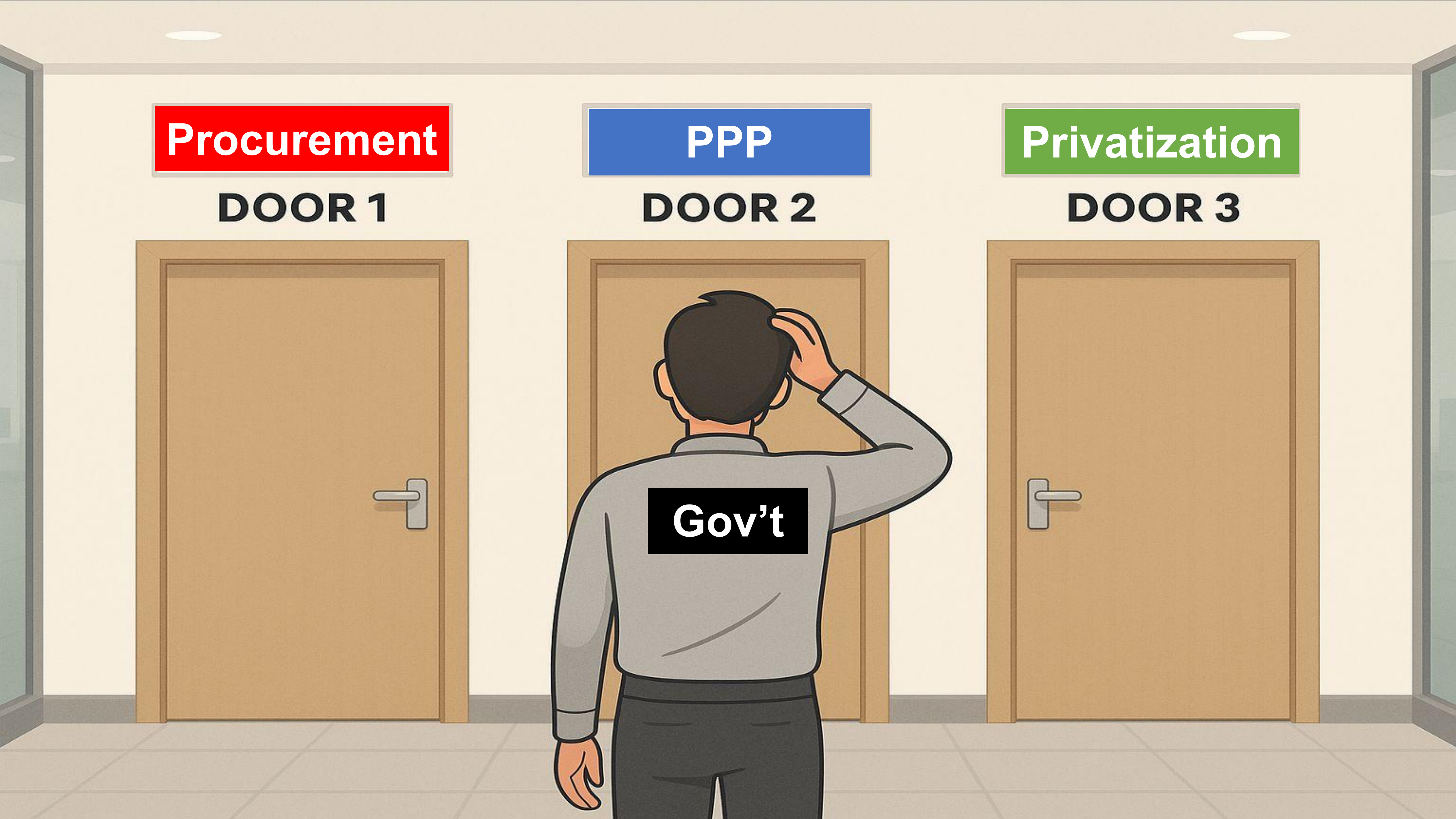
28 August 2025

Government Projects


Procurement
DOOR 1
PPP
DOOR 2
Privatization
DOOR 3
Gov’t

Quizzer:
Mechanisms/ Options/ Governing Law

1. Your **Administrative Agency** wants to:
   a) Undertake a **flood control** project – it has **enough funds**?
   b) Construct a **road project** – it has **no funds** – it wants to earn **revenues**?
   c) Implement a **commercial mall** project – it has **no funds**?
   d) Sell its **public market and land** to a private company?
2. What is the **governing law**?
3. Who **approves** the project?
4. Can the Agency accept **unsolicited proposals**?

Public-Private Partnerships

Presentation Flow: 7 Ps

1 Policies

2 Parties

3 Projects

4 Partnership Schemes

5 Permissions

6 Procedures

7 Pact

(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

BOT Law and IRR	Repealed or modified accordingly *IRR: Repealed*
NEDA JV Guidelines	Repealed or modified accordingly *IRR: Repealed*
AA PPP Guidelines	Repealed or modified accordingly
LGU PPP Ordinances	Repealed or modified accordingly

AA and LGU Authority

"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**, AA **guidelines/** LGU **ordinances must not be inconsistent** with statutes such as the PPP Code.
- This is an **implied restriction** in local legislation and rule-making.
- AAs/ LGUs can issue guidelines/ enact ordinances on **specified PPP arrangements** that **not covered** the PPP Code.

PPP Existing Contracts

Existing Contracts	Governed by the agreements *(PPP Code suppletory application)*
Existing Franchises	PPP Code Section on Variation/ Expansion/ Extension applicable *(provided not impair substantive rights)*

(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.**

Nature of PPPs

Aspects:

