

*Local Government Academy  
Department of Interior and Local Government*

*Course Book*

**PUBLIC-PRIVATE PARTNERSHIPS BY  
LOCAL GOVERNMENT UNITS**  
LGU PPPs

***Volume 2: Template Ordinances and  
Executive Order***

PPP, JV, Lease and Corporatization Ordinances  
Executive Order on Timelines and Schedule

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**Table of Contents**

A. Proposed PPP Code

B. Proposed Joint Venture Ordinance

C. Proposed Lease Ordinance

D. Proposed Corporatization Ordinance

E. Proposed Executive Order on Timelines and Schedule

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## **A. PROPOSED LGU PUBLIC-PRIVATE PARTNERSHIP CODE**

November 23, 2014

Ordinance No. \_\_\_\_\_

Series of 20\_\_\_\_

### **A PROVINCIAL/ CITY/ MUNICIPAL CODE PURSUING A PUBLIC-PRIVATE PARTNERSHIP (PPP) APPROACH TOWARDS DEVELOPMENT, PROVIDING FOR THE PROCEDURE FOR SELECTING THE PRIVATE SECTOR PROPONENT, ADOPTING A CONTRACT MANAGEMENT FRAMEWORK, AND PROVIDING APPROPRIATIONS AND FOR OTHER PURPOSES**

WHEREAS, under Section 20, Article II of the 1987 Constitution, the “State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments”;

WHEREAS, the private sector participates in infrastructure, development and social service-related projects of the State and local government units (LGUs) through what is popularly known as Public-Private Partnerships (PPPs);

WHEREAS, Republic Act No. 7160 or the Local Government Code of 1991 and its Implementing Rules, in particular Sections 17 (a), 18, 22 and 35, empower LGUs to discharge functions and responsibilities as are necessary, appropriate, or incidental to efficient and effective provisions of the basic services and facilities, to acquire, develop, lease, encumber, alienate, or otherwise dispose of real or personal property held by them in their proprietary capacity and to apply their resources and assets for productive, developmental, or welfare purposes, in the exercise or furtherance of their governmental or proprietary powers and functions and thereby ensure their development into self-reliant communities and active participants in the attainment of national goals, to enter into contracts and to enjoy full autonomy in the exercise of their proprietary functions, and to enter into joint ventures with the private sector, respectively;

WHEREAS, the Department of Interior and Local Government (DILG) Legal Opinion No. 8, S. 2014 stated that that a “duly enacted local legislation (PPP Code) must be complied with in undertaking (its) PPP projects.”

WHEREAS, according to the Department of Justice (DOJ) Opinion No. 18, S. 2012, “xxx local governments may enact their own Public-Private Partnership (PPP) Code or omnibus ordinance outlining, among others, all applicable modalities. xxx A local government, through an enabling ordinance, is free to act to address local concerns, even without an enabling ordinance, provided no statute will be infringed”;

WHEREAS, In Legal Opinion No. 10, S. 2014, the DILG affirmed the above-quoted DOJ Opinion and further said that, “the LGUs’ discretion xxx is consistent with the state policy of local autonomy and is in line with the operative principle of decentralization and the national goal of propelling social and economic growth and development through the active participation of the private sector”;

WHEREAS, in furtherance of and consistent with local autonomy, fiscal autonomy, the principle of subsidiarity, public good and welfare, general welfare, and full autonomy over proprietary powers, the Province/ City/ Municipality is free, provided no statute is violated, to adopt its definition of a PPP undertaking and prescribe the requirements, procedures and conditions for Provincial/ City/ Municipal PPPs, and incorporate these in an operative framework; and

WHEREAS, having a framework in ordinance form will ensure and facilitate consistency, integrity, reliability, sustainability, accountability and transparency, and enforceability;

NOW THEREFORE, on motion of Councilor (name), duly seconded by Councilor(s) (name[s]),

BE IT ORDAINED, by the *Sangguniang Panlalawigan/ Panlungsod/ Bayan* of (name) in session assembled that:

#### Chapter 1. **Basic Principles and Definitions**

SECTION 1. *Short Title.* – This Ordinance shall be known as **A PROVINCIAL/ CITY/ MUNICIPAL CODE PURSUING A PUBLIC-PRIVATE PARTNERSHIP (PPP) APPROACH TOWARDS DEVELOPMENT, PROVIDING FOR THE PROCEDURE FOR SELECTING THE PRIVATE SECTOR PROPONENT, ADOPTING A CONTRACT MANAGEMENT FRAMEWORK, AND PROVIDING APPROPRIATIONS AND FOR OTHER PURPOSES** and cited as the “Province/ City/ Municipality of (name) PPP Code.”

Sec. 2. *Declaration of Policy.* – (a) It is hereby declared as a policy that the Province/ City/ Municipality of (name) shall advance the public good and general welfare, and promote the interest of the community and the Province/ City/ Municipality within the framework of sustainable and integrated development, and effective constructive engagement and meaningful people’s participation in local governance.

(b) PPPs shall be pursued by the Province/ City/ Municipality consistent with and in furtherance of the vision and mission of the Province/ City/ Municipality which state that:

VISION: (state vision)

MISSION: (state mission)

Sec. 3. *Operative Principles.* – The accomplishment of the stated policy shall be guided by the following principles:

- (a) The Province/ City/ Municipality, pursuant to Sections 1, 2 and 5, Article X of the 1987 Constitution, is a territorial and political subdivision which enjoys local autonomy and fiscal autonomy. Under Section 3, Article X of the 1987 Constitution, local autonomy means a more responsive and accountable local government structure instituted through a system of decentralization. Fiscal autonomy means that local governments have the power to create their own sources of revenue in addition to their equitable share in the national taxes released by the national government, as well as the power to allocate their resources in accordance with their own priorities.
- (b) The general welfare and the public good shall always be promoted and that transparency, public accountability and social accountability mechanisms and approaches shall be integrated in PPPs from inception to implementation.
- (c) The Province/ City/ Municipality exists and operates in its governmental and proprietary capacities thereby making the Province/ City/ Municipality an agent of and is therefore accountable to the State and its community. The role of the Province/ City/ Municipality both as a regulator of a business and as implementer of a proprietary undertaking must be clearly delineated.
- (d) The Province/ City/ Municipality must develop into a self-reliant community, and as such, is in a better position to address and resolve matters that are local in scope. The Province/ City/ Municipality is under the supervision of the President and under the qualified control of Congress.
- (e) Under Section 18 of the of Republic Act No. 7160 of the Local Government Code of 1991 (1991 LGC), the Province/ City/ Municipality may acquire, develop, lease, encumber, alienate, or otherwise dispose of real or personal property held by them in their proprietary capacity and to apply their resources and assets for productive, developmental, or welfare purposes.
- (f) Under Section 22 (c) of the 1991 LGC, no contract may be entered into by the Provincial Governor/ City Mayor/ Municipal Mayor on behalf of the Province/ City/ Municipality without prior authorization by the Sanggunian Panlalawigan/

Panlungsod/ Bayan. The participation of the Sanggunian is indispensable in the adoption and implementation of a PPP arrangement.

- (g) Under Section 22 (d) of the 1991 LGC, the Province/ City/ Municipality enjoys full autonomy in the exercise of its proprietary functions and shall exercise the powers expressly granted, those necessarily implied therefrom, as well as powers necessary, appropriate, or incidental for its efficient and effective governance, those not otherwise prohibited by law and those which are essential to the promotion of the general welfare.
- (h) Under Section 25 (b) of the 1991 LGC, the Province/ City/ Municipality may collaborate or cooperate with other local governments, national government agencies, government-owned and controlled corporations, government instrumentalities and government corporate entities for the implementation of local projects.
- (i) Under the charter of the Province/ City/ Municipality, Sections 16, 17, 19 and 129 of 1991 LGC and other statutes, the Province/ City/ Municipality has been given the responsibility and mandate to exercise devolved and delegated powers.
- (j) The Province/ City/ Municipality, under Section 106 of 1991 LGC, is mandated to draw up and implement a comprehensive multi-sectoral development plan. PPPs shall be pursued by the Province/ City/ Municipality consistent with its infrastructure, development, investment, environmental and governance framework embodied in relevant policies, plans, ordinances and codes.
- (k) The Province/ City/ Municipality, as a partner in a PPP arrangement, may provide equity, subsidy or guarantee and use local funds; and the usage thereof for a PPP project shall be considered for public use and purpose.
- (l) Under Sections 34, 35 and 36 of the 1991 LGC and in the exercise of its powers, the Province/ City/ Municipality may enter into joint ventures and such other cooperative arrangements with people's and non-governmental organizations to engage in the delivery of certain basic services, capability-building and livelihood projects, and to develop local enterprises designed to improve productivity and income, diversify agriculture, spur rural industrialization, promote ecological balance, and enhance the economic and social well-being of the people; provide assistance, financial or otherwise, to such people's and non-governmental organizations for economic, socially-oriented, environmental, or cultural projects to be implemented within its territorial jurisdiction.

- (m) The Province/ City/ Municipality, under Section 3 (l) of the 1991 LGC, is duty-bound to ensure the active participation of the private sector in local governance.
- (n) The right of the people to information on matters of public concern is guaranteed under Section 7, Article III of the 1987 Constitution. Furthermore, it is the policy of the State to allow full public disclosure of all its transactions involving public interest such as PPPs under Section 28, Article II of the 1987 Constitution.
- (o) The people's right to effective and reasonable participation and public trust provision under Section 16, Article XIII and Section 1, Article XI, respectively, of the 1987 Constitution guarantee and empower civil society groups to have effective and meaningful participation in the regulation and management of PPP projects.

Sec. 4. *Rationale for PPP.* – PPPs shall be promoted to provide more, better, affordable and timely services to the community. In pursuing PPPs, the Province/ City/ Municipality shall be guided by the following reasons and drivers:

- (a) PPPs shall be undertaken in furtherance of the Provincial/ City/ Municipal development and physical framework plan.
- (b) PPP is an essential part of the overall infrastructure reform policy of the Province/ City/ Municipality. By encouraging performance-based management of the delivery of public services applying commercial principles and incentives whenever possible, by introducing competition in and for the market, and by involving users and stakeholders in the decision-making process, infrastructure and regulatory reform shall be achieved.
- (c) PPPs should be adopted to address a pressing and urgent or critical public need. Under the principle of "Additionality," the increased economic benefits to consumer welfare of having needed public services and infrastructure accessible now because of the PPP, rather than having to wait until the Province/ City/ Municipality could provide the public services much later. PPP would also encourage the accelerated implementation of local projects.
- (d) PPPs can be adopted to avoid costs and public borrowing. By contracting with the private sector to undertake a new infrastructure project, scarce Provincial/ City/ Municipal capital budgets can be directed to other priority sectors such as social services, education, and health care.

- (e) PPPs allow for technology transfer, and improved efficiency and quality of service. These could be valuable contribution of the private sector in local governance.
- (f) PPPs should be feasible and affordable, demonstrating the need for the project, broad level project costs estimation, and indicative commercial viability. The assessment of affordability shall be the cornerstone for all PPP projects, both to the Province/ City/ Municipality and the general public.
- (g) PPP Projects should be bankable. High participation costs, unreasonable risk transfer or lengthy and complex contract negotiations must be avoided. A cost recovery pricing policy attractive to the private sector must be in place; provided that the same will not be disadvantageous to government and public interest.
- (h) PPP Projects should provide value-for-money and good economic value as far as practicable, including allocation of risks to the party best able to control, manage, mitigate or insure these risks, and maximization of the benefits of private sector efficiency, expertise, flexibility and innovation.
- (i) PPP Projects must provide economic and social benefits and should be evaluated on this basis rather than on purely financial considerations. The Province/ City/ Municipality remains responsible for services provided to the public, without necessarily being responsible for corresponding investment.
- (j) PPP Projects must give consideration for empowerment of Filipino citizens as a strategy for economic growth and sustainability and must thus provide for the participation of local investors to the furthest extent practicable given the nature of the project. The Province/ City/ Municipality shall also ensure the hiring and employment of local labor in the PPP venture.
- (k) Procurement of PPP Projects must be competitive and must be undertaken through open competitive bidding. Competition must be legitimate, fair and honest. In the field of government contract law, competition requires, not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, the same undertaking, but also that it be legitimate, fair and honest; and not designed to injure or defraud the government. Where competitive bidding cannot be applied, a competitive process ensuring both transparency and economically efficient outcome must be employed.
- (l) The regulation of the PPP shall be pursuant to the PPP contract and exercised by the appropriate regulatory authority. A duly executed and legal PPP Contract shall be respected and not impaired, and shall be binding on the successor administration pursuant to the provision on corporate succession. Procedures,

activities and steps duly undertaken by the Provincial Governor/ City Mayor/ Municipal Mayor, PPP-SC, Sangguniang Panlalawigan/ Panlungsod/ Bayan pursuant to this Ordinance shall be continued by the successor Administration. Any amendment or revision to this Ordinance by the next Administration shall not in any way prejudice vested and contractual rights of the Province/ City/ Municipality and the PSPs as to the substance of agreements signed, certifications issued, resolutions issued and procedures undertaken.

- (m) To provide efficient public service, the Province/ City/ Municipality must ensure, through stronger performance management and guidance, proper implementation of PPP contracts that will result in value for money, on-time delivery of quality services to the public, achievement of government policy goals, all within sustainable and integrated development.

Sec. 5. *Definition of Terms.* – As used in this Code, the following terms shall mean:

- (a) *Build-Operate-Transfer Law Scheme* - Under Republic Act No. 6957 as amended by RA No. 7718, the following are the BOT Law variants:

- (i) *Build-and-Transfer (BT)* - A contractual arrangement whereby the Private Sector Proponent (PSP) undertakes the financing and construction of a given infrastructure or development facility, and after its completion, turns it over to the Province/ City/ Municipality, which shall pay the PSP, on an agreed schedule, its total investment expended on the project, plus a Reasonable Rate of Return thereon.
- (ii) *Build-Lease-and-Transfer (BLT)* - A contractual arrangement whereby a PSP is authorized to finance and construct an infrastructure or development facility and upon its completion, turns it over to the Province/ City/ Municipality on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to the Province/ City/ Municipality.
- (iii) *Build-Operate-and-Transfer (BOT)* - A contractual arrangement whereby the PSP undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The PSP operates the facility over a fixed term, during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid, or as negotiated and incorporated in the contract, to enable the PSP to recover its investment, and its operating and maintenance expenses in the project. The PSP transfers the facility to the Province/ City/

Municipality at the end of the fixed term which shall not exceed fifty (50) years. This build, operate and transfer contractual arrangement shall include a supply-and-operate scheme, which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Province/ City/ Municipality so requires, operates the facility, providing, in the process, technology transfer and training to Filipino nationals.