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

Rationale of PPP

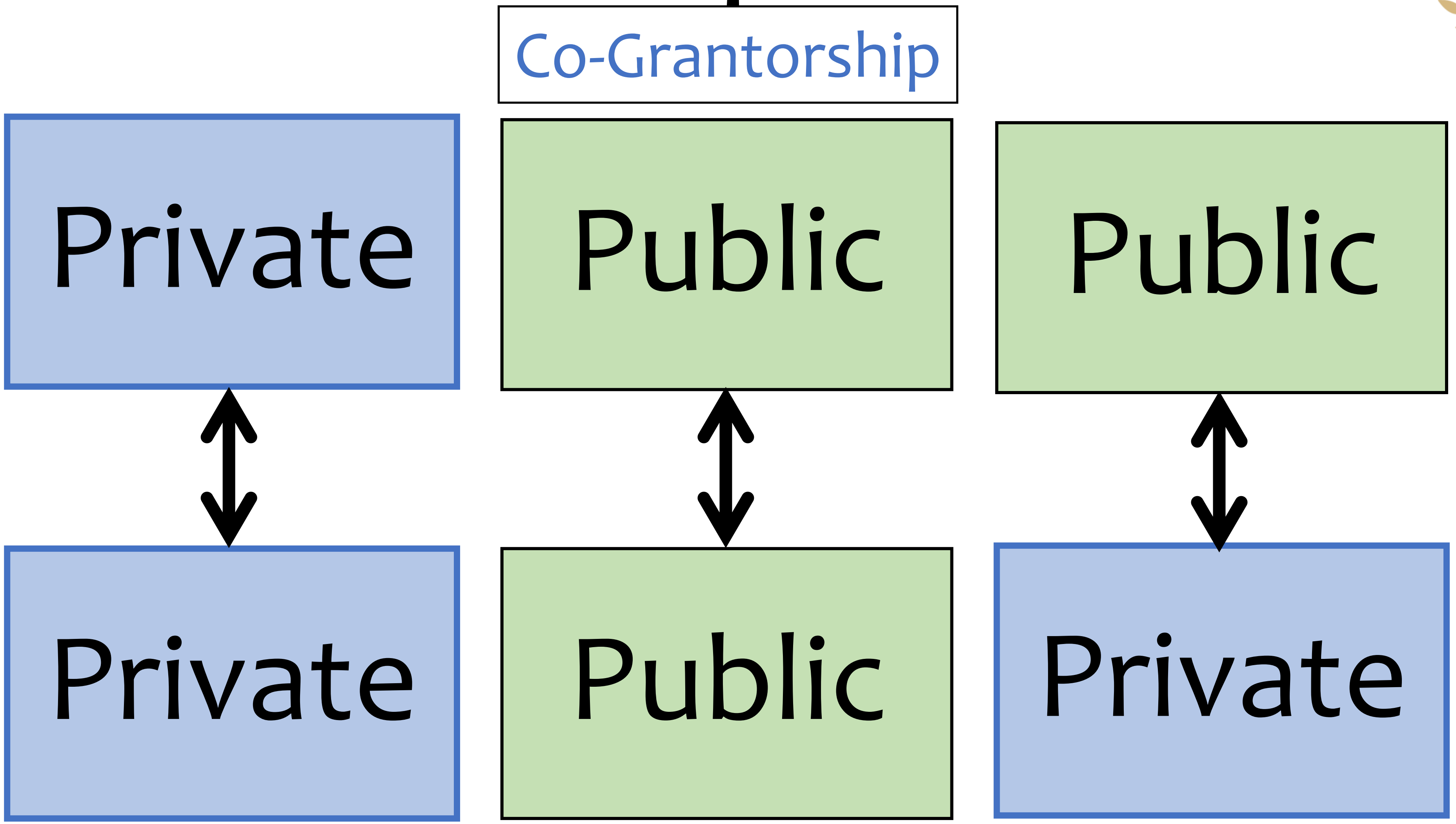
- **Indispensable role of the private sector**, encourage private enterprise, and provide incentives to needed investments
- Enabling environment for the private sector to **mobilize its resources** to finance, design, construct, operate, and maintain infrastructure or development projects and services
- **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

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 Partnerships



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

Regulatory Bodies

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.

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

Private Party: Legal

Project requires Public Utility Franchise	Project does <u>not</u> require Public Utility Franchise
Private Proponent (PP) = Facility Operator (FO): ○ a Filipino ○ if a corporation, must be duly registered with the SEC and owned up to ≥ 60% by Filipinos ○ if a consortium of local, foreign, or local and foreign firms, Filipinos must have ≥ 60% interest ○ if a cooperative, must be duly registered with the Cooperative Development Authority (CDA)	PP or FO: ○ Filipino or ○ Foreign-owned
PP ≠ FO, FO: ○ a Filipino ○ if a corporation, must be duly registered with the SEC and owned up to ≥ 60% by Filipinos ○ if a cooperative, must be duly registered with the CDA	

Private Party: Track Record

- *Firm Experience:* By **itself or through the member-firms** in case of a consortium, or through a **Contractor(s)** or **nominated affiliates,** proposed **Facility Operators** and/or entities bound by a **technical services agreement**, collectively referred to as **Nominated Entities** which the prospective Private Partner may engage for the project, the prospective Private Partner, its Contractors, and/or Nominated Entities, must have **successfully undertaken** a project(s) **similar or related** to the subject infrastructure or development project to be bid.
- *Key Personnel Experience:* sufficient experience in the relevant aspect of schemes similar or related to the subject project

Private Party: Financial Capacity

Equity

- a **minimum amount of equity** to the project measured in terms of the **latest net worth** of the company as of the nearest date to the deadline for submission of qualification/ pre-qualification documents
- If **consortium**, the **net worth of the lead member or the combined net worth of members** as of the nearest date to the deadline for submission of qualification/ pre-qualification documents

Private Party: Financial Capacity

Debt: current letter **testimonial from a financial institution** (authorized by BSP to transact in the Philippines, or has an investment grade foreign currency credit rating from a reputable agency which has an outstanding rating on the RP) attesting that:

- The prospective PP or members of the consortium are **banking with them**; and
- The prospective PP and/or members of the consortium are in **good financial standing** and/or **qualified to obtain debt financing** from such financial institution to finance the PPP Project equivalent to the value of the debt requirement in the proposal.

Private Party: Waiver by Bidder

- Accepts the **qualification criteria** established by the IA PBAC
- Waives any right it may have to seek and obtain a writ of **injunction** or prohibition or restraining order against the Implementing Agency or its PBAC to prevent or restrain:
  - the qualification process or any proceedings related thereto
  - the holding of a bidding or any proceedings related thereto
  - the negotiation of and award of the PPP contract to a successful bidder
  - to carry out of the awarded PPP contract
- Such waiver shall, however, be **without prejudice** to the right of a disqualified or losing bidder to question:
  - the lawfulness of its disqualification
  - the rejection of its bid by appropriate administrative or judicial processes not involving the issuance of a writ of injunction or prohibition or restraining order

(2.1) Public Governance

PPP Governing Board

1. Chairperson: DEPDev 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

ED Council	ICC	Cabinet Secretary
GOCC/ GI Board	Sanggunian	LUC Board

Department of Economy, Planning, and Development (DEPDev)

ED Council

- Approve National Projects (≥ P15B Project Cost)

Investment Coordination Committee (ICC)

- Recommend to Board (≥ **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)

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

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 **DEPDev**
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 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

Local IAs

1. Chairperson – the Administrator or at least a third ranking permanent official of the local IA
2. IA Treasurer or Accountant
3. IA Planning and Development Coordinator or Engineer of the Implementing
4. Legal officer of the LGU (if none, external legal advisor or higher LGU)
5. A representative from and selected by the local *Sanggunian* or by the LUC Board designated through a resolution

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

IA PBAC: Functions

- Responsible for all aspects of pre-bidding and bidding process in solicited proposals
  - preparation of the tender documents
  - publication of the Invitation to Pre-qualify and Bid
  - pre-qualification of prospective bidders
  - conduct of pre-bid conferences and issuance of supplemental notices
  - interpretation of the rules regarding the bidding
  - conduct of bidding
  - evaluation of bids
  - resolution of disputes between bidders
  - recommendation for the acceptance of the bid and/or for the award of the PPP contract

IA PPP Units

- IA may create PPP Units (planning, overseeing, implementing, and monitoring the PPP Projects)
  - New unit or office
  - Existing unit or committee
- PPP Center to assist

Composition (minimum for National while discretionary for Local; may be outsourced)

1. Senior Official (at least 3rd ranking)
2. Technical – Project Development
3. Technical – Planning
4. Technical – Contract Management
5. Finance
6. Legal

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

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 USPs
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

- **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, DEPDev, 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

Consolidated List of Investment Programs (CLIPs)

Requirements

- All plans must be submitted to DEPDev and PPP Center within 30 days from IRR effectivity
- Without prejudice to UPs
- If not submitted, excluded from list of PPP Projects
- Allows for updating of list
- For National Projects: DEPDev, RDCs and PPP Center
- For Local Projects: DEPDev, RDCs, PPP Center and Local Sanggunian

Information Needed

- Name and brief description of the project
- Indicative Project Cost
- Project location
- Plan or investment program where the PPP Project is included
- Status of the Project
- Development costs
- Recommended objectives, goals and desired outcomes

Developing PPP Projects

- 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**
- Requires **stakeholder consultations** and analyses
- **Commercial feasibility**
- **Market Acceptability**
- **Lessons learned** from previous or ongoing PPP Projects
- **Whole-of-government approach**

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.