- (iv) *Build-Own-and-Operate (BOO)* - A contractual arrangement whereby a PSP is authorized to finance, construct, own, operate and maintain an infrastructure or development facility from which the PSP is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users. Under this project, the proponent who owns the assets of the facility may assign its operation and maintenance to a facility operator. The divestiture or disposition of the asset or facility shall be subject to relevant rules of the Commission on Audit (COA).
- (v) *Build-Transfer-and-Operate (BTO)* - A contractual arrangement whereby the Province/ City/ Municipality contracts out the construction of an infrastructure facility to a PSP such that the contractor builds the facility on a turnkey basis, assuming cost overruns, delays, and specified performance risks. Once the facility is commissioned satisfactorily, title is transferred to the Province/ City/ Municipality. The PSP, however, operates the facility on behalf of the Province/ City/ Municipality under an agreement.
- (vi) *Contract-Add-and-Operate (CAO)* - A contractual arrangement whereby the PSP adds to an existing infrastructure facility which it is renting from the Province/ City/ Municipality and operates the expanded project over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the PSP.
- (vii) *Develop-Operate-and-Transfer (DOT)* - A contractual arrangement whereby favorable conditions external to a new infrastructure project to be built by a PSP are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates, such as higher property or rent values.

- (viii) *Rehabilitate-Operate-and-Transfer (ROT)* - A contractual arrangement whereby an existing facility is turned over to the PSP to refurbish, operate and maintain for a franchise period, at the expiry of which the legal title to the facility is turned over to the Province/ City/ Municipality.
- (ix) *Rehabilitate-Own-and-Operate (ROO)* - A contractual arrangement whereby an existing facility is turned over to the PSP to refurbish and operate, with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity.
- (b) *Competitive Challenge or Swiss Challenge* - An alternative selection process wherein third parties or challengers shall be invited to submit comparative proposals to an unsolicited proposal. Accordingly, the PSP who submitted the unsolicited proposal, or the original proponent, is accorded the right to match any superior offers given by a comparative PSP.
- (c) *Competitive Negotiations* - Refers to a process where the Province/ City/ Municipality negotiates with eligible and qualified PSPs and awards the project to that PSP which offers the best combination of quality and price.
- (d) *Competitive Selection or Bidding or Open Competition* - Refers to a method of selection or procurement initiated and solicited by the Province/ City/ Municipality, based on a transparent criteria, which is open to participation by any interested party.
- (e) *Concession* - A contractual arrangement whereby the financing and construction of a new facility and/ or rehabilitation of an existing facility is undertaken by the PSP after turnover thereof to it, and includes the operation, maintenance, management and improvement, if any, of the facility for a fixed term during which the PSP generally provides service directly to facility users and is allowed to charge and collect the approved tolls, fees, tariffs, rentals or charges from them. The Province/ City/ Municipality may receive a concession or franchise fee during the term of the contract and/ or other consideration for the transfer, operation or use of any facility. There may be a transfer of ownership of the asset or facility after the concession period has ended subject to rules of the COA.
- (f) *Corporatization* - Refers to transformation of a public entity or quasi-municipal corporation established by the Province/ City/ Municipality into one that has the structure and attributes of a private corporation, such as a board of directors, officers, and shareholders, and having it registered with the Securities and

Exchange Commission as a stock corporation. The process involves the establishment of a distinct legal identity for the company under which the Province's/ City's/ Municipality's role is clearly identified as owner; segregation of the company's assets, finances, and operations from other Provincial/ City/ Municipal operations; and development of a commercial orientation and managerial independence while remaining accountable to the government or electorate.

- (g) *Cost Sharing* – This shall refer to the Province/ City/ Municipality portion of capital expenses associated with the establishment of an infrastructure development facility such as the provision of access infrastructure, right-of-way, and any partial financing of the project.
- (h) *Credit Enhancement* - This shall refer to direct and indirect support to a development facility by the PSP and/or Province/ City/ Municipality, the provision of which is contingent upon the occurrence of certain events and/or risks, as stipulated in the PPP contract. Credit enhancements are allocated to the party that is best able to manage and assume the consequences of the risk involved. Credit enhancements may include but are not limited to government guarantees on the performance or the obligation of the Province/ City/ Municipality under its contract with the PSP, subject to existing laws on indirect guarantees. Indirect Guarantees shall refer to an agreement whereby the Province/ City/ Municipality assumes full or partial responsibility for or assists in maintaining the financial standing of the PSP or project company in order that the PSP/ project company avoids defaulting on the project loans, subject to fulfillment of the PSP/ project company of its undertakings and obligations under the PPP contract.
- (i) *Developmental Projects* – Provincial/ City/ Municipal Projects normally financed and operated by the Province/ City/ Municipality, but which will now be wholly or partly financed, constructed and/ or operated by the PSP; projects that will advance and promote the general welfare and public good; projects and activities that will be responsive to the needs of the communities; projects that will raise revenues for the Province/ City/ Municipality; projects in furtherance of devolution, deconcentration and decentralization; and other infrastructure, social-related and developmental projects as may be authorized by the Province/ City/ Municipality.
- (j) *Direct Provincial/ City/ Municipal Equity* - Refers to the subscription by the Province/ City/ Municipality of shares of stock or other securities convertible to shares of stock of the special purpose vehicle or single-purpose project company, whether such subscription will be paid by money or assets.

- (k) *Direct Provincial/ City/ Municipal Guarantee* - Refers to an agreement whereby the Province/ City/ Municipality guarantees to assume responsibility for the repayment of debt directly incurred by the PSP in implementing the project in case of a loan default.
- (l) *Direct Provincial/ City/ Municipal Subsidy* - Refers to an agreement whereby the Province/ City/ Municipality shall: (a) defray, pay or shoulder a portion of the PPP project cost or the expenses and costs in operating and maintaining the project; (b) condone or postpone any payments due from the PSP; (c) contribute any property or assets to the project; (d) waive or grant special rates on real property taxes on the project during the term of the contractual arrangement; and/ or (e) waive charges or fees relative to the business permits or licenses that are to be obtained for the construction of the project, all without receiving payment or value from the PSP or operator for such payment, contribution or support.
- (m) *Divestment or Disposition* - Refers to the manner or scheme of taking away, depriving, withdrawing of title to a property owned by the Province/ City/ Municipality and vesting ownership thereof to a PSP.
- (n) *Feasibility or Project Study (FS)* - A study, full or pre-feasibility study or business case prepared by the Province/ City/ Municipality in a competitive selection or a PSP when submitting an unsolicited proposal, containing or indicating a needs analysis, affordability assessment, value for money assessment, preliminary risk assessment, stakeholder assessment, human resource assessment, bankability assessment, legal viability assessment, PPP mode selection, market testing if relevant, indicative transaction implementation plan, and draft PPP contract. The study may be supported by the results of the appropriate “willingness-and-ability-to-pay” survey. The Project Study can be a feasibility study, pre-feasibility study or business case.
- (o) *Franchise* - Refers to the right or privilege affected with public interest which is conferred upon a PSP, under such terms and conditions as the Province/ City/ Municipality may impose, in the interest of public welfare, security and safety.
- (p) *Joint Venture (JV)* - A contractual arrangement whereby a PSP or a group of private sector entities on one hand, and the Province/ City/ Municipality on the other hand, contribute money/ capital, services, assets (including equipment, land, intellectual property or anything of value), or a combination of any or all of the foregoing. The Province/ City/ Municipality shall be a minority equity or shareholder while the PSP shall be majority equity or shareholder. Each party shall be entitled to dividends, income and revenues and will bear the corresponding losses and obligations in proportion to its share. Parties to a JV share risks to jointly undertake an investment activity in order to accomplish a

specific, limited or special goal or purpose with the end view of facilitating private sector initiative in a particular industry or sector, and eventually transferring ownership of the investment activity to the PSP under competitive market conditions. It involves a community or pooling of interests in the performance of the service, function, business or activity, with each party having a right to direct and govern the policy in connection therewith, and with a view of sharing both profits and losses, subject to agreement by the parties.

- (q) *Lease or Affermage* - A contractual arrangement providing for operation, maintenance, and management services by the PSP, including working capital and/ or improvements to an existing infrastructure or development facility leased by the PSP from the Province/ City/ Municipality for a fixed term. Under a lease, the PSP retains revenue collected from customers and makes a specified lease payment to the Province/ City/ Municipality. Under an affermage, the parties share revenue from customers wherein the PSP pays the contracting authority an affermage fee, which varies according to demand and customer tariffs, and retains the remaining revenue. The Province/ City/ Municipality may provide a purchase option at the end of the lease period subject to rules of the COA.
- (r) *Limited Negotiations* - Refers to a process whereby the Province/ City/ Municipality negotiates with the PSP in instances when there is only one eligible and qualified PSP in a competitive selection process, under Stage 2 of the competitive challenge process, or when there is a prior completed competitive process.
- (s) *Management Contract* - A contractual arrangement involving the management or provision by the PSP of operation and maintenance or related services to an existing infrastructure or development facility owned or operated by the Province/ City/ Municipality. The PSP may be compensated by the Province/ City/ Municipality using the funds of the latter; or the PSP may collect tolls/ fees/ rentals and charges which shall be turned over to the Province/ City/ Municipality and shall be compensated in the form of a fixed fee, a share in the revenues and/ or performance-based management or service fee during the contract term.
- (t) *Negotiated Projects* - Refer to instances where the desired project is the result of an unsolicited proposal from a PSP or, where the Province/ City/ Municipality has failed to identify an eligible private sector partner for a desired PPP activity when there is only one qualified bidder after subjecting the same to a competitive selection or bidding.
- (u) *New Technology* - Refers to having at least one of the following attributes:

- a. A recognized process, design, methodology or engineering concept which has demonstrated its ability to significantly reduce implementation of construction costs, accelerate project execution, improve safety, enhance project performance, extend economic life, reduce costs of facility maintenance and operations, or reduce negative environmental impact or social/ economic disturbances or disruptions during either the project implementation/ construction phase or the operation phase; or
- b. A process for which the project proponent or any member of the proponent joint venture/ consortium possesses exclusive rights, either world-wide or regionally; or
- c. A design, methodology or engineering concept for which the proponent or a member of the proponent consortium or association possesses intellectual property rights.
- (v) *Private Sector Proponent (PSP)* - Refers to the private sector entity which shall have contractual responsibility for the project and which shall have an adequate track record in the concerned industry, as well as technical capability and financial base consisting of equity and firm commitments from reputable financial institutions, to provide, upon award, sufficient credit lines to cover the total estimated cost of the project to implement the said project.
- (w) *Public-Private Partnerships (PPP)* - PPP is a form of legally enforceable contract between the Province/ City/ Municipality and a PSP, requiring new investments from the PSP and transferring key risks to the PSP in which payments are made in exchange for performance, for the purpose of delivering a service provided or intended to be provided by the Province/ City/ Municipality. PPP shall also include dispositions of an asset, facility, project owned, or entity created by the Province/ City/ Municipality to a PSP; procurement of a service; assumption by a PSP of a proprietary function of the Province/ City/ Municipality; grant of a concession or franchise to a PSP by the Province/ City/ Municipality; or usage by the PSP of public property owned or possessed by the Province/ City/ Municipality.

Alternatively, a PPP is a legally enforceable contract where each party assumes specified functions, bears certain risks, provides contribution or renders some obligation, and earns benefits and revenues from the PPP arrangement.

- (x) *PPP Contract* - Whenever appropriate, the PPP Contract shall contain the Preambulatory Clauses or Whereas Clauses, Party Clause, Rules of Interpretation, Nature of the PPP, Term of the Project, Contract Objective, Performance Bonds,

Key Performance Indicators, Risk Allocation, Rights, Payment to PSE or PSP, Tariff Scheme, Subsidy or Support Mechanism, Insurance Requirements, Delay Provisions, Force Majeure, Governmental Action, Government and Public Sector Entity (PSE) Warranties, PSP Warranties, Change in the Law, Regulatory Regime, Variations, Termination, Indemnification, Intellectual Property, Claims, Financial security, Dispute Resolution, Step-in Rights, Changes in the Composition of the PSP/ Service Provider, Partnership Management, Compliance with all Laws, Personnel, Conditions Precedent, among others.

- (y) *Reasonable Rate of Return (RROR)* - Refers to the rate of return that a PSP shall be entitled to, as determined by the PPP Regulatory Authority taking into account, among others, the prevailing cost of capital (equity and borrowings) in the domestic and international markets, risks being assumed by the PSP and the level of Provincial/ City/ Municipal undertakings and contributions extended for the project.
- (z) *Rehabilitate-Lease-and-Transfer (RLT)* - A contractual arrangement whereby an existing facility is turned over to the PSP to refurbish and operate, and upon its completion, turns it over to the Province/ City/ Municipality on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to the Province/ City/ Municipality.
- (aa) *Rehabilitate-and-Transfer (RT)* - A contractual arrangement whereby an existing facility is turned over to the PSP to refurbish and operate, and after its completion, turns it over to the Province/ City/ Municipality, which shall pay the PSP, on an agreed schedule, its total investment expended on the project, plus a reasonable rate of return thereon.
- (bb) *Rehabilitate-Transfer-and-Operate (RTO)* - A contractual arrangement whereby an existing facility is turned over to the PSP to refurbish and operate. Once the facility is commissioned satisfactorily, title is transferred to the Province/ City/ Municipality. The PSP, however, operates the facility on behalf of the Province/ City/ Municipality under an agreement.
- (cc) *Service Contract* - A contractual arrangement whereby the PSP shall provide a particular service to the Province/ City/ Municipality involving the Province's/ City's/ Municipality's proprietary authority or to entities or corporation created by the Province/ City/ Municipality. The PSP shall be entitled to be paid a fee per unit of work done during the term of the contract; or compensated by the Province/ City/ Municipality using the funds of the latter; or the PSP may collect tolls/ fees/ rentals and charges which shall be turned over to the Province/ City/ Municipality and shall be compensated in the form of a share in the revenues.