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)

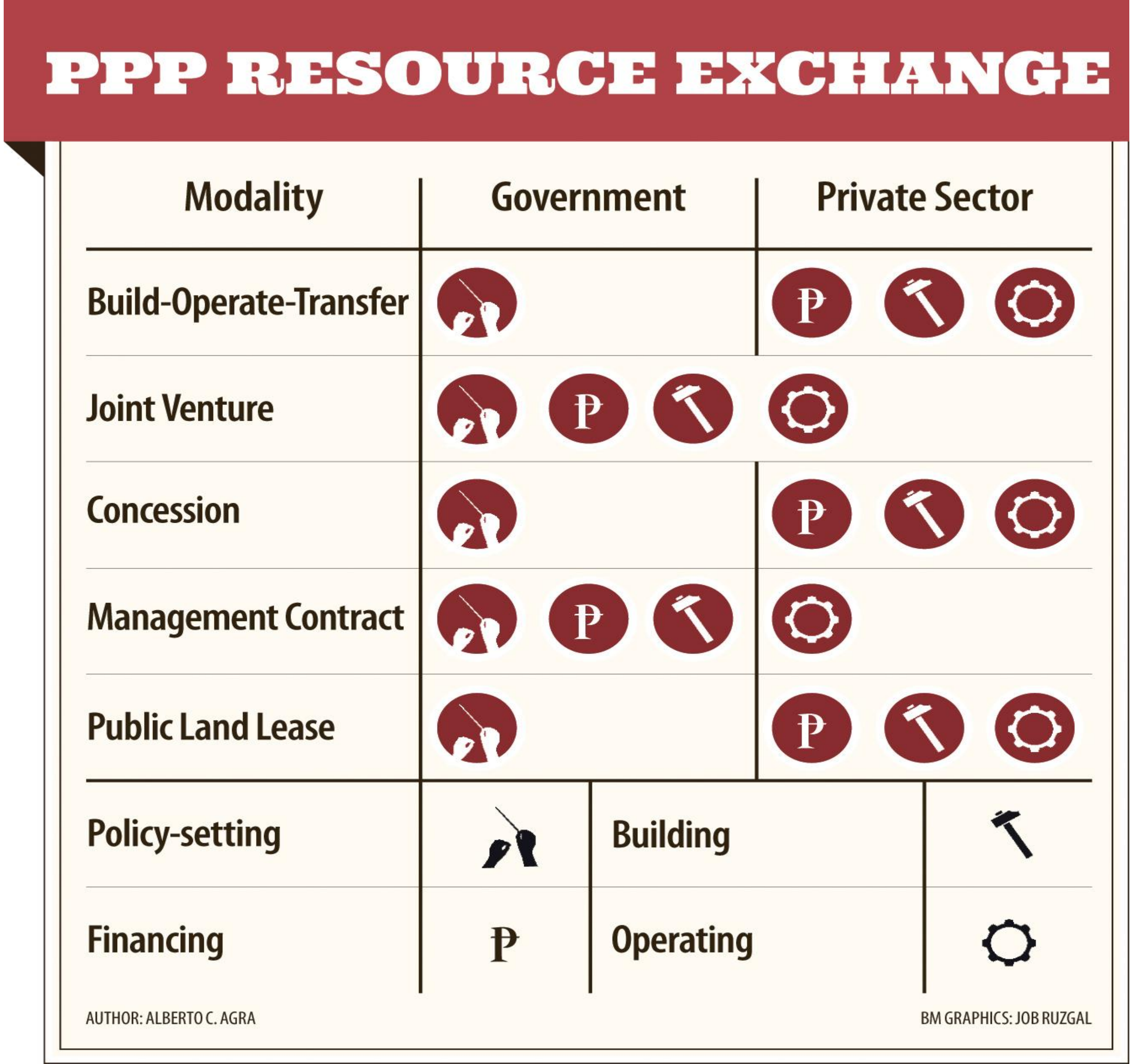
Value for Money (VfM)

- 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



Delineation of Functions
(“Division of Labor”)

13 PPP Code-Covered Arrangements

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

1. Joint Ventures (public or public and commercial)
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 (public or public and commercial)
4. BOT, BT, BLT, BOO, BTO, CAO, DOT, ROT and ROO
5. Operate and Maintain

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)
- With Contingent Liability
- 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
- Reversion to Government or **Divestment**

Joint Venture: JVC

- The shares of the IA and the PP in the **profits, losses, assets** acquired and/or constructed, and any other interests derived from the JV shall be proportionate to their **respective contributions**
- The IA shall be represented in the **Board** of the JVC. The composition of the Board shall be based on the JV Partners' proportional contribution. The JV Partners may agree for the IA to have greater representation in the Board.
- The IA and the PP shall be entitled to receive **dividends** from the net profits proportionate to the equity contributions of each party (IA may have higher return; more favorable terms; IA dividends may be used to offset against payments)

Lease

- Lease with:
  - Rehabilitate
  - O&M, and
  - Provision for Working Capital and/or Improvements
  - of an existing land or facility owned by the government
  - for a fixed period of time covering more than 1 year
  - Includes/ provides public infrastructure or development services
- Lease as component of PPP

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

10 Exclusions

- If excluded PPP arrangements **satisfies elements of PPP** under the PPP Code and IRR, covered under PPP Code and IRR
- The IA may request for a **non-policy matter opinion** from the PPP Center to determine whether a project is covered by the PPP Code and this IRR
- Subject partnerships that have **not been submitted through the administrative process** defined as PPPs under the PPP Code under its jurisdiction and rules

PPP Code vs. PPP Ordinance

Aspects	PPP Code	PPP Ordinance
Application	All LGUs	Specific (adopting) LGU/ Sanggunian
Covered Arrangements	1. JVs for Public or Mix of Public and Commercial purposes 2. Leases for Public or Mix of Public and Commercial purposes 3. BOT, BT, BLT, BOO, BTO, CAO, DOT, ROT and ROO 4. Operate and Maintain	1. JVs for purely commercial purposes 2. Leases for purely commercial purposes 3. Donations (Onerous and Gratuitous) 4. Divestment (COA Circular) 5. Subsidiary (Corporation Code) 6. Corporatization (Corporation Code)
Study	Feasibility Study	Feasibility or Pre-Feasibility Study
Approving Body	Sanggunian	LGU: LCE and Sanggunian
Unsolicited Prop.	Government Undertakings not allowed	N/A
Other Agencies	PPP Center (for completeness) and DEPDev-ICC (when GAA)	N/A

Proposed/ Template PPP Ordinance

(5) Permissions

Approval of National PPPs

- ≥ ***P15B Project Cost***
  - ED Council Approval (*120 days*) (non-delegable)
  - ICC favorable Recommendation to ED Council
  - 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)
- 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 3rd party Appraisers, development plans, financial performance reports, and management reports)

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
- DOF - National Government Undertaking under the PPP contract

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]

Approval of Local PPPs
Regardless of Project Cost

- Approved by **Sanggunian** (if LGU) or **Board** (if LUC) (non-delegable)
- Confirmation/ endorsement by **LDC** prior to approval *(30 days, approval by inaction)*
  - Review if aligned/ consistent with local development plans
  - Review project and identify concerns
  - Submit confirmation and results of review

Approval of Local PPPs
Regardless of Project Cost

- Approved by **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 (once RDC endorsement secured, LDC shall endorse)
- Clearance from **Statutory Counsel** - compliance with approved PTCs and applicable laws
- Clearance from **DOF** - if there is national government undertaking (prior to LDC confirmation)

Approval of PPPs: Completeness

- Complete feasibility study
- Traceable economic and financial models in electronic copy
- Proposed parameters, terms, and conditions (PTCs)
- VFM analysis
- Valuation report, as applicable
- Documentation of the stakeholders' consultations conducted, including the participating sector or communities consulted
- Other documents, information, or materials that may be required by the ICC in its approval guidelines, including the forms and templates, needed to commence project evaluation

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
12. Proposed Tariff Structure
13. Financial Analysis
14. Economic Analysis
15. Social and Environmental Analysis
16. Risk Allocation
17. VfM Analysis
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)

2 Required Traceable Models

Economic Model

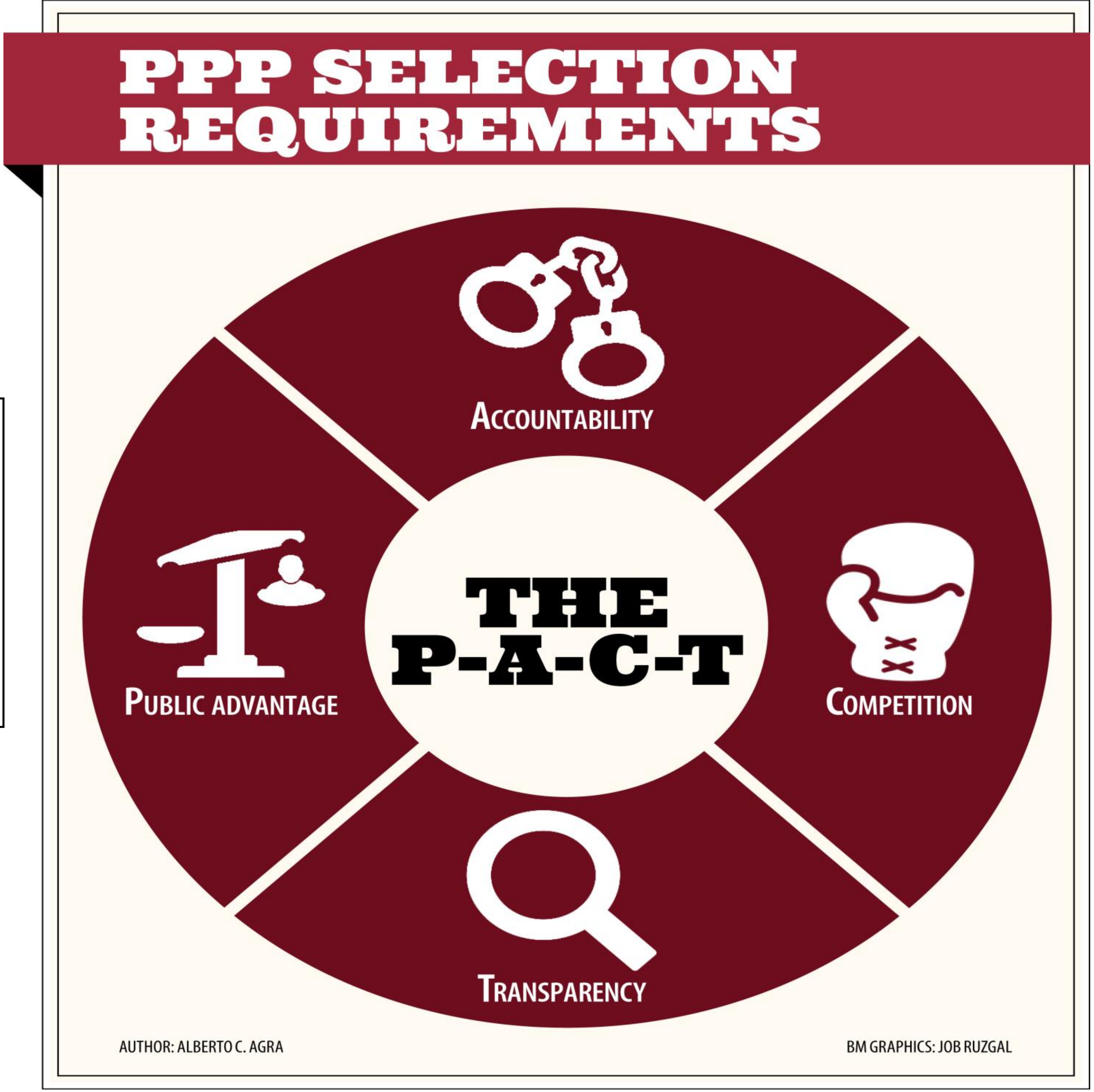
1. Assumptions
2. Economic Benefits and Costs
3. Conversion of Financial Costs to Economic Costs
4. Calculation of Economic Viability (economic internal rate of return; economic net present value; benefit-cost ratio)

Financial Model

1. Assumptions
2. Balance Sheet
3. Income Statement
4. Cash Flows (full life)
5. Calculations on Financial Viability (debt service coverage ratio, free cash flows to firm and equity holders; project and equity internal rates of return; project and equity net present value; and weighted average cost of capital)

(6) Procedures

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

- Public bidding initiated by IA
  - Stages: Single-Stage or Two-Stage (qualification requirements and/ then bid proposals – sequential or simultaneous)
  - Manner: Manual or Electronic
  - IA right to reject any and all bids, waives any defect which do not constitute a material deviation, reservation or omission
- 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: Technical Proposal

- Compliance statements with regard to the **technical parameters** as stated in the bid/tender documents
- **Operational feasibility** of the PPP Project, which shall indicate the organization, methods, and procedures for the operation and maintenance of the PPP Project under bidding
- **Technical soundness**/ preliminary engineering design, including the proposed project timeline
- Preliminary **environmental assessment,** which shall indicate the probable adverse effects of the PPP Project on the environment and the corresponding mitigating measures to be adopted