- (dd) *Unsolicited Proposal* - Refers to project proposals submitted by a PSP to the Province/ City/ Municipality to undertake Developmental Projects without a formal solicitation issued by the Province/ City/ Municipality whereby the negotiated terms shall be subjected to comparative proposals.
- (ee) *Value for Money (VfM)* - Refers to the concept that over the whole-life of a project finance-PPP project, government's total expenditures (i.e., its payments to the private sector), adjusted for the risks that have been transferred to the private sector, will be less, on a Net Present Value (NPV) basis, than if the government will perform the services itself. VfM considers monetary and non-monetary factors such as: (i) risk transfer; (ii) reduced whole life costs; (iii) speed of implementation; and (iv) quality and reliability of service.
- (ff) *Viability Gap Funding (VGF)* - Refers to an explicit subsidy that is performance-driven (i.e., based on private party achieving measurable outputs) and targeted to socio-economically disadvantaged users or groups of users; or any financial support in the form of grants or assistance, one time or deferred, to infrastructure projects undertaken through PPPs with a view to make them commercially viable.

*Sec. 6. Rules of Interpretation.* – This Code and the provisions hereof shall be liberally interpreted to accomplish the policy and objectives set forth in Sections 2, 3 and 4 hereof.

*Sec. 7. Authorities.* – (a) This Code is being adopted pursuant to the Province's/ City's/ Municipality's constitutional and statutory authorities enumerated under Section 3 hereof; and when not inconsistent with the relevant laws aforementioned, shall govern the adoption and implementation of the PPP Modalities.

(b) In pursuing BOT Law variants, the Province/ City/ Municipality shall comply with Republic Act No. 6957 as amended by RA No. 7718 (BOT Law) and its Implementing Rules and Regulations.

(c) In entering into Management and Service Contracts where provincial/ city/ municipal funds are used, the Province/ City/ Municipality shall comply with Republic Act 9184 or the Government Procurement Reform Act (GPRA) and its Implementing Rules and Regulations.

(d) For Dispositions, COA Circular No. 89-296 (January 27, 1989) shall govern.

(e) For Corporatization, the incorporation of the corporation must be done in accordance with the Corporation Code of the Philippines.

(f) For Local Concessions, Rehabilitate-and-Transfer, Rehabilitate-Lease-and-Transfer, and Rehabilitate-Transfer-and-Operate, Management and Service Contracts where Provincial/ City/ Municipal funds are not used to procure the services of the contractor or consultant, the Provincial/ City/ Municipal ordinances policies or ordinances will be the governing instrument.

(g) For Joint Ventures, Section 35 of the 1991 LGC and Article 66 of the Implementing Rules and Regulations of the 1991 LGC shall be governing law, and Law on Partnerships of the Civil Code of the Philippines shall apply suppletorily.

(h) For Leases and Affermage, the Law on Leases of the Civil Code of Philippines may be referred to.

## Chapter 2. PPP Projects and PPP Modalities

Sec. 8. *PPP Projects.* – (a) The Province/ City/ Municipality, through the appropriate and viable PPP mode, may undertake Developmental Projects, including but not limited to, energy and power, renewable energy, waste-to-energy, roads, bridges, causeways, waterways, highways, ports, wharfs, terminals, airports, community airports, canals, dams, desilting, dredging, mining and exploration, hydropower projects, water supply and distribution, sewerage, irrigation, drainage, water conservation such as impoundment areas and rainwater harvesting, telecommunications, railroad and railways, short-haul transit services such as monorail, guided bus, bus services and trams, intermodal and multi-modal transit systems, transport systems, traffic control and management, parking facilities, reclamation projects, platform settlements, industrial estates or townships, central business and industrial park development, hotels and resorts, socialized housing, non-conventional low-cost housing, settlement/ resettlement and relocation facilities, residential subdivisions, parks and open space development/ redevelopment, pocket parks, public art, libraries, heritage conservation, government buildings, sustainable/ green public buildings, sports facilities, wellness establishments, tourism such eco-tourism, wellness tourism and agri/agro-tourism, public markets, commercial buildings, slaughterhouses, storage buildings, warehouses, cold storage, solid waste management, sanitary landfills, meeting and convention centers, information technology networks and database infrastructure, education-related, classrooms, health facilities, hospitals, social services-related, prisons, agriculture-related, post-harvest facilities, environmental management and protection, climate change adaption, disaster risk reduction, among other developmental projects.

(b) The determination of the appropriateness and viability of the PPP mode shall be specified, explained and justified in the feasibility or project study weighing all the relevant value drivers and reasons for pursuing a PPP project.

(c) Parties to PPP arrangement shall undertake an activity in order to accomplish either an integrated or multi-use arrangement or specific goal or purpose with the end view of serving the public good or generating revenues.

Sec. 9. *List of Priority Projects.* – The Province/ City/ Municipality shall identify specific priority developmental projects that may be undertaken under any of the PPP Modalities defined under Sec. 10 hereof.

Sec. 10. *PPP Modalities.* – In undertaking a specific PPP Project, the Province/ City/ Municipality may adopt and pursue any of the following PPP Modalities and provide for other modalities not inconsistent with law:

1. Build-and-Transfer (BT);
2. Build-Lease-and-Transfer (BLT);
3. Build-Operate-and-Transfer (BOT);
4. Build-Own-and-Operate (BOO);
5. Build-Transfer-and-Operate (BTO);
6. Contract-Add-and-Operate (CAO);
7. Develop-Operate-and-Transfer (DOT);
8. Rehabilitate-Operate-and-Transfer (ROT);
9. Rehabilitate-Own-and-Operate (ROO);
10. Rehabilitate-Lease-and-Transfer (RLT);
11. Rehabilitate-and-Transfer (RT);
12. Rehabilitate-Transfer-and-Operate (RTO);
13. Concession Arrangement;
14. Joint Venture (JV);
15. Lease or Affermage;
16. Management Contract;
17. Service Contract;
18. Divestment or Disposition;
19. Corporatization; and
20. Any other modality akin to any of the above or features thereof which falls under the alternative definition of a PPP under Section 5 (u) hereof.

Sec. 11. *General Requirements.* – These are the general requirements for the Province/ City/ Municipality in entering into PPPs:

(a) Undertaking a PPP for a Development Project must be premised on any or all of the reasons and drivers mentioned in Section 4 hereof.

(b) The list of projects to be implemented by the Province/ City/ Municipality under any of the BOT Law variants shall be submitted for confirmation to the Provincial/ City/ Municipal Development Council for projects costing above Twenty up to Fifty Million Pesos; above Fifty Million up to Two Hundred Million Pesos to the regional development councils; and those above Two Hundred Million Pesos to the Investment Coordination Committee of the National Economic and Development Authority (NEDA).

(c) Projects included in the List of Priority Projects shall not be eligible for unsolicited proposals under any of the BOT Law variants, unless involving a new concept or technology; provided, that for any of the other PPP Modalities, unsolicited proposals may be accepted even if the project is included in the List of Priority Projects or whether the same features a new concept or technology or not.

(d) The prohibition for extending Direct Provincial/ City/ Municipal Guarantee, Direct Provincial/ City/ Municipal Subsidy and Direct Provincial/ City/ Municipal Equity only applies to unsolicited proposals for BOT Law variants under Republic Act No. 6957 as amended by RA No. 7718.

(e) For BOT Law variants that will be subjected to bidding, Concession Arrangements, Leases or Affermage, Management and Service Contracts, and Joint Ventures, the Province/ City/ Municipality may provide Direct Provincial/ City/ Municipal Guarantee, Direct Provincial/ City/ Municipal Subsidy, Direct Provincial/ City/ Municipal Equity, or Viability Gap Funding; provided, that the Province/ City/ Municipality can use a portion of its general fund, its development fund comprising 20% of its annual share in the Internal Revenue Allotment, and/ or its equitable share in the proceeds of the utilization and development of the national wealth found within its territory for this purpose; provided further, that any amount used for subsidy or equity for a PPP project shall be deemed for development purposes and for the direct benefits of the inhabitants pursuant to Sections 287 and 294 of the 1991 LGC respectively.

(f) For all PPP Modalities, the Province/ City/ Municipality may provide Credit Enhancements and Cost-Sharing schemes.

(g) Official Development Assistance (ODA) as defined in R.A. 8182, otherwise known as the ODA Act of 1996, as amended by R.A. 8555, may be availed of for PPP projects where there is difficulty in sourcing funds; provided, that ODA financing shall not exceed 50% of the project cost, with the balance to be provided by the PSP.

(h) Any subsidy to the constituents that will be extended by the Province/ City/ Municipality must be targeted, transparent and efficiently administered.

(i) Each PPP Modality adopted for a specific PPP project must specifically provide and adopt a tariff-mechanism such as but not limited to cash-needs, price cap, revenue cap, rate of return, hybrid of the foregoing, or any other appropriate scheme.

(j) For negotiated contracts for BOT Law variants for public utility projects which are monopolies, the rate of return on rate base shall be determined by existing laws, which in no case shall exceed twelve per centum [12%].

(k) In case of a project requiring a franchise or license to operate, the winning PSP shall automatically be granted by the Province/ City/ Municipality the franchise or license or permit to operate and maintain the facility, including the collection of tolls, fees, rentals, and other charges in accordance with the schedules stipulated in the approved PPP contract. In case a JV Company is formed, the franchise, concession or license shall be automatically granted to the JV Company. Upon the signing of the JV Agreement by the Governor/ Mayor pursuant to the authority given by the Sangguniang Panlalawigan/ Panlungsod/ Bayan, the franchise, concession or license is deemed awarded to the winning PSP, in case of a contractual JV, or the JV company. The original franchise period as stipulated in the contract agreement may be extended, as may be authorized by the Province/ City/ Municipality, provided that the total franchise period shall not exceed fifty (50) years.

(l) The Province/ City/ Municipality shall have the option to form or allow the formation of a special purpose vehicle or single-purpose project company to implement the PPP project as may be appropriate under the chosen PPP Modality.

(m) In participating in PPPs, the Province/ City/ Municipality may, subject to Sections 16, 17, 18, 19 and 20 of the 1991 LGC, exercise police power, perform devolved powers, power to apply and generate resources, expropriate and reclassify and enact or integrate zoning ordinances.

(n) The Province/ City/ Municipality shall prescribe and impose Procurement Ethics to be followed by the Province/ City/ Municipality and all bidders based on the principles of honesty, integrity, probity, diligence, fairness, trust, respect and consistency for all PSPs and bidders.

(o) In a JV or appropriate modality, the co-venturers or parties to a JV shall contribute money, capital, services, personnel, assets including equipment, land, intellectual property or anything of value, or a combination of any or all of the

foregoing to the JV arrangement. The contribution of the Province/ City/ Municipality shall be subject to third party independent valuation. Further:

- (i) The Province/ City/ Municipality may allocate a portion of its Internal Revenue Allotment, real property tax, development fund, regular funds, proceeds from the utilization and development of its national wealth, Special Education Fund when the JV project is education-related, Calamity Fund when the JV project is calamity- or reconstruction-related, and special funds, if appropriate, as its contribution or share in the JV activity. These may be the actual or current funds, or future or monetized value of these funds of the Province/ City/ Municipality.
- (ii) The Province/ City/ Municipality may contract a loan, avail of Official Development Assistance, secure grants, issue bonds, debentures, securities, collaterals, and notes the proceeds of which can be earmarked for the JV activity.
- (iii) On the part of the Province/ City/ Municipality, in addition to the foregoing contributions, it may extend goodwill, free carry, grant a franchise, concession, usufruct, right-of-way, equity, subsidy or guarantee, provide cost-sharing and credit enhancement mechanisms, exercise police power, give tax incentives or tax holidays, perform devolved powers, expropriate and reclassify and enact or integrate zoning ordinances.
- (iv) The Province/ City/ Municipality shall be a minority equity or shareholder while the PSP shall be majority equity or shareholder, except in the case where fifty percent (50%) of the outstanding capital stock or contribution is owned or made by the Province/ City/ Municipality. A reasonable percentage of the equity to be provided by the PSP should come from its own resources and not borrowed.
- (v) Notwithstanding having only a minority share or equity, the written consent of the Province/ City/ Municipality may be obtained, based on the JVA, prior to any divestment of any asset or facility, dissolution, transfer or sale of share or equity on the part of the PSP, purchases or transactions beyond prescribed thresholds, or other activities which may affect the rights and stake in the Project of the Province/ City/ Municipality.
- (vi) Any cost avoidance or substantial savings that will be made by the Province/ City/ Municipality because of and directly attributable to

the JV activity may be factored in the computation of the respective shares of the Province/ City/ Municipality and the PSP.

- (vii) For the utilization and development of natural resources located within its jurisdiction, the Province/ City/ Municipality shall be entitled to an equitable share which may come in the form of a portion of the benefits, revenues and profits thereof.
- (viii) The share of each JV party shall be set as fixed or determinable percentages or values either based on an overall or across-the-board assignment of contributions, revenues, profits, losses, risks and functions; or on specific assignment of contributions and functions to each JV party, provided that, the agreed percentage share is maintained and that joint governance is ensured where the Province/ City/ Municipality shall have representation in the governing structure based on in proportionate share at the minimum.
- (ix) Subject to the terms of the competitive selection process and agreement of the parties, the Province/ City/ Municipality may be entitled to a share greater than its contribution or equity.
- (x) Each party shall be entitled to dividends, profits, income and revenues and will bear the corresponding risks, losses and obligations in proportion to its share, either based on gross or net revenues or income, unless the parties agree that the Province/ City/ Municipality will have a greater share in the dividends, profits, income and revenues and/ or bear lower risk and percentage loss than what it contributes to the JV arrangement.
- (xi) For as long as the Province/ City/ Municipality is involved in the JV undertaking, the PSP shall not sell/transfer its interest in the JV Company without the express written consent of the Province/ City/ Municipality.
- (xii) The share or equity of the Province/ City/ Municipality in the JV arrangement may be advanced, in full or in part, by the PSP where the PSP shall be paid from the future revenues due the Province/ City/ Municipality either by set-off or actual payment.
- (xiii) The JV activity may, subject to the terms of the competitive selection process, include the divestment, disposition or transfer of ownership of the JV activity, equity, asset or project to the PSP or JV partner. The

divestment or disposition may take place at the end of the JV period or before the term ends.

(p) Procurement made by the Province/ City/ Municipality using public funds shall be subject to the GPRA and its Revised Implementing Rules and Regulations. Procurement made by the PSP using private funds shall not be covered by said statute.

(g) The revenues, funds, expenditures and contributions of the Province/ City/ Municipality shall be subject to the audit examination by the COA. Revenues, funds, expenditures and contributions of the PSP shall be subject to audit by a private auditing firm.

*[Alternatively, "the revenues, funds, expenditures and contributions from the Province/ City/ Municipality and from the PSP are subject to audit by the COA."]*

(h) Any subsidy, guarantee, equity or contingent liability assumed or given by the Province/ City/ Municipality must be reflected, disclosed and recognized in the annual appropriations of the Province/ City/ Municipality.

**Sec. 12. Government-to-Government Joint PPP Undertakings.** – The Province/ City/ Municipality by mutual agreement in a Government-to-Government arrangement with other local governments, national government agencies, government-owned and -controlled corporations, government instrumentalities and government corporate entities, may implement PPP Projects for projects located within the Province's/ City's/ Municipality's territory or those projects that will benefit the Province/ City/ Municipality and its community even if the project site is outside the Province's/ City's/ Municipality's territory; provided, that the collaborating or partner government entity jointly undertakes with the Province/ City/ Municipality the selection of the PSP using the appropriate PPP Modality.

### Chapter 3. **PPP Procedures and PPP Contract**

**Sec. 13. PPP Procedures.** – The following procedures shall apply: (a) For BOT Law variants, the Province/ City/ Municipality must comply with the procedure set forth in Republic Act No. 6957 as amended by RA No. 7718 and its Implementing Rules and Regulations.

(b) For Management and Service Contracts where Provincial/ City/ Municipal funds will be used, the Province/ City/ Municipality shall comply with Republic Act No.

9184 or the Government Procurement Reform Act and its Implementing Rules and Regulations.

(c) For Concessions, Leases or Affermage, and Management and Service Contracts where public funds are not used to procure the services of the contractor or consultant, competitive selection, limited negotiations, competitive negotiations or competitive challenge as defined herein may be utilized to select the PSP.

(d) For Joint Ventures, Rehabilitate-Transfer, Rehabilitate-Lease-and-Transfer and Rehabilitate-Transfer-and-Operate, competitive selection, limited negotiations or competitive challenge as defined herein may be utilized to select the PSP/ JV partner.

(e) For Divestment or Disposition of a property, COA Circular No. 89-296 (January 27, 1989) shall be applicable.

(f) For the Divestiture of a subsidiary or corporation incorporated by the Province/ City/ Municipality under Corporatization, the sale may be pursued via a public offering or through a public auction or other relevant schemes under COA Circular No. 89-296 (January 27, 1989).

(g) If the Province/ City/ Municipality opts to select a PSP using either Competitive Selection or Competitive Challenge, the Province/ City/ Municipality in the Competitive Selection and Competitive Negotiations, and the PSP in the Competitive Challenge approach must prepare and submit a Feasibility or Project Study. The costs of preparing the Feasibility or Project Study may be reimbursed by the winning PSP to the Province/ City/ Municipality under the Competitive Selection mode.

(h) All recommendations of the PPP Selection Committee shall be submitted to the Provincial Governor/ City Mayor/ Municipal Mayor for consideration and approval.

(i) All PPP contracts must be signed by the Provincial Governor/ City Mayor/ Municipal Mayor with prior authorization by the Sanggunian Panlalawigan/ Panlungsod/ Bayan.

(j) During the consideration of the draft PPP Contract by the Sanggunian Panlalawigan/ Panlungsod/ Bayan, a public consultation/ hearing shall be conducted explaining the PPP Project, PPP Contract, accountability mechanisms built into the PPP arrangement, the benefits and costs of the PPP Project, among other relevant matters.

(k) After the signing of the PPP Contract by the Provincial Governor/ City Mayor/ Municipal Mayor, the PPP-SC shall issue the Notice of Award to the PSP.

(l) While the PPP Contract is already valid, perfected and enforceable, it may be submitted for judicial, executive or administrative confirmation from the courts or appropriate government institutions.

Sec. 14. *PPP Selection Committee.* – (a) There is hereby created a PPP Selection Committee (PPP-SC) for purposes of selecting a PSP for a specific PPP Project. The PPP-SC, to be constituted and convened by the Provincial Governor/ City Mayor/ Municipal Mayor, shall be composed of the following:

- (i) Chairperson – At least a third ranking officer of the Province/ City/ Municipality;
- (ii) Secretary – Provincial/ City/ Municipal Legal Officer;
- (iii) The Provincial/ City/ Municipal Treasurer;
- (iv) The Provincial/ City/ Municipal Planning and Development Officer;
- (v) One (1) representative from and selected by the Sanggunian Panlalawigan/ Panlungsod/ Bayan designated in an appropriate resolution; and
- (vi) Two (2) representatives from and chosen by the accredited civil society groups, people's and non-governmental organizations who are members of the Provincial/ City/ Municipal Development Council.

A quorum of the PPP-SC shall be composed of a simple majority of all voting members. The Chairperson shall vote only in case of a tie.

The PPP-SC with the approval of the Provincial Governor/ City Mayor/ Municipal Mayor may invite provisional non-voting members from the national government agencies, regulatory agencies, NEDA, DILG, and the private sector to observe in the proceedings of the PPP-SC; and form a support staff composed of employees and staff of the Province/ City/ Municipality.

(b) The PPP-SC shall be responsible for all aspects of the pre-selection and selection process, including, among others, the preparation of the Feasibility or Project Study and selection/ tender documents; determination of the minimum designs, performance standards/ specifications, economic parameters and reasonable rate of return or tariff-setting mechanism appropriate to the PPP Modality; drafting or evaluation of the PPP contract; publication of the invitation to apply for eligibility and submission of proposals or comparative proposals; defining the eligibility

requirements, appropriate form and amount of proposal securities, and schedules of the selection and challenge processes; pre-qualification of prospective PSPs, bidders or challengers; conduct of pre-selection conferences and issuance of supplemental notices; interpretation of the rules regarding the selection process; conduct of the selection or challenge process; evaluation of the legal, financial and technical aspects of the proposals; resolution of disputes between PSPs and challengers; defining the appeals mechanisms; and recommendation for the acceptance of the proposal and/or for the award of the contract.

Sec. 15. *Competitive Selection.* – (a) The Competitive Selection procedure shall consist of the following steps: advertisement, issuance of instructions and tender documents, conduct of pre-bid conferences, eligibility screening of prospective bidders, receipt and opening of bids, posting of proposal securities, evaluation of bids, post-qualification, and award of contract.

(b) The Provincial Governor/ City Mayor/ Municipal Mayor shall approve the tender documents and the draft PPP Contract before they are issued to the prospective PSPs/ bidders.

Sec. 16. *Limited Negotiations.* – Where the Province/ City/ Municipality:

- (a) fails to identify an eligible PSP for a desired PPP activity when there is only one qualified bidder after subjecting the same to a competitive selection or bidding; or
- (b) considers a project or activity either through competitive selection or competitive challenge where an indispensable or integral component thereof has already been subjected to a competitive process by the appropriate administrative agency, government instrumentality or government-owned and -controlled corporation which gives the PSP/ offerer a vested and exclusive right over that component without which, the PPP Project cannot be implemented as envisioned,

Limited Negotiations may take place. The negotiations will cover all the technical and financial aspects of the PPP project or activity; provided, that the minimum designs, performance standards/ specifications and economic parameters stated in the Feasibility or Project Study and Terms of Reference are complied with. The Provincial Governor/ City Mayor/ Municipal Mayor shall approve the terms of the Limited Negotiations prior to the award of the contract to the PSP. Under the 2<sup>nd</sup> instance, the Province/ City/ Municipality shall publish a notice to the public prior to

the start of the negotiations, and if pursued under Competitive Challenge, the 3<sup>rd</sup> stage as defined below may be dispensed with.

Sec. 17. *Competitive Negotiations.* – For concession arrangements, leases or affermage, and management and service contracts where public funds are not used to procure the services of the contractor or consultant, the Province/ City/ Municipality invites two or more qualified PSPs to enter into negotiations for a PPP project, unless there is only one qualified offeror with a unique specialization, informing all the qualified PSPs that there is more than one offeror and simultaneous negotiations are being conducted and that the PPP contract shall be awarded to the PSP which offers the best combination of quality and price based on the feasibility or project study prepared by the Province/ City/ Municipality. Prior to the start of the negotiations with the identified PSPs, the Province/ City/ Municipality shall notify the public of the process.

Sec. 18. *Competitive Challenge.* – The Competitive Challenge process shall be divided into three (3) Stages, described as:

Stage One/ Unsolicited Proposal – The steps are:

- (i) A PSP submits an unsolicited proposal accompanied by a Feasibility or Project Study and draft PPP contract to the Provincial/ City/ Municipal for a projected PPP Project.
- (ii) The PPP-SC shall make a determination of the completeness of the unsolicited proposal, the eligibility of the PSP, the necessity for the proposed project, the consistency of the terms of the draft PPP contract with this Ordinance, and the appropriateness of the proposed PPP modality.
- (iii) Upon completion of the initial evaluation, the Provincial Governor/ City Mayor/ Municipal Mayor, upon recommendation of the PPP-SC, shall either issue a certificate of acceptance or non-acceptance of the proposal for purposes of detailed negotiations. Upon the issuance of the certificate of acceptance, the PSP is *ipso facto* conferred original proponent status and no other proposal for the same project may be subjected to the competitive challenge process.
- (iv) If there is more than one unsolicited proposal submitted for the same PPP Project, the Provincial Governor/ City Mayor/ Municipal Mayor, upon recommendation of the PPP-SC, may reject all proposals and pursue competitive selection, or accept the unsolicited proposal that is complete and

provides the greater advantage and benefits to the community and revenues to the Province/ City/ Municipality.

Stage Two/ Detailed Negotiations – The steps are:

- (i) The parties shall negotiate and agree on the terms and conditions of the PPP Project concerning its technical and financial aspects.
- (ii) Once negotiations are successful, the Parties shall issue a joint certification stating that an agreement has been reached and specifying the eligibility of the PSP and the technical and financial aspects of the PPP Project as agreed upon.
- (iii) The issuance of the certification commences the activities for the solicitation for comparative proposals.
- (iv) However, should negotiations not result to an agreement acceptable to both parties, the Province/ City/ Municipality shall have the option to reject the proposal by informing the PSP in writing stating the grounds for rejection and thereafter may accept a new proposal from other PSPs, decide to pursue the proposed activity through other PPP Modalities or subject the PPP Project to a Competitive Selection.

Stage Three/ Competitive or Swiss Challenge Proper – The steps are:

- (i) The PPP-SC shall prepare the tender documents. The eligibility criteria used in determining the eligibility of the private sector entity shall be the same as those stated in the tender documents. Proprietary information shall, however, be respected and protected, and treated with confidentiality. As such, it shall not form part of the tender and related documents.
- (ii) The Provincial Governor/ City Mayor/ Municipal Mayor shall approve all tender documents including the draft contract before the publication of the invitation for comparative proposals.
- (iii) The PPP-SC shall publish the invitation for comparative proposals.
- (iv) The PSP or Original Proponent shall post the proposal security at the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.
- (v) In the evaluation of proposals, the best offer shall be determined to include the original proposal of the PSP. If the Province/ City/ Municipality

determines that an offer made by a comparative PSP or challenger other than the negotiated terms with original proponent is superior or more advantageous to the Province/ City/ Municipality than the original proposal, the PSP who submitted the original proposal shall be given the right to match such superior or more advantageous offer. Should no matching offer be received within the stated period, the PPP Project shall be awarded to the comparative PSP submitting the most advantageous proposal. If a matching offer is received within the prescribed period, the PPP Project shall be awarded to the original proponent. If no comparative proposal is received by the Province/ City/ Municipality, the PPP Project shall be immediately awarded to the original proponent.

- (vi) In the event that the Original Proponent is not able to match the superior offer of the challenger, the winning challenger shall reimburse, within 30 days from issuance of the notice of award, the original proponent the cost of preparing the project study, provided, that this reimbursement arrangement and the cost of preparing of the project study are expressly stated in the terms of reference for the competitive challenge, and that the PPP-SC has determined that the cost is reasonable.

Sec. 19. *Schedules and Timelines.* – The Provincial Governor/ City Mayor/ Municipal Mayor through an executive order, upon the recommendation of the PPP-SC, shall have the authority to adopt and prescribe the appropriate schedules and timelines for each PSP selection process: provided, that the periods are reasonable and will not undermine free competition, transparency and accountability.

Sec. 20. *PPP Contract.* – (a) The PPP Contract shall be signed by the Provincial Governor/ City Mayor/ Municipal Mayor on behalf of the Province/ City/ Municipality with the prior authorization or ratification by the Sanggunian Panlalawigan/ Panlungsod/ Bayan, and the duly authorized representative of the PSP.

(b) The direct and ultimate beneficiary of any PPP Contract shall be the constituents of the Province/ City/ Municipality.

(c) The principal PPP Contract shall describe the PPP Project, the rights, functions, obligations and responsibilities of and risks assumed by each of the contracting party, dispute mechanisms and all other provisions enumerated under Section 5 (v) hereof.

(d) The other ancillary contracts may include insurance contracts; loan agreements; bonds; guarantee arrangements; equity arrangements; operations and maintenance contracts; and engineering, procurement and construction (EPC) contracts.

(e) The Provincial Governor/ City Mayor/ Municipal Mayor shall not proceed with the award and signing of the contract if there are material deviations from the parameters and terms and conditions set forth in the proposal/tender documents that tend to increase the financial exposure, liabilities and risks of the Province/ City/ Municipality or any other factors that would cause disadvantage to government and any deviation that will cause prejudice to losing PSPs.