Solicited Project: Technical Proposal

- **Project Cost** as proposed by the bidder
- **Financing plan** and third-party valuation of the bidder's contribution, in the case of JV arrangements
- **Bid security** (cash, certified check, manager's check, letter of credit, or bank draft/ guarantee issued by a reputable local/foreign bank, or a surety bond callable on demand issued by the GSIS or an entity duly registered and recognized by the Office of the Insurance Commission):

Project Cost	Required Bid Security
Less than Php 5 billion	2.0% of the Project Cost
Php 5 billion to less than Php 10 billion	Php 100 million + 1.5% of the Project Cost excess over Php 5 billion
Php 10 billion and above	Php 175 million + 1.0% of the Project Cost excess over Php 10 billion

Solicited Project: Financial Proposal

- Compliance statements with regard to the **financial parameters** as stated in the bid/tender documents
- **Propose Project Cost**, operations and maintenance cost and other related costs
- **Project Financial Scheme**, which may include the amount of equity to be infused, debt to be obtained for the PPP Project, and sources of financing
- **Financial Proposal** corresponding to the bid parameters set by the IA
- **Financing plan and third-party valuation** of the bidder's/challenger's contribution, in the case of JV arrangements
- Other documents

Solicited Project: Most Responsive Bid

Highest (if financial)

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

Lowest (if financial)

- 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

Solicited Project

Failure to Enter into Contract

- Winning bidder fails to:
  - comply with post-award requirement
  - enter into the contract
- IA forfeit bid security
- IA may award to next MRB

Re-Bidding

- IA unable to execute PPP Contract
- Winning refuses without justifiable cause to accept the award of PPP Contract
- When courts find that PPP contract is null and void

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.

Solicited Project: Process

Preparation of Documents → Advertisement/ Invitation → Pre-Qualification → Submission of Proposals (Technical and Financial) → Bid Evaluation → Award of Contract

Preparation of Documents

1. Feasibility Study
2. Draft Contract
3. PTCs
4. Consultation
5. Instructions/ Forms
6. Proposal Securities

Pre-Qualification

3 Tests
1. Legal
2. Technical
3. Financial

Bid Evaluation

Most Responsive/ Advantageous

Award of Contract

3 Scenarios
1. 2 or more
2. Single/ only 1
3. Failed/ 0

Unsolicited Proposals: 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

- 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 *(90 c. days x 2)**

(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:
1st 90: Continues or not
2nd 90: 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

Risk Allocation

- **Equitable and optimal risk allocation** between/ among the PPP Parties
- **Each party** shares in the associated risks
- 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

- Solely or partially
- Debt and Equity
- Project Finance

Government

- Direct government appropriations
- Official Development Assistance

Blended Financing

- Partner government, bilateral or multilateral agency, local or international quasi-sovereign entities or international or multilateral lending institution
- May mobilize financing from private or commercial institutions for one or more components of a PPP Project
- Procurement activity under GPRA

Alternative Financing

- Green Financing (investments that create environmental benefits in support of green growth, low-carbon, carbon avoidance, and sustainable development, and the use of alternative assets such as carbon credits)
- Carbon Finance Mechanisms, Real Estate Investment Trust Instruments, Blue Financing Instruments
- Corporate or Project Bonds, Municipal Bonds, Islamic Bonds and Bonds from Securitization
- 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
- 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 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")
- 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 RoRto 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

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 renumerated 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

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

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)

“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
- Rules apply to existing franchises unless substantive rights will be impaired

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

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

Procurement of Infrastructure Projects

New Government Procurement Act (R.A. No. 12009)
which took effect on August 13, 2024
and its IRR which took effect on February 25, 2025

3 Key Elements of Procurement

- Procuring Entities (Government)
- Objects of Procurement
- Public Funds

8 Procuring Entities

All Branches/ Instrumentalities	Departments	Bureaus, Offices and Agencies	Government Financial Institutions
Government-Owned and -Controlled Corporations	(Government Instrumentalities)	State University and Colleges	Local Government Units

Private Sector

Suppliers	Manufacturers	Distributors
Contractors	Service Providers	Consultants

Infrastructure Projects

Construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of (with detailed engineering):

1. Road and bridges
2. Airports and seaports
3. Communication facilities
4. Civil works components of IT
5. Irrigation
6. Flood control and drainage
7. Water supply, sanitation and sewerage
8. Solid waste management
9. Shore protection
10. Energy/ power and electrification
11. National buildings
12. School buildings
13. Hospitals
14. Other related construction projects

Public Funds

regardless of source (local or foreign)

NGAs: GAA/ Others

GOCCs/ (GIs)/ GFIs: Corporate Budgets

SUCs: Corporate Budgets

LGUs: Appropriations Ordinance

Annual Procurement Plan (APP)

- **All procurement** should be within the **approved budget** of the Procuring Entity
- Crucial to the **efficient discharge of governmental functions**
- **No government procurement** shall be undertaken unless it is in accordance with the **approved APP** or Indicative APP of the Procuring Entity
- APP shall be **approved by the HoPE**
- **Contents**
  1. Name of the project/ procurement
  2. Project management office (PMO)/ end-user unit
  3. General description of the project/ procurement
  4. Procurement methods to be adopted
  5. Criteria for bid evaluation
  6. Time schedule
  7. Source of funds
  8. Approved Budget for the Contract

Approved Budget for the Contract (ABC)

- Refers to the **budget for the contract**
- **Approved** by the **HoPE**
- Reflects the **most advantageous prevailing price** for the government
- **Basis** or reference for **Total project cost** reflected in the **Multi-Year Contractual Authority** (MYCA)
- Indicated in **Invitation to Bid**
- The **upper limit or ceiling for the Bid prices** (*bid prices that exceed this ceiling shall be disqualified outright from further participating in the bidding*)

Financial Parameters

Infrastructure Projects

- **Before invitation**, BAC to decide if:
  1. Lowest Calculated Responsive Bid (LCRB)
  2. Most Economically Advantageous Responsive Bid (MEARB)
  3. Most Advantageous Responsive Bid (MARB)
- 1st meet **pass/ fail technical** components
- **ABC** is upper limit/ ceiling

- **Bid Evaluation**

1. LCRB
   - Ranked from lowest to highest
   - Lowest calculated **price** shall be referred to as the Lowest Calculated Bid (LCB)
2. MEARB
   - predetermined **quality-price** ratio (*quality 60-85%/ price 15-40%)*
   - criteria (*qualitative, environmental, and/or social aspects)*
3. MARB (*fit-for-purpose)*

Fit-for-Purpose

- an approach to procurement
- that applies the most suitable mechanism or strategy designed to address the **specific needs** of the Procuring Entity and **each project,**
- while promoting **flexibility** and **responsiveness** to different conditions and scenarios,
- based on **factors** or situations, such as, but not limited to,
  - the **nature and complexity** of the project
  - **market condition** and readiness
  - **urgency** or **risks**
  - in order to ensure and achieve **value for money**

Modes of Procurement for Infrastructure

1. Competitive Bidding
2. Limited Source Bidding
3. Competitive Dialogue
4. Small Value Procurement
5. Negotiated Procurement
6. Design-Build
7. Agency-to-Agency