(f) Any amendment to a PPP Contract, which if effected will not violate the policy on competition and fairness and does not materially affect the substance of the PPP Contract, after award and signing of contract shall undergo approval by the Provincial Governor/ City Mayor/ Municipal Mayor with prior authorization by the Sanggunian Panlalawigan/ Panlungsod/ Bayan. Non-compliance with the corresponding approval process stated shall render the amendment null and void.

#### Chapter 4. Regulation and Contract Management

Sec. 21. *PPP Regulatory Authority's Mandate.* – The PPP Regulatory Authority (PPP-RA) created under this Code shall be tasked with performing contract management functions, such as partnership management (i.e., corporate governance, communication and information sharing, and dispute resolution), performance or service delivery management (i.e., risk management and performance management), and contract administration (i.e., variation management, contract maintenance and financial administration), for all PPP arrangements entered into by the Province/ City/ Municipality. Aside from these, the PPP-RA shall be responsible for setting and monitoring the tariff, and administering the subsidy pursuant to the PPP contract.

Sec. 22. *Composition of the PPP Regulatory Authority.* – (a) The membership of the PPP-RA shall be composed of the following:

- (i) Chairperson – The Provincial Governor/ City Mayor/ Municipal Mayor or the Provincial/ City/ Municipal Administrator if so designated by the Provincial Governor/ City Mayor/ Municipal Mayor;
- (ii) Vice-Chairperson – Vice-Governor/ Vice-Mayor or a member of the Sanggunian Panlalawigan/ Panlungsod/ Bayan to be chosen by the Sanggunian as evidenced by an appropriate resolution;

- (iii) Two (2) representatives of the Sanggunian Panlalawigan/ Panlungsod/ Bayan belonging to two (2) distinct registered political parties to which the Provincial Governor/ City Mayor/ Municipal Mayor does not belong to chosen on the basis of proportional representation of all parties represented in the Sanggunian Panlalawigan/ Panlungsod/ Bayan;
  - (iv) Provincial/ City/ Municipal Legal Officer;
  - (v) Provincial/ City/ Municipal Treasurer;
  - (vi) Provincial/ City/ Municipal Planning and Development Officer; and
  - (vii) Two (2) representatives from and chosen by the accredited civil society groups, people's and non-governmental organizations who are members of the Provincial/ City/ Municipal Development Council. These representatives shall not be the same representatives in the PPP-SC.
- (b) For projects covered by government-to-government joint PPP undertakings, the collaborating or partner government entity shall have one (1) representative in the PPP-RA, provided that such representative shall only sit in meetings of the PPP-RA, or portions thereof, and have a vote only on matters directly affecting the PPP project covered by such joint PPP undertaking. For this purpose, government-to-government joint PPP undertakings means such mutual agreement entered into by the Province/ City/ Municipality with other local governments, national government agencies, government-owned and -controlled corporations, government instrumentalities and government corporate entities, for the implementation of PPP projects that will benefit the Province/ City/ Municipality and its community even if the project site is outside the Province's/ City's/ Municipality's territory.
- (c) The PPP-RA may appoint a contract manager for a PPP project depending on the PPP contract value, complexity and associated risks. The contract manager shall have the necessary management skills and technical knowledge of the goods, services or works to be provided under the PPP contract. The PPP-RA shall determine the manner and source of payment for the contract manager's compensation, provided that if a regular employee of the Province/ City/ Municipality is appointed as contract manager, he/she shall not receive additional compensation for such appointment. The contract manager shall have a vote on matters directly affecting the PPP project that he/she is managing.

- (d) A quorum of the PPP-RA shall be composed of a simple majority of all voting members. The Chairperson shall vote only in case of a tie.
- (e) The PPP-RA with the approval of the Provincial Governor/ City Mayor/ Municipal Mayor may invite third party experts to attend its meetings to act as advisors and observers. Such third party experts may represent national government agencies, regulatory agencies, the NEDA, the PPP Center, the DILG, private sector, non-governmental organizations and civic groups.
- (f) The PPP-RA may form a support staff composed of employees and personnel of the Province/ City/ Municipality. The PPP-RA may also engage consultants hired pursuant to law.

Sec. 23. *Contract Management Manual.* – (a) The Provincial/ City/ Municipal Legal Officer, Provincial/ City/ Municipal Treasurer and Provincial/ City/ Municipal Planning and Development Officer and one of the civil society representatives of the PPP-RA, acting as the PPP-RA Manual Committee (PPP-RA-MC), shall jointly prepare a contract management manual for each executed PPP contract, which shall serve as a guide to the Province/ City/ Municipality and its personnel in ensuring a consistent, high quality contract monitoring process that is specific for such PPP contract.

- (b) The contract management manual in (a) shall be submitted to the PPP-RA for approval within twenty-one (21) days from the execution of a PPP contract, provided that, for outstanding PPP contracts concluded prior to the effectivity of this Code, the contract management manual shall be submitted to the PPP-RA within one hundred and twenty days (120) days from the effectivity of this Code and the provisions of this Code shall apply *mutatis mutandis*.
- (c) The PPP-RA may accept, reject, or order the revision of the contract management manual at any time during the life of the PPP project, provided that any revision subsequent to the first acceptance of the contract management manual at the inception of the PPP project shall require written notice to the PSP and opportunity to be heard.
- (d) If the contract management manual has not been approved by the PPP-RA within seven (7) days from its submission as provided in paragraph (b), the same shall be deemed issued and approved by the PPP-RA for all purposes.
- (e) The PPP-RA shall evaluate each contract management manual quarterly, which shall be amended as may be necessary. Any amendment to the

contract management manual shall be effective upon the approval of the PPP-RA.

- (f) The PPP-RA, all throughout the life of the PPP Contract, shall present, make available and explain, before and after any material action is taken, all relevant information regarding the implementation of the PPP Contract, the submissions of the PSP and actions taken by the PPP-RA, to the Provincial/ City/ Municipal Development Council.

Sec. 24. *Contents of the Contract Management Manual.* – Each contract management manual shall include the following information:

- (a) a description of the PPP project and its history;
- (b) a summary of the key terms of the PPP contract;
- (c) roles and responsibilities of each member of the PPP-RA and other Provincial/ City/ Municipal personnel and contractors, as applicable, who are involved in the PPP project;
- (d) roles and responsibilities of key personnel of the PSP;
- (e) details of the post-award conference;
- (f) partnership management procedures;
- (g) performance or service delivery management;
- (h) contract administration; and
- (i) project closeout procedures.

Sec. 25. *Post-Award Conference.* – (a) Immediately after the PPP contract is awarded, the PPP-RA Chairperson shall call a post-award conference to ensure that the Province/ City/ Municipality and PSP have a clear and mutual understanding of the terms and conditions of the PPP contract, and to determine the responsibilities of parties. Notice of the post-award conference shall be sent by the PPP-RA Chairperson at least five (5) working days before the scheduled date thereof.

- (b) The post-award conference shall be attended by the members of the PPP-RA, such employees and contractors of the Province/ City/ Municipality that who

be involved in the management of the PPP contract, and key personnel of the PSP.

- (c) The PPP-RA Chairperson shall preside at the post-award conference, and shall appoint a secretary of the conference from the Provincial/ City/ Municipal personnel present.
- (d) The minutes of the conference shall be sent to each participant within five (5) days of the adjournment of the conference.

*Sec. 26. Personnel and Training Requirements.* – (a) The contract management manual shall identify the Provincial/ City/ Municipal personnel involved in contract management, the specific roles and responsibilities of each, and the skills and technical knowledge required to perform their functions.

- (b) Independent contractors may be engaged in the absence of the qualified Provincial/ City/ Municipal personnel, provided that, except in the case of contract managers engaged in accordance with Section 8(c), contractors may only be engaged for a period not exceeding three (3) years from the effective date of the PPP contract. Such contractor shall:
  - (i) have at least two (2) understudies; and
  - (ii) provide a training program for Provincial/ City/ Municipal personnel in his field of specialization, with such training being done regularly during regular office hours.
- (c) During the contract life, the Provincial/ City/ Municipal personnel shall undergo such continuous training on contract monitoring to ensure that the Province/ City/ Municipality is equipped to monitor reliably the PSP's performance over the entire life of the PPP contract.

*Sec. 27. Partnership Management.* – Each contract management manual shall identify processes to ensure accountability and manage the relationship between the Province/ City/ Municipality and the PSP, and shall describe:

- (a) each party's governance structure, including the overall system of institutional structures, operating rules, compliance mechanisms and accountability procedures;

- (b) guidelines on communication and information sharing between the Province/ City/ Municipality and the PSP, including reporting requirements, frequency and purpose of regular meetings, record-keeping of all exchanges, and the acceptable modes of correspondence between them; and
- (c) the process for resolving disputes between the parties, identifying, among others, the different levels of dispute resolution, offices and officials involved, timetable for resolving such disputes, and possible actions to compel a party to adequately comply with contractual terms.

*Sec. 28. Performance or Service Delivery.* – The contract management manual shall identify measures to ensure that the services or goods provided by the PSP are in accordance with the standards and prices agreed in the PPP contract. Such measure shall include:

- (a) an identification of risks under the PPP contract, the timetable for resolving such risks when they arise, contingency plans that ensure immediate resumption of services in the event of an interruption of service delivery by the PSP, and penalties for failing or refusing to resolve them, provided that a separate risk mitigation plan shall be developed and periodically reviewed and updated throughout the life of the contract for contracts with significant risks;
- (b) clear and demonstrable key performance indicators that demonstrate evidence of poor, satisfactory or non-performance by the PSP, taking into consideration the cost and value obtained, performance and customer satisfaction, delivery improvement, delivery capability, benefits realized and relationship strength and responsiveness;
- (c) a performance management plan and performance monitoring system that will be used by the Province/ City/ Municipality to monitor affordability, service delivery, value for money, quality, and performance improvement, which shall in all cases include:
  - (i) a timetable and start and end date for each performance component, including milestones with accompanying timeframes, dependencies, required or desired outcomes, and acceptable performance levels;
  - (ii) requirements and standards to be used to monitor PSP performance;
  - (iii) procedures and guidelines for measuring customer satisfaction and mechanisms to solicit end user feedback;

- (iv) submission of regular, accurate and timely reports by the PSP, Provincial/ City/ Municipal personnel or the contract manager, as applicable, to the PPP-RA detailing performance monitoring efforts and the types of information that should be included in such reports;
  - (v) Province/ City/ Municipality access to PSP records to allow Provincial/ City/ Municipal personnel to verify the information that the PSP reports to them and to ensure that funds are expended properly;
  - (vi) random inspections of PSP records and on-site monitoring visits; and
  - (vii) regular meetings with the PSP to review progress, discuss problems and consider necessary changes; and
- (d) a performance review and corrective actions system that apply to non-compliance or breach of contract, and penalties for non-performance and bonuses for good performance.

*Sec. 29. Contract Administration.* – The contract management manual shall lay down a contract administration system, which shall include:

- (a) systems and procedures for variation management, the roles and responsibilities of Provincial/ City/ Municipal personnel, and reportorial requirements for each event of proposed or successful contract variation;
- (b) a system for contract maintenance, identifying key contract deliverables and schedules, as well as trigger events; and
- (c) systems and procedure for financial administration, including an estimate of the resources that the Province/ City/ Municipality will devote thereto, systems and procedures to make and receive financial payments, and rules for keeping records of financial transactions in accordance with the requirements of the contract.

*Sec. 30. Closeout Procedures.* - Formal, written closeout procedures shall be included in contract management plan to ensure that all goods and services have been delivered satisfactorily, all properties are disposed accordingly, all Provincial/ City/ Municipal properties are returned, and all amounts due under the PPP contract have been paid.

Sec. 31. *Post-Contract Review.* - A post-contract review shall be conducted at the end of a contract period, which shall include a post-contract analysis, evaluation and reporting of the PPP project, the PSP's performance, and the Provincial's/ City's/ Municipal's contract management system. The post-contract review shall likewise include a financial audit of the entire PPP project and determination of lessons learned. Provincial/ City/ Municipal policies and procedures shall be updated where required. Notwithstanding the requirement herein, if the PPP contract is subject to renewal or extension, the post-contract review shall be conducted within a reasonable time before the deadline for such renewal or extension.

Sec. 32. *Document Control.* – The PPP-RA shall act as the administrator of documents and correspondence relating to the PPP project and PPP contract. The contract management manual shall:

- (a) identify the documents and correspondences that must be retained by the PPP-RA;
- (b) require that all such documents be kept in both electronic and paper format during contract life or such longer period as may be required under applicable law; and
- (c) lay down the protocol for document storage, logging, accountability, disclosure and access by the parties and the public.

#### Chapter 5. **Accountability, Information, Education and Monitoring**

Sec. 33. *Code of Conduct.* – Before commencing their functions, each member of the PPP-SC and PPP-RA and the contract manager shall sign a Code of Conduct, which shall guide each member in the performance of their duties as such.

Such Code of Conduct shall require each member to, among others:

- (a) act at all times in accordance with relevant legislation and regulations;
- (b) act at all times with fidelity, honesty, integrity and in the best interests of the Province/ City/ Municipality and its constituents;
- (c) recognize the public's right to access to information in accordance with law;
- (d) not misuse his or her position and privileges of a member of the PPP-SC and PPP-RA, whether or not such will prejudice the interest of the public, the PSP, or any third person;

- (e) to take the utmost care in ensuring reasonable protection of the records of each PPP project, and to not disclose any confidential and proprietary information to persons without a need to know such information, or in violation of any non-disclosure requirements under law or contract;
- (f) carry out his or her duties with the skill and care expected from a person of knowledge and experience, and to exercise prudent judgment;
- (g) forthwith report to the appropriate authorities any act of negligence, fraud, corruption, misuse of government funds, failure or refusal to perform duties, or any other act which may constitute a crime or offense, or which is prejudicial to the public interest, in the selection of the PSP and implementation of a PPP contract;
- (h) forthwith declare any personal or business interest that he or she, or any of his or her relatives within the fourth degree of affinity or consanguinity, may have in any business of a PSP, in which case, the official or representative shall no longer be a member of the PPP-SC and PPP-RA;
- (i) forthwith declare any conflict of interest, insofar as the PPP Project concerned, that he or she may have or will have, in which case, the official or representative shall not longer be a member of the PPP-SC and PPP-RA;
- (j) not vote or act in a particular way on any matter in consideration of any offer, promise, gift or present, from a member of the public, government, a political party, social group or non-governmental organization, or any stakeholder or potential stakeholder;
- (k) not receive any gift or anything else of value which is or may be viewed as aimed at influencing or directing his or her vote or actions; and
- (l) to disclose immediately to the PPP-SC or PPP-RA as the case may be, any attempted inducement that may be construed as aimed at influencing or directing his or her acts as a member of the PPP-SC and PPP-RA.

Sec. 34. *Disciplinary Action.* – Violation of this Code and the Code of Conduct insofar as the Provincial/ City/ Municipal elective officials are concerned shall constitute a ground for disciplinary action or amount to loss of confidence under the 1991 LGC and relevant laws, and with regards local appointive officials, such violation shall render them administratively liable. Officials may also be rendered criminally liable under applicable laws and ordinances. Representatives of the PSP shall be held liable

for damages, offenses and crimes depending on the nature of their participation and involvement in the unlawful act or omission.

Sec. 35. *Liability.* – The Province/ City/ Municipality and its officials, in undertaking a PPP project, selecting a PSP and implementing a PPP contract, shall not be exempt from liability for death or injury to persons or damage to property.

Sec. 36. *Social Accountability.* – The Province/ City/ Municipality shall ensure, promote and eliminate all obstacles to social accountability and allow and enhance constructive engagement between citizens' groups, academe, consumers, rate-payers, general public, Province/ City/ Municipality, national government agencies, regulatory agencies, and PSP.

Sec. 37. *Transparency and Right to Information.* – The PPP Contract, feasibility or project studies, bidding documents, terms of reference, results of the PSP selection process, Code of Conduct, Contract Management Manual, minutes of the post-award conference, PPP-RA, and PPP-RA-MC, and other relevant documents and instruments shall be posted in two conspicuous places of the Province/ City/ Municipality and uploaded in a dedicated website of the PPP-RA which can be freely accessed by the public. The Province/ City/ Municipality shall also implement a strategic communication plan addressed to all stakeholders.

Sec. 38. *Capability-Building Program.* – (a) The Province/ City/ Municipality shall design and implement a continuing education and capacity-building program on PPPs for its officials, and the members of the PPP-SC and PPP-RA.

(b) The Province/ City/ Municipality shall also undertake a comprehensive and sustained education and governance campaign aimed at informing all stakeholders and civil society organizations about PPPs ventures of the Province/ City/ Municipality and allowing them to participate in the overall PPP program of the Province/ City/ Municipality. The program shall include strategic and annual evaluation and planning sessions, workshops, seminars, focus-group discussions on PPPs, market opportunities, projects, management of contracts and regulation of PPPs and other PPP-related topics.

(c) The Province/ City/ Municipality may tap consultants to assist them in implementing PPPs and in building capability for PPPs.

Sec. 39. *Monitoring and Governance Audit Program.* – The Province/ City/ Municipality, in order to ensure transparency and accountability, shall encourage civil society organizations, people's and non-governmental organization and civic aggrupations to establish a PPP monitoring, evaluation and governance audit body

functionally and fiscally independent from the Province/ City/ Municipality and other government institutions.

Sec. 40. *Technical and Financial Assistance.* – The DILG, Department of Finance, Department of Budget and Management, NEDA and the PPP Center may extend technical and financial assistance to the Province/ City/ Municipality and such assistance may be embodied in a memorandum of understanding or agreement.

## Chapter 6. Final Provisions

Sec. 41. *Appropriations.* – To carry out the provisions of this Code, the amount of (amount) Pesos (P [figures]) shall be appropriated. Thereafter, such sums as may be necessary for the continuous implementation of this Code shall be included in the annual budget of the Province/ City/ Municipality.

Sec. 42. *Alternative Dispute Resolution.* – All PPP contracts of the Province/ City/ Municipality shall include a provision on the use of Alternative Dispute Resolution (ADR) mechanisms in resolving disputes arising from the PPP contract. All controversies in connection with PPP undertakings and projects of the Province/ City/ Municipality shall likewise be addressed using ADR.

Sec. 43. *Implementing Rules.* – While this Code and the provisions hereof are already operative upon the Code's effectivity, the Provincial Governor/ City Mayor/ Municipal Mayor may issue the appropriate and relevant rules and regulation for the proper implementation of the Code or its provisions, including the issuance of relevant mechanisms to insure competition, manuals, guidelines, sample contracts and bid documents, PPP indexes and comparators, and performance scorecards.

Sec. 44. *Application of Other PPP Laws and Regulations.* – Whenever relevant and appropriate as determined by the Provincial Governor/ City Mayor/ Municipal Mayor and in the absence of a specific provision to the contrary, upon recommendation of the PPP-SC and PPP-RA as the case may be, the BOT Law, the GPRA, Executive Order No. 301 (26 July 1987), COA Circular No. 89-296 (January 27, 1989), and their applicable rules and regulations, and the JV Guidelines adopted by the NEDA, either the 2008 or 2013 versions, shall apply in a suppletory manner.

Sec. 45. *Separability Clause.* – If, for any reason, any section or provision of this Code or any part thereof, or the application of such section, provision or portion is declared invalid or unconstitutional, the remainder thereof shall not be affected by such declaration.

Sec. 46. *Repealing Clause.* – All ordinances and resolutions or parts thereof inconsistent with the provisions of this Code are hereby repealed or modified accordingly.

Sec. 47. *Effectivity.* – This Code shall take effect fifteen (15) days after its posting in two conspicuous places within the Province/ City/ Municipality.

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## **B. PROPOSED LGU JOINT VENTURE ORDINANCE**

November 23, 2014

Ordinance No. \_\_\_\_

Series of 20\_\_

### **A PROVINCIAL/ CITY/ MUNICIPAL ORDINANCE PURSUING A JOINT VENTURE (JV) APPROACH TOWARDS DEVELOPMENT, PROVIDING FOR THE PROCEDURE FOR SELECTING THE JV PRIVATE SECTOR PARTNER AND REGULATION OF THE JV ACTIVITY, AND INSTITUTING ACCOUNTABILITY MECHANISMS**

WHEREAS, under Section 20, Article II of the 1987 Constitution, the “State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments”;

WHEREAS, the private sector participates in infrastructure, development and social service-related projects of the State and local government units (LGUs) through what is popularly known as Public-Private Partnerships (PPPs);

WHEREAS, Republic Act No. 7160 or the Local Government Code of 1991 (1991 LGC), in particular Sections 17 (a), 18 and 22, empower LGUs to discharge functions and responsibilities as are necessary, appropriate, or incidental to efficient and effective provisions of the basic services and facilities, to acquire, develop, lease, encumber, alienate, or otherwise dispose of real or personal property held by them in their proprietary capacity and to apply their resources and assets for productive, developmental, or welfare purposes, in the exercise or furtherance of their governmental or proprietary powers and functions and thereby ensure their development into self-reliant communities and active participants in the attainment of national goals, to enter into contracts and to enjoy full autonomy in the exercise of their proprietary functions, respectively;

WHEREAS, 1991 LGC and its Implementing Rules and Regulations (IRR) categorically empower LGUs to enter into JVs, a PPP modality, to wit:

#### *Section 35. Linkages with People's and Non-governmental Organizations.*

— Local government units may enter into joint ventures and such other cooperative arrangements with people's and non-governmental organizations to engage in the delivery of certain basic services, capability-building and livelihood projects, and to develop local enterprises designed to improve productivity and income, diversity agriculture, spur rural industrialization, promote ecological balance, and enhance the economic and social well-being of the people.

Article 66. *Joint Ventures and Cooperative Programs or Undertakings.* — LGUs may enter into joint ventures and such other cooperative arrangements with people's organizations, NGOs or the private sector, to engage in the delivery of certain basic services; capability-building and livelihood projects; develop local enterprises designed to improve productivity and income; diversify agriculture; spur rural industrialization; promote ecological balance; and enhance the economic and social well-being of the people.

WHEREAS, the 1991 LGC and its IRR, however, do not define what a JV is and do not spell out the particular requirements and conditions, and procedures for choosing the private JV partner. The absence of a detailed statute and national framework on LGU JVs and the authority of LGUs to adopt or enact their own LGU JV framework or ordinance have been confirmed by the Department of Interior and Local Government or DILG (Legal Opinion No. 10, s. 2014, April 8, 2014; Legal Opinion No. 47 s. 2012, July 13, 2012) and the Department of Justice (Opinion No. 18, S. 2012, April 3, 2012). Presidential Executive Order No. 78 (July 4, 2012) also affirmed that LGUs may provide their own JV rules, guidelines and procedures;

WHEREAS, a JV is not a variant under R.A. 6957 as amended by R.A. 7718, popularly known as the BOT Law, and is not procurement as defined under the R.A. 9184 or the Government Procurement Reform Act (GPRA), therefore, said statutes do not govern JVs;

WHEREAS, the JVs by LGUs are excluded from the coverage of the 2013/ Revised and 2008 JV Guidelines issued by the National Economic and Development Authority (NEDA) are adopted herein;

WHEREAS, in furtherance of and consistent with local autonomy, fiscal autonomy, the principle of subsidiarity, public good and welfare, general welfare, and full autonomy over proprietary powers, LGUs are free, provided no statute is violated, to adopt their own definition of a JV undertaking and prescribe the requirements, procedures and conditions for local JVs, and incorporate these in an operative framework; and

WHEREAS, having a framework in ordinance form will ensure and facilitate consistency, integrity, reliability, sustainability, accountability and transparency, and enforceability;

NOW THEREFORE, on motion of Councilor (name), duly seconded by Councilor(s) (name[s]),

BE IT ORDAINED, by the *Sangguniang Panlalawigan/ Panlungsod/ Bayan* of (name) in session assembled that:

SECTION 1. *Title.* – This Ordinance shall be known as **A PROVINCIAL/ CITY/ MUNICIPAL ORDINANCE PURSUING A JOINT VENTURE (JV) APPROACH TOWARDS DEVELOPMENT, PROVIDING FOR THE PROCEDURE FOR SELECTING THE JV PRIVATE SECTOR PARTNER AND REGULATION OF THE JV ACTIVITY, AND INSTITUTING ACCOUNTABILITY MECHANISMS** and cited as the “(Name of LGU) JV Ordinance.”

Sec. 2. *Declaration of Policy.* – (a) It is hereby declared, as a policy, that the Province/ City/ Municipality of (name) shall advance the public good and general welfare, and promote the interest of the community and the Province/ City/ Municipality within the framework of sustainable and integrated development, and effective constructive engagement and meaningful people’s participation in local governance.

(b) PPPs in general and JVs in particular shall be pursued by the Province/ City/ Municipality consistent with and in furtherance of the vision and mission of the City which state that:

VISION: (state vision)

MISSION: (state mission)

Sec. 3. *Operative Principles.* – The accomplishment of the stated policy shall be guided by the following principles:

(p) The Province/ City/ Municipality, pursuant to Sections 1, 2 and 5, Article X of the 1987 Constitution, is a territorial and political subdivision which enjoys local autonomy and fiscal autonomy. Under Section 3, Article X of the 1987 Constitution, local autonomy means a more responsive and accountable local government structure instituted through a system of decentralization. Fiscal autonomy means that local governments have the power to create their own sources of revenue in addition to their equitable share in the national taxes released by the national government, as well as the power to allocate their resources in accordance with their own priorities.

(q) The general welfare and the public good shall always be promoted and that transparency, public accountability and social accountability mechanisms and approaches shall be integrated in JVs from inception to implementation.

- (r) The Province/ City/ Municipality exists and operates in its governmental and proprietary capacities thereby making the Province/ City/ Municipality an agent of and is therefore accountable to the State and its community.
- (s) The Province/ City/ Municipality must develop into a self-reliant community, and as such, is in a better position to address and resolve matters that are local in scope.
- (t) Under Section 18 of the of Republic Act No. 7160 of the Local Government Code of 1991 (1991 LGC), the Province/ City/ Municipality may acquire, develop, lease, encumber, alienate, or otherwise dispose of real or personal property held by them in their proprietary capacity and to apply their resources and assets for productive, developmental, or welfare purposes.
- (u) Under Section 22 (c) of the 1991 LGC, no contract may be entered into by the Provincial Governor/ City Mayor/ Municipal Mayor on behalf of the Province/ City/ Municipality without prior authorization from the Sanggunian Panlalawigan/ Panlungsod/ Bayan. The participation of the Sanggunian is thus indispensable in the adoption and implementation of a JV arrangement.
- (v) Under Section 22 (d) of the 1991 LGC, the Province/ City/ Municipality enjoys full autonomy in the exercise of its proprietary functions and shall exercise the powers expressly granted, those necessarily implied therefrom, as well as powers necessary, appropriate, or incidental for its efficient and effective governance, those not otherwise prohibited by law and those which are essential to the promotion of the general welfare.
- (w) Under Section 25 (b) of the 1991 LGC, the Province/ City/ Municipality may collaborate or cooperate with other LGUs, national government agencies (NGAs), government-owned and controlled corporations (GOCCs), government instrumentalities (GIs) and government corporate entities (GCEs) for the implementation of local JV projects.
- (x) Under the charter of the Province/ City/ Municipality, Sections 16, 17, 19 and 129 of 1991 LGC and other statutes, the Province/ City/ Municipality has been given the responsibility and mandate to exercise devolved and delegated powers.
- (y) The Province/ City/ Municipality, under Section 106 of 1991 LGC, is mandated to draw up and implement a comprehensive multi-sectoral development plan. JVs shall be pursued by the Province/ City/ Municipality consistent with its

infrastructure, development, investment, environmental and governance framework embodied in relevant policies, plans, ordinances and codes.