Competitive Bidding: Process

Technical then Financial

Publication

Pre-bid conference

Eligibility Screening

Receipt of Bids

Opening of Bids

Evaluation of Bids

Post-Qualification

Award of Contract

Requirements:

1. Legal
2. Technical
3. Financial

Opening of Bids to Award:
≮ 60 calendar days

Limited Source Bidding

- **Direct invitation** to bid by the Procuring Entity
- To a set of **pre-selected suppliers or consultants** with known **experience and proven capability** relative to the requirements of a particular contract
- Procurement of **highly specialized** Infrastructure Projects involving and affecting **national security**

Competitive Dialogue

- **2-stage** bidding process

1. Invitation (propose solutions)
2. Dialogue
   a. submission of **initial technical proposals** then dialogue to **finalize the project requirements**
   b. Submission of technical and financial **proposals**
   c. bid **evaluation** and **post-qualification** processes

- **Conditions**

1. Involves **innovative design or solutions** involving procurement of complex purchases
2. The contract **requires prior negotiations** because of specific circumstances related to the nature, complexity, legal and financial issues, or risks attached to the procurement
3. The **technical specifications** cannot be sufficiently established or precisely defined

Small Value Procurement

- Procuring Entity requests for the submission of at least **3 price quotations** (receipt of **1 quotation** is sufficient to proceed with the evaluation of bidders)
- The amount involved does **not exceed P2,000,000**

Negotiated Procurement

1. 2 failed biddings
2. Emergency Cases (*state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage)*
3. Take-over of Contracts (*rescinded or terminated under the contract to prevent damage to or loss of life or property, or to restore vital public services)*
4. Adjacent or Contiguous (*ongoing Infrastructure Project)*
5. Agency-to-Agency (*Agency mandate and absorptive capacity to undertake the project)*
7. Defense Cooperation Agreements and Inventory-Based Item
8. Lease of Real Property and Venue (*preferred that government agencies lease publicly-owned real property or venue from other government agencies)*

Design-Build

- A **single contractor** is responsible for **both design and construction** of the government building
- Allows **quality assurance, effective cost** and **schedule management**
- **Not** require **detailed engineering investigations**, surveys, and designs for the project which shall consider among others, the impact on the environment

Agency-to-Agency

The **Servicing Agency** (MOA with HoPE):

- Has **mandate**
- Has **absorptive capacity** to undertake the project
- Owns or has access to the necessary **tools and equipment** required for the project
- May implement the Infrastructure Project **in-house, by job-order**, or through the *pakyaw* contracting system (not sub-contract)
- Must have a **track record** of having completed, or supervised a project, by Administration or by contract, similar to and with a cost of at least 50% of the project at hand

Other Provisions: Allowed/ Required

- Multi-Year Contractual Authority (MYCA) *(request from DBM)*
- Procurement by Electronic Means *(through PhilGEPS)*
- Standardization of Procurement Process and Forms
- Strategic Procurement Planning and Budgeting Linkage
- Project Procurement Management Plan *(requires market scoping)*
- Use of Framework Agreement
- Electronic Payment
- Sub-contracting *(maximum 50%)*
- Implementation in Phases *(clear delineation of work)*
- Pooled Procurement *(multiple Procuring Entities)*
- Performance Security *(per GPPB)*
- Reservation Clause *(collusion, non-observance of procedures, not benefit government)*
- Sustainable Public Procurement *(Green Strategy, Green Local Market, Inclusive)*
- Liquidated Damages in contract
- *Not allowed:* Splitting of contracts *(dividing/ breaking up to evade or circumvent)*

Divestment and Disposal of Property

Commission on Audit Circular No. 89-296 January 27, 1989

Privatization and Disposition of Government Assets

Guidelines adopted by the Privatization Council which took effect on March 11, 2025

2 Levels of Privatization

Straight/ Direct

1. Privatization
2. Disposition
3. Divestment

Intermediate

1. PPP (BOO, JV, Lease)
2. Long-Term Lease
3. Lease-Purchase

Defining Terms

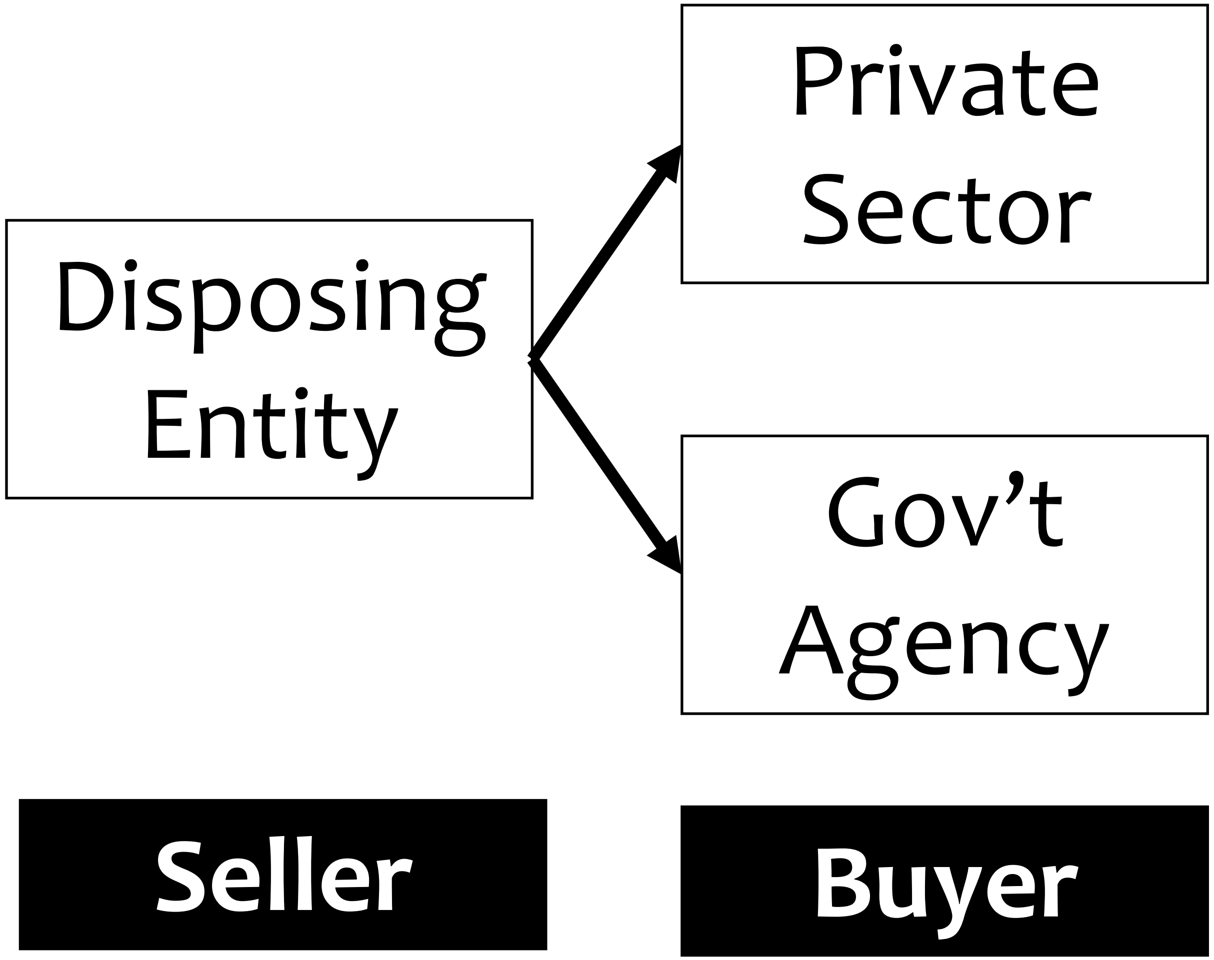
Privatization *PrC Guidelines*	○ *Activities:* Selling, transferring, conveying, or assigning ○ *Object:* Government Asset ○ *Intent:* Transfer ownership of Asset to the private sector
Disposition *PrC Guidelines*	1. Selling, transferring, conveying, or assigning of the Government Asset with the intention of transferring ownership to the winning bidder 2. Leasing the Government Asset on a long-term basis 3. Any other activities of similar nature wherein the government's ownership, possession, or enjoyment of the Government Asset will be limited or transferred whether fully or partially, on a permanent or long-term basis.
Divestment *COA Circular*	Taking away, depriving, withdrawing of an authority, power or title