- (z) The Province/ City/ Municipality, as a partner in a JV arrangement, may provide money, capital, land, assets, intellectual property, personnel, services, franchise, equity, subsidy or guarantee and use local funds; and the usage thereof for a JV project shall be considered for public use and purpose.
- (aa) The Province/ City/ Municipality, under Section 3 (l) of the 1991 LGC, is duty-bound to ensure the active participation of the private sector in local governance. In the selection of the private sector proponent (PSP), the three core requirements – competition, transparency and accountability – must be complied with.
- (bb) The right of the people to information on matters of public concern is guaranteed under Section 7, Article III of the 1987 Constitution. Furthermore, it is the policy of the State to allow full public disclosure of all its transactions involving public interest such as JV agreements (JVAs) under Section 28, Article II of the 1987 Constitution.
- (cc) The people's right to effective and reasonable participation and public trust provision under Section 16, Article XIII and Section 1, Article XI, respectively, of the 1987 Constitution guarantee and empower civil society groups to have effective and meaningful participation in the regulation and management of JV projects.

Sec. 4. *Rationale for JVs.* – In pursuing JVs, the Province/ City/ Municipality shall be guided by the following reasons and drivers:

- (a) JVs shall be promoted to provide more, better, affordable and timely services to the community. JVs shall be undertaken in furtherance of the Province's/ City's/ Municipality's vision, mission and development and physical framework plan.
- (b) JVs shall promote the pooling and community of resources, sharing of responsibilities and functions, joint governance and decision-making, mutual innovation, and profit, income, dividends, risk and loss allocation.
- (n) JVs shall encourage the accelerated implementation of local projects, allow for technology transfer, and improved efficiency and quality of service, provide value-for-money and good economic value, enhance economic and social benefits.

- (o) Procurement of JV Projects must be competitive and must be undertaken through open competitive bidding or competitive challenge, or in certain cases, limited negotiations. Competition must be legitimate, fair and honest. The selection of the private sector co-venturer must be done in compliance with the requirements of competition, transparency and accountability.

Sec. 5. *Rules of Interpretation.* – This Ordinance and the provisions hereof shall be liberally interpreted to accomplish the policy and objectives herein set forth.

Sec. 6. *Definition of Terms.* – As used in this Ordinance, the following terms shall mean:

- (gg) *Competitive Challenge or Swiss Challenge* - An alternative selection process wherein third parties or challengers shall be invited to submit comparative proposals to an unsolicited proposal. Accordingly, the PSP that submitted the unsolicited proposal, or the original proponent, is accorded the right to match any superior offers given by a comparative PSP/ challenger.
- (hh) *Competitive Selection or Bidding or Open Competition* - A method of selection or procurement initiated and solicited by the Province/ City/ Municipality, based on a transparent criteria, which is open to participation by any interested party.
- (ii) *Contractual JV* - A legal and binding agreement under which the JV Partners shall perform the primary functions and obligations under the JVA without forming a JV Company.
- (jj) *Cost of JV Activity/Project* - The total amount of the contributions of the parties to the JV activity/project in present value with discount rate.
- (kk) *Cost Sharing* - The capital expenses made by the Province/ City/ Municipality associated with the establishment of an infrastructure development facility such as the provision of access infrastructure, right-of-way, and any partial financing of the project.
- (ll) *Credit Enhancement* - The direct and indirect support to a development facility by the PSP and/or Province/ City/ Municipality, the provision of which is contingent upon the occurrence of certain events and/or risks, as stipulated in the JVA. Credit enhancements are allocated to the party that is best able to manage and assume the consequences of the risk involved. Credit enhancements may include but are not limited to government guarantees on the performance or the obligation of the Province/ City/ Municipality under its contract with the PSP, subject to existing laws on indirect guarantees. Indirect Guarantees shall

refer to an agreement whereby the Province/ City/ Municipality assumes full or partial responsibility for or assists in maintaining the financial standing of the PSP or project company in order that the PSP/ project company avoids defaulting on the project loans, subject to fulfillment of the PSP/ project company of its undertakings and obligations under the JVA.

- (mm) *Developmental Projects* – Provincial/ City/ Municipal Projects normally financed and operated by the Province/ City/ Municipality, but which will now be wholly or partly financed, constructed and/ or operated by the PSP; projects that will advance and promote the general welfare and public good; projects and activities that will be responsive to the needs of the communities; projects that will raise revenues for the Province/ City/ Municipality; projects in furtherance of devolution, deconcentration and decentralization; and other infrastructure, social-related and developmental projects as may be authorized by the Province/ City/ Municipality.
- (nn) *Direct Provincial/ City/ Municipal Equity* - The subscription by the Province/ City/ Municipality of shares of stock or other securities convertible to shares of stock of the JV Company whether such subscription will be paid by money or assets.
- (oo) *Direct Provincial/ City/ Municipal Guarantee* - An agreement whereby the Province/ City/ Municipality guarantees to assume responsibility for the repayment of debt directly incurred by the PSP in implementing the project in case of a loan default.
- (pp) *Direct Provincial/ City/ Municipal Subsidy* - An agreement whereby the Province/ City/ Municipality shall: (a) defray, pay or shoulder a portion of the JV project cost or the expenses and costs in operating and maintaining the project; (b) condone or postpone any payments due from the PSP; (c) contribute any property or assets to the project; (d) waive or grant special rates on real property taxes on the project during the term of the contractual arrangement; and/ or (e) waive charges or fees relative to the business permits or licenses that are to be obtained for the construction of the project, all without receiving payment or value from the PSP or operator for such payment, contribution or support.
- (qq) *Divestment or Disposition* - The manner or scheme of taking away, depriving, withdrawing of title to a property owned by the Province/ City/ Municipality and vesting ownership thereof to a PSP.
- (rr) *Project Study* - A study prepared by the Province/ City/ Municipality in a competitive selection or a PSP when submitting an unsolicited proposal, which indicates the following: needs analysis, affordability assessment, value for money

assessment, preliminary risk assessment, stakeholder assessment, human resource assessment, bankability assessment, legal viability assessment, market testing if relevant, indicative transaction implementation plan, and draft JVA. The Project Study may be a feasibility study, pre-feasibility study or business case.

(ss) *JV Company* – A stock corporation, formed by the Province/ City/ Municipality and the PSP, fifty percent (50%) or less of the outstanding capital stock of which is owned by the Province/ City/ Municipality.

(tt) *JV Partner or Private Sector Proponent (PSP)* - The private sector entity which shall be the JV partner of the Province/ City/ Municipality for the JV project or activity and which shall have an adequate track record in the concerned industry, as well as technical capability and financial base consisting of equity and firm commitments from reputable financial institutions, to provide, upon award, sufficient credit lines to cover the total estimated cost of the project to implement the said project. The JV Partner or PSP may be a consortium or private JV.

(uu) *Negotiated Projects* - The instances where the desired project is the result of an unsolicited proposal from a PSP or, where the Province/ City/ Municipality has failed to identify an eligible private sector partner for a desired JV activity when there is only one qualified bidder after subjecting the same to a competitive selection or bidding.

(vv) *Public-Private Partnerships (PPP)* - PPP is a form of legally enforceable contract between the Province/ City/ Municipality and a PSP, where each party assumes specified functions, bears certain risks, provides contribution or renders some obligation, and earns benefits and revenues from the PPP arrangement.

(ww) *Unsolicited Proposal* - Refers to project proposals submitted by a PSP to the Province/ City/ Municipality to undertake a JV Project without a formal solicitation issued by the Province/ City/ Municipality whereby the negotiated terms shall be subjected to comparative proposals.

**Sec. 7. JV Arrangement.** – (a) A JV, a PPP modality, is a contractual arrangement between the Province/ City/ Municipality and a JV PSP or a group of private sector entities as co-venturers involving a community or pooling of interests in the performance of the service, function, business, activity or components of the JV project, with each party having a right to direct and govern the policy in connection therewith, and with a view of sharing income, dividends, revenues, profits, risks and losses, subject to the JVA.

(b) The term of the JV activity should be a fixed period not to exceed a maximum of fifty (50) years.

(c) The JV activity may, subject to the terms of the competitive selection process, include the divestment, disposition or transfer of ownership of the JV activity, asset or project to the PSP or JV partner. The divestment or disposition may take place at the end of the JV period or before the term ends.

(d) The Province/ City/ Municipality, by mutual agreement in a Government-to-Government arrangement with other LGUs, NGAs, GOCCs, GIs and GCEs, may implement JV Projects for projects located within the Province's/ City's/ Municipality's territory or those projects that will benefit the Province/ City/ Municipality and its community even if the project site is outside the Province's/ City's/ Municipality's territory; provided, that the collaborating or partner government entity jointly undertakes with the Province/ City/ Municipality the selection of the PSP.

*Sec. 8. Contributions and Shareholdings.* – (a) The co-venturers or parties to a JV shall contribute money, capital, services, personnel, assets including equipment, land, intellectual property or anything of value, or a combination of any or all of the foregoing to the JV arrangement. The contribution of the Province/ City/ Municipality shall be subject to third party independent valuation.

(b) The Province/ City/ Municipality may allocate a portion of its Internal Revenue Allotment, real property tax, development fund, regular funds, proceeds from the utilization and development of its national wealth, Special Education Fund when the JV project is education-related, Calamity Fund when the JV project is calamity- or reconstruction-related, and special funds, if appropriate, as its contribution or share in the JV activity. These may be the actual or current funds, or future or monetized value of these funds of the Province/ City/ Municipality.

(c) The Province/ City/ Municipality may contract a loan, avail of Official Development Assistance, secure grants, issue bonds, debentures, securities, collaterals, and notes the proceeds of which can be earmarked for the JV activity.

(d) On the part of the Province/ City/ Municipality, in addition to the foregoing contributions, it may extend goodwill, free carry, grant a franchise, concession, usufruct, right-of-way, equity, subsidy or guarantee, provide cost-sharing and credit enhancement mechanisms, exercise police power, give tax incentives or tax holidays, perform devolved powers, expropriate and reclassify and enact or integrate zoning ordinances.

(e) The Province/ City/ Municipality shall be a minority equity or shareholder while the PSP shall be majority equity or shareholder, except in the case where fifty percent (50%) of the outstanding capital stock or contribution is owned or made by the Province/ City/ Municipality. A reasonable percentage of the equity to be provided by the PSP should come from its own resources and not borrowed.

(f) Notwithstanding having only a minority share or equity, the written consent of the Province/ City/ Municipality may be obtained, based on the JVA, prior to any divestment of any asset or facility, dissolution, transfer or sale of share or equity on the part of the PSP, purchases or transactions beyond prescribed thresholds, or other activities which may affect the rights and stake in the Project of the Province/ City/ Municipality.

(g) Any cost avoidance or substantial savings that will be made by the Province/ City/ Municipality because of and directly attributable to the JV activity may be factored in the computation of the respective shares of the Province/ City/ Municipality and the PSP.

(h) For the utilization and development of natural resources located within its jurisdiction, the Province/ City/ Municipality shall be entitled to an equitable share which may come in the form of a portion of the benefits, revenues and profits thereof.

(i) The share of each JV party shall be set as fixed or determinable percentages or values either based on an overall or across-the-board assignment of contributions, revenues, profits, losses, risks and functions; or on specific assignment of contributions and functions to each JV party, provided that, the agreed percentage share is maintained and that joint governance is ensured where the Province/ City/ Municipality shall have representation in the governing structure based on in proportionate share at the minimum.

(j) Subject to the terms of the competitive selection process and agreement of the parties, the Province/ City/ Municipality may be entitled to a share greater than its contribution or equity.

(k) Each party shall be entitled to dividends, profits, income and revenues and will bear the corresponding risks, losses and obligations in proportion to its share, either based on gross or net revenues or income, unless the parties agree that the Province/ City/ Municipality will have a greater share in the dividends, profits, income and revenues and/ or bear lower risk and percentage loss than what it contributes to the JV arrangement.

(l) For as long as the Province/ City/ Municipality is involved in the JV undertaking, the PSP shall not sell/transfer its interest in the JV Company without the express written consent of the Province/ City/ Municipality.

(m) The share or equity of the Province/ City/ Municipality in the JV arrangement may be advanced, in full or in part, by the PSP where the PSP shall be paid from the future revenues due the Province/ City/ Municipality either by set-off or actual payment.

(n) Any subsidy, guarantee, equity or contingent liability assumed or given by the Province/ City/ Municipality must be reflected, disclosed and recognized in the annual appropriations of the Province/ City/ Municipality.

Sec. 9. *JV Agreement.* – (a) The JVA shall govern the relationship between the co-venturers, the Province/ City/ Municipality and PSP. The JVA shall be a public document which can be freely accessed by the public, shall be posted in two conspicuous places of the Province/ City/ Municipality and uploaded in the website of the Province/ City/ Municipality.

(b) The JVA shall contain the following provisions:

1. The date on which the agreement is established, executed, and considered effective;
2. The names, addresses and identification of the parties, including the type of business of each member of the JV;
3. The name under which the JV will do business;
4. The principal place of business of the JV;
5. Clearly defined purpose and objective/s, contractual/agreement mode (whether JV Company/Corporate JV or contractual JV), term and scope of the JV;
6. The term of the JV activity;
7. Total cost of the JV activity, project specifications and features;
8. The relationship between the parties, management roles of each party in the JV activity, and a statement that the parties are actually co-venturers for the project, whether or not the contract is in the name of all members;
9. The establishment of a fund by the parties to finance the work, together with the amount, type (cash, assets, etc.), and valuation of committed contributions of each party and when such contributions will be made, with the fund being deposited in a special bank account under dual control and all progress payments and other revenues being deposited in such account. If the equity/contribution of the private sector is to be

- borrowed, a statement that a provincial/ city/ municipal government guarantee for said loan will be extended or not;
10. Procedure for additional capital infusions, if required, and a statement that a provincial/ city/ municipal government guarantee for loans to be incurred by the private sector in case the additional contribution of the private sector is to be borrowed will be extended or not;
  11. A declaration of the participation of the parties and percentage in which profits and losses are shared, in proportion to the contributions of the party to the working fund. The amount of contribution of funds by the parties can be increased or decreased, depending on the contributions of equipment or expertise;
  12. The formation of a governing board or equivalent structure in the case of a Contractual JV and a board of directors in case of a Company JV;
  13. Specified termination/liquidation of the JV Company, buy-out provisions, and details on the transfer of ownership of the JV activity/facility including provisions on what happens to the JV's assets after the expiration of the JV agreement or end of the JV period. If equity other than cash is to be contributed, a statement as to how the property will be valued and the ownership of the property during and after the effectivity of the JVA;
  14. Designation of one of the parties as general manager of the project, with authority to bind the JV Company/Partnership/Parties; or, in the alternative, the constitution of a management committee, with a provision for remuneration. The basic management structure, management duties, other duties of the co-venturers and procedures to be followed in dealing with unusual situations or problems that may develop should be specified;
  15. Implementation milestones, regular meeting schedules, financial and periodic JV and progress reporting procedure;
  16. Establishment of a JV bank account, and the appointment of a chartered accountant and lawyer;
  17. Provide for the acquisition of licenses in the name of the JV or each co-venturer, as required;
  18. Type of insurance carried by the JV and clearly defined liabilities to be insured against by each participant;
  19. Definition of items which are to be considered as costs to the JV for the purpose of determining profit or loss and a description of items which are not reimbursable to members of the JV and specified division of the profits and, risks and losses;
  20. Confidentiality of trade information passed between the co-venturers;
  21. Ownership or retention of patents, technology, and consultant reports;
  22. Performance security requirements of the project and the bonding obligations of the co-venturers;

23. Undivided pro-rata interests held by the co-venturers on all assets of the JV;
24. Restriction regarding assignment of private sector participant's undivided pro-rata interests in assets of the JV;
25. Cost recovery scheme, including payment to the government of royalties/rights, the form/description and amount of earnings (cash, asset, etc.), whether it is in absolute amounts or variable, and the period and timing such earnings or payment shall be received. In case of non-cash payment or payment in form of asset, a statement/provision on how it will be valued, the minimum value of the asset, and the determination/selection of asset such as how and who will determine/select the asset;
26. Indemnification and liquidated damages;
27. Performance and warranty bonds;
28. Minimum insurance coverage;
29. Acceptance tests and procedures;
30. Validity of the performance security, warranty period and procedures;
31. Grounds for and effects of contract termination/default including modes for settling disputes, procedure for handling guarantees, defects and insurance after termination, and threshold (in terms of amount, time/period, or both) for which non-payment or delay in payment and delay in starting the project/s shall be grounds for termination/rescission of the JV contract/agreement;
32. The manner and procedures for the resolution of warranty against corruption;
33. Compliance with all other laws, rules and regulations;
34. Procedure and/or period for withdrawal by the government entity of its contribution to the JV, or exit divestment by the Government Entity of its interest in the JV, and Substitution or addition of parties;
35. Payout of funds;
36. Alternative Dispute Resolution;
37. Disputes arbitration clause; and
38. Anti-Corruption warranties.

(b) All JVAs must be signed by the Provincial Governor/ City Mayor/ Municipal Mayor with prior authorization by the Sanggunian Panlalawigan/ Panlungsod/ Bayan, and the duly authorized representative of the PSP. The direct and ultimate beneficiary of any JVA shall be the constituents of the Province/ City/ Municipality.

(c) The Provincial Governor/ City Mayor/ Municipal Mayor shall not proceed with the award and signing of the contract if there are material deviations from the parameters and terms and conditions set forth in the proposal/tender documents

that tend to increase the financial exposure, liabilities and risks of the Province/ City/ Municipality or any other factors that would cause disadvantage to government and any deviation that will cause prejudice to losing PSPs.

(d) Any amendment to a JVA, which if effected will not violate the policy on competition and fairness and does not materially affect the substance of the JVA, after award and signing of contract shall undergo approval by the Provincial Governor/ City Mayor/ Municipal Mayor with prior authorization by the Sanggunian Panlalawigan/ Panlungsod/ Bayan. Non-compliance with the corresponding approval process stated shall render the amendment null and void.

(e) The regulation of the JV shall be pursuant to the JVA. A duly executed JVA shall be respected and not impaired, and shall be binding on the successor administration pursuant to the provision on corporate succession. Procedures, activities and steps duly undertaken by the Provincial Governor/ City Mayor/ Municipal Mayor, PPP-SC, and Sangguniang Panlalawigan/ Panlungsod/ Bayan pursuant to this Ordinance shall be continued by the successor Administration. Any amendment or revision to this Ordinance by the next Administration shall not in any way prejudice vested and contractual rights of the Province/ City/ Municipality and the PSPs as to the substance of agreements signed, certifications issued, resolutions issued and procedures undertaken.

(f) While the JVA is already valid, perfected and enforceable, the JVA may be submitted for judicial, executive or administrative confirmation from the courts or appropriate government institutions.

(g) A JVA with a PSP pertains to the JV activity or project identified in the JVA.

Sec. 10. *JV Projects.* – (a) The Province/ City/ Municipality, regardless of the cost, may undertake developmental projects.

(b) JVs may be undertaken for the delivery of certain basic services, capability-building and livelihood projects, to develop local enterprises designed to improve productivity and income, diversify agriculture, spur rural industrialization, promote ecological balance, and enhance the economic and social well-being of the people.

(c) In particular, the Province/ City/ Municipality may enter into JV arrangements for developmental projects such as but not limited to energy and power, renewable energy, waste-to-energy, roads, bridges, causeways, waterways, highways, ports, wharfs, terminals, airports, community airports, canals, dams, desilting, dredging, mining and exploration, hydropower projects, water supply and distribution, sewerage, irrigation, drainage, water conservation such as impoundment areas and

rainwater harvesting, telecommunications, railroad and railways, short-haul transit services such as monorail, guided bus, bus services and trams, intermodal and multi-modal transit systems, transport systems, traffic control and management, parking facilities, reclamation projects, platform settlements, industrial estates or townships, central business and industrial park development, hotels and resorts, socialized housing, non-conventional low-cost housing, settlement/ resettlement and relocation facilities, residential subdivisions, parks and open space development/ redevelopment, pocket parks, public art, libraries, heritage conservation, government buildings, sustainable/ green public buildings, sports facilities, wellness establishments, tourism such eco-tourism, wellness tourism and agri/agro-tourism, public markets, commercial buildings, slaughterhouses, storage buildings, warehouses, cold storage, solid waste management, sanitary landfills, meeting and convention centers, information technology networks and database infrastructure, education-related, classrooms, health facilities, hospitals, social services-related, prisons, agriculture-related, post-harvest facilities, environmental management and protection, climate change adaption, disaster risk reduction, among other developmental projects.

(d) The Province/ City/ Municipality shall identify specific priority developmental projects enumerated in its comprehensive multi-sectoral development plan, and development and physical framework plan for JV arrangements.

(e) Parties to a JV jointly undertake an activity in order to accomplish either an integrated or multi-use arrangement or specific goal or purpose with the end view of serving the public good, facilitating private sector initiative in a particular industry or sector, and eventually transferring ownership of the investment activity to the PSP under competitive market conditions.

(f) In case of a project or activity requiring a franchise, concession or license to operate, the winning PSP, in case of a contractual JV, shall automatically be granted by the Province/ City/ Municipality the franchise or license or permit to jointly operate and maintain the facility with the Province/ City/ Municipality, including the collection of tolls, fees, rentals, and other charges in accordance with the schedules stipulated in the approved JVA. In case a JV Company is formed, the franchise, concession or license shall be automatically granted to the JV Company. Upon the signing of the JVA by the Governor/ Mayor pursuant to the authority given by the Sangguniang Panlalawigan/ Panlungsod/ Bayan, the franchise, concession or license is deemed awarded to the winning PSP, in case of a contractual JV, or the JV company. The original franchise period as stipulated in the JVA may be extended, as may be authorized by the Province/ City/ Municipality, provided that the total franchise period shall not exceed fifty (50) years.

(g) Procurement made by the Province/ City/ Municipality using public funds shall be subject to the GPRA and its Revised Implementing Rules and Regulations. Procurement made by the PSP using private funds shall not be covered by said statute.

(h) The revenues, funds, expenditures and contributions of the Province/ City/ Municipality shall be subject to the audit examination by the Commission on Audit (COA). Revenues, funds, expenditures and contributions of the PSP shall be subject to audit by a private auditing firm.

*[Alternatively, “the revenues, funds, expenditures and contributions from the Province/ City/ Municipality and from the PSP are subject to audit by the COA.”]*

Sec. 11. *JV Vehicle.* – (a) The Province/ City/ Municipality and the PSP have the option to implement the JV activity through a Contractual or Unincorporated JV, or establish a JV or Incorporated Company.

(b) The JV Company shall be formed by the Province/ City/ Municipality and the PSP under the following parameters:

1. The JV Company shall be incorporated and registered as a stock corporation in accordance with the provisions of Batas Pambansa Bilang 68, otherwise known as the Corporation Code of the Philippines, as amended, and the prevailing and applicable rules and regulations promulgated by the Securities and Exchange Commission;
2. Ownership and nationality requirements under the Constitution and other pertinent laws should be complied with;
3. The Province/ City/ Municipality shall be represented in the Board of the JV Company in proportion to its investment unless more seats are allotted for the Province/ City/ Municipality;
4. The JV Company shall be permitted to derive income from the activities authorized under the JVA during the term thereof. The Province/ City/ Municipality and the PSP shall be entitled to receive dividends each year from the net profits that would constitute portion of the unrestricted retained earnings of the company in each year in accordance with the JVA; and
5. The JV Company should stipulate a fixed period for term of existence not to exceed a maximum of fifty (50) years.

Sec. 12. *JV Procedural Requirements.* – (a) If the Province/ City/ Municipality opts to select a PSP using either Competitive Selection or Competitive Challenge, the Province/ City/ Municipality in the Competitive Selection must prepare, and the PSP

in the Competitive Challenge approach must submit a Project Study. The costs of preparing the Project Study may be reimbursed by the winning PSP to the Province/ City/ Municipality or Original Proponent, as the case may be, subject to the terms of the bidding/ challenge.

(b) There is hereby created a JV - Selection Committee (JV-SC) for purposes of selecting a PSP for a specific JV Project. The JV-SC, to be constituted and convened by the Provincial Governor/ City Mayor/ Municipal Mayor, shall be composed of the following:

- (vii) Chairperson – At least a third ranking officer of the Province/ City/ Municipality;
- (viii) Secretary – Provincial/ City/ Municipal Legal Officer;
- (ix) The Provincial/ City/ Municipal Treasurer;
- (x) The Provincial/ City/ Municipal Planning and Development Officer;
- (xi) One (1) representative from and selected by the Sanggunian Panlalawigan/ Panlungsod/ Bayan designated in an appropriate resolution; and
- (xii) Two (2) representatives from and chosen by the accredited civil society groups, people's and non-governmental organizations who are members of the Provincial/ City/ Municipal Development Council.

A quorum of the JV-SC shall be composed of a simple majority of all voting members. The Chairperson shall vote only in case of a tie.

The JV-SC with the approval of the Provincial Governor/ City Mayor/ Municipal Mayor may invite provisional non-voting members from the national government agencies, regulatory agencies, NEDA, DILG, COA and the private sector to observe in the proceedings of the JV-SC; and form a support staff composed of employees and staff of the Province/ City/ Municipality.

(c) The JV-SC shall be responsible for all aspects of the pre-selection and selection process, including, among others, the preparation or evaluation of the Project Study and selection/ tender documents; determination of the minimum designs, performance standards/ specifications, economic parameters or appropriate tariff-setting mechanism; drafting or evaluation of the JVA; publication of the invitation to apply for eligibility and submission of proposals or comparative proposals; defining the eligibility requirements, appropriate form and amount of proposal securities, and schedules of the selection and challenge processes; pre-qualification of prospective PSPs, bidders or challengers; conduct of pre-selection conferences and issuance of supplemental notices; interpretation of the rules regarding the selection process; conduct of the selection or challenge process; evaluation of the legal, financial and technical aspects of the proposals; resolution of disputes between PSPs

and challengers; defining the appeals mechanisms; and recommendation for the acceptance of the proposal and/ or for the award of the contract.

(d) All recommendations of the JV-SC shall be submitted to the Provincial Governor/ City Mayor/ Municipal Mayor for consideration and approval. The Provincial Governor/ City Mayor/ Municipal Mayor shall approve the tender documents and the draft JVA before they are issued to the prospective PSPs/ bidders.

(e) All JVAs must be signed by the Provincial Governor/ City Mayor/ Municipal Mayor with prior authorization by the Sanggunian Panlalawigan/ Panlungsod/ Bayan.

(f) During the consideration of the draft JVA by the Sanggunian Panlalawigan/ Panlungsod/ Bayan, a public consultation/ hearing shall be conducted explaining the JV Project, draft JVA, accountability mechanisms built into the JV arrangement, the benefits and costs of the JV Project, among other relevant matters.

(g) After the signing of the JVA by the Provincial Governor/ City Mayor/ Municipal Mayor, the JV-SC shall issue the Notice of Award to the PSP.

Sec. 13. *Competitive Procedures.* – (a) In the selection of the PSP, there shall be procedures available for the Province/ City/ Municipality, i.e., Competitive Selection, Limited Negotiations, and Competitive Challenge.

(b) The Competitive Selection procedure shall consists of the following steps: advertisement, issuance of instructions and tender documents, conduct of pre-bid conferences, eligibility screening of prospective bidders, receipt and opening of bids, posting of proposal securities, evaluation of bids, post-qualification, and award of contract.

(c) Where the Province/ City/ Municipality:

- i. fails to identify an eligible PSP for a desired JV activity when there is only one qualified bidder after subjecting the same to a competitive selection or bidding, or
- ii. considers a project or activity either through competitive selection or competitive challenge where an indispensable or integral component thereof has already been subjected to a competitive process by the appropriate administrative agency, government instrumentality or government-owned and -controlled corporation which gives the PSP/ offerer a vested and exclusive right over that component without which,

the PPP Project cannot be implemented as envisioned, Limited Negotiations may take place.

The negotiations will cover all the technical and financial aspects of the JV project or activity; provided, that the minimum designs, performance standards/ specifications and economic parameters stated in the Feasibility or Project Study and Terms of Reference for the Competitive Selection are complied with. The Provincial Governor/ City/ Municipal Mayor shall approve the terms of the Limited Negotiations prior to the award of the contract to the PSP. Under the 2<sup>nd</sup> instance, the Province/ City/ Municipality shall