Defining Terms

Lease *PrC Guidelines*	○ Right to use/ possess by DE (lessor) in return for rent (lessee) ○ Lease preferred mode ○ $1 < x \leq 25$ years ○ Lease rate $\geq$ 4% of Base Price ○ More profitable and advantageous to National Government ○ Asset more marketable ○ Subject to approval of PrC

Parties
PrC Guidelines

***Disposing Entity** (DE):*
- Government institution
- Designated by the PrC, upon recommendation by the PrC-TC
- To dispose of Government Assets
- Including but not limited to the PMO, PCGG, NDC, and other government institutions identified by the OP



Government Assets

- **Real or personal property** of any kind owned or held by the government institutions, directly or indirectly, through foreclosure or other means, in settlement of such obligations
- **Receivables** and other obligations due to the government institutions under credit, lease, indemnity, and other agreements, together with all collateral security and other rights granted to such Institutions by contract or operation of law to secure or enforce the right of payment of such obligations
- **Shares of stocks** and other investments held by government institutions
- The **government institution** themselves, whether as parent or subsidiary corporations
- Other Government Assets that may be deemed **underutilized, idle**, or not being used for the specific purpose of the possessors' charter and function
- **Property and other assets** (not merchandise or inventory for sale, and foreclosed assets or collaterals acquired in regular course of business)

Consideration/ Payment

PrC Guidelines

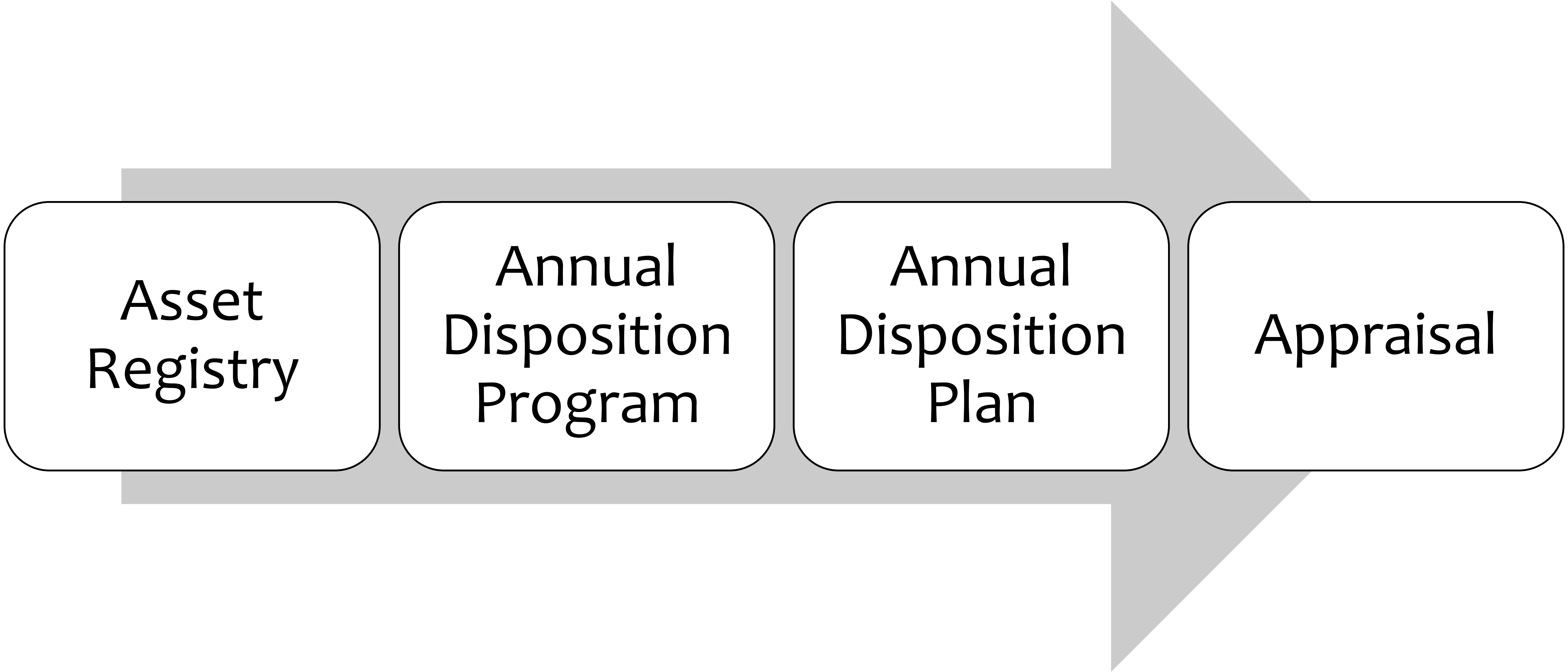
Base Price	**Minimum amount** or floor price approved by PrC
General Rule	Paid in **cash** and in **lump sum** *Transfer of Ownership:* Upon full payment
Exception	**Installment or deferred payments** may be allowed only under **meritorious** circumstances subject to the **approval of the PrC** *Transfer of Ownership:* Allowed if balance is fully secured by a mortgage on the Assets or by standby letter of credit issued or confirmed by a bank or a government financial institution

Requirements
PrC Guidelines

As Is Where Is	○ **Physical condition** of the Asset ○ Its **contents or inclusions** at the time of the sale, conditions of the owner's title or other evidence of ownership ○ Extent and state of whatever **rights, interests**, and participation over the Asset the DE may have at the time of the sale ○ Buyer's assumption of all **unpaid taxes**, fees, charges, assessments, encumbrances, liens, and the like accruing on the Asset in order to transfer the Certificate of Title ○ **All attendant faults** of the Asset, if any, whether or not immediately apparent and without any express and implied warranty
Appraisal/ Valuation	Estimating the **value** of an Asset as of a **specific date** for a **given purpose**, usually the **market value or value**

Pre-Disposition Activities

PrC Guidelines



Modes of Disposition

PrC Guidelines

Requirements

1. Transparency
2. Competition
3. Efficiency

Public Auction

Sale through Negotiation

Unsolicited Proposal

Gov't-to-Gov't Transactions

Public Auction

- Attract greatest number
- Inspection
- COA as responsive and articulate witness

1. Invitation to Bid
2. Publication/ Posting
3. Pre-Bid Conference
4. Bid Submission
5. Bid Opening/ Evaluation
6. DE Report
7. PrC Confirms
8. DE Award
9. Payment and CPs

Sale through Negotiation
PrC Guidelines

Failed Bidding

1. No bids
2. All bids ineligible
3. Only one offer or tender
4. Winning Bidder withdraws/ refuses, without justifiable cause
5. Winning Bidder fails to settle the full/ installment payment

Sale through Negotiation

Offeror(s): Written Offer(s) → DE: Publish Notice → Offeror(s): 10% Deposit → DE: Evaluation of Offer(s) → DE: Report → PrC: Approval

1-on-1 basis or group

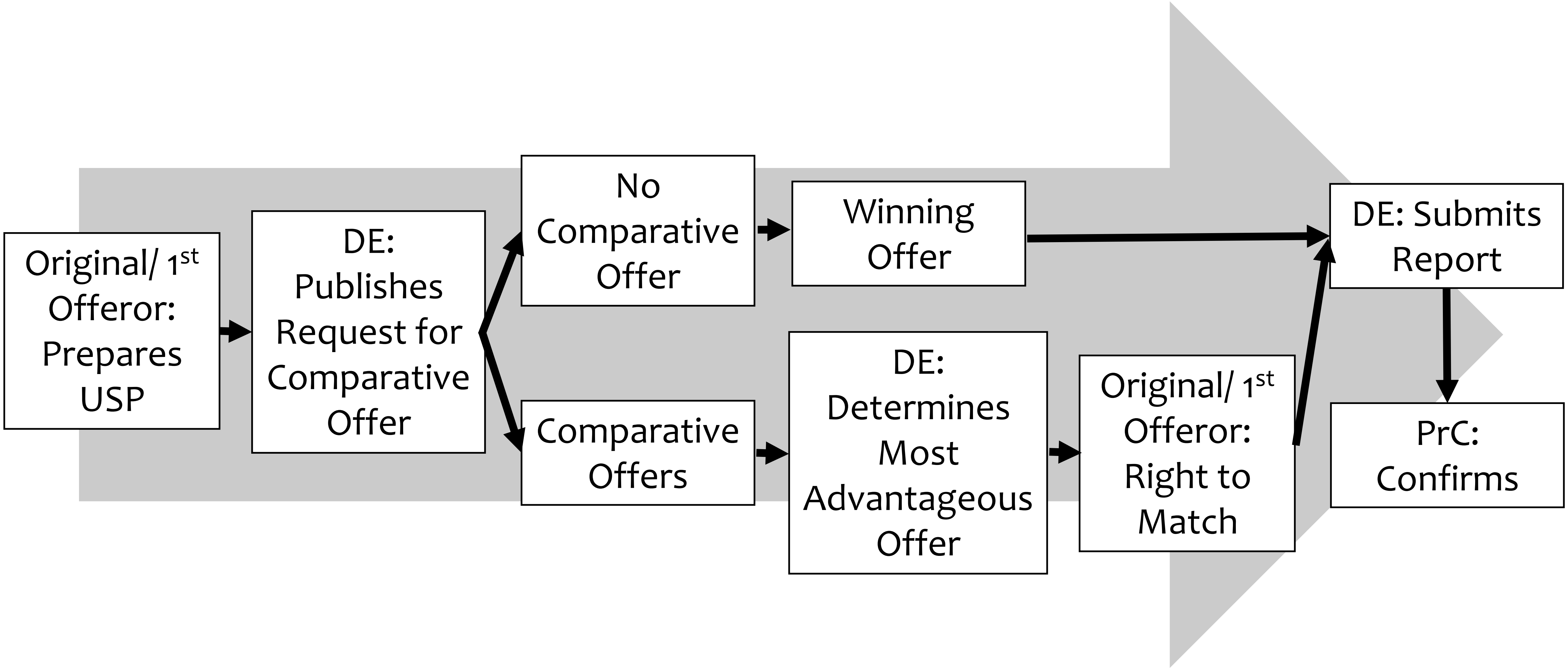
- 1 Offer: ≥ Base Price
- >1 Offer: consider ≥ Base Price

Unsolicited Proposal: *Contents*

PrC Guidelines

Property Description	Price Offer ($\geq$Base Price)	Payment Terms
10% Deposit	*Valuation*	*Disposition Plan*

Unsolicited Proposal: *Procedure*
PrC Guidelines



Government-to-Government Transactions

Proposal from a Government Agency	o DE: may dispense with publication o PrC: may confirm sale without considering other comparative offers
Proposals from a Government Agency and Private Sector	Preference to highest financial offer
Transfer without cost or appraised value	Asset no longer serviceable/ needed

Contrasting the 3 Ps

Aspects	Procurement	PPP	Privatization
Governing Law	RA 12009 (2024)	RA 11966 (2023) or PPP Ordinance	COA Circular 89-296 (1989)/ PrC Guidelines (2025)
Role of Government	Procuring Entity (Buyer)	Implementing Agency (Partner/ Implementer)	"Divestor"/ Disposing Entity (PrC-designated)
Role of Private Sector	Contractor/ Builder	Partner (Financier, Designer Builder, and Operator)	Buyer
Project	Infrastructure	Infrastructure or Development (typically provided by Government)	Property/ Government Assets (real/ personal property, stocks or receivables)
Ownership of Project	Government	Government (Transfer) or Private Sector (Divestment)	Private Sector
Funds Involved	Public Funds	Private Funds (Public Funds for Government Undertaking, Contribution or Availability Payment allowed)	Private Funds (or Public Funds if Government is Buyer)
Inputs	Specifications by Procuring Entity	Minimum Parameters, Terms and Conditions	As Is Where Is

Aspects	Procurement	PPP	Privatization
Modes/ Arrangements	1	13 (JV, Lease, Build-Operate-Transfer, etc.) (10 excluded)	1
Selection Procedures	6 (Bidding, Dialogue, Limited Source, Negotiated, Small Value and Design-Build)	3 (Solicited and Unsolicited)	3 (Public Auction, Negotiated Sale and Unsolicited Proposal)
Financial Parameter	Price, Quality, Most Advantageous	Most Responsive/ Advantageous (If financial, Highest or Lowest)	Price (Advantageous)
Payment to Private	Contract Price	Investment Recovery Schemes/ Reasonable Rate of Return	N/A
Approving Bodies	Head of Procuring Entity (HoPE)	ED Council/ ICC, Agency Head, Board or Sanggunian	LGU Head/ PrC (DE Recommends)
Overall Policy-Making/ Secretariat	GPPB and TSO-DBM	PPP Governing Board and PPP Center	COA/ PrC and PrC-TC

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Together, let us learn-unlearn-relearn.

Thank you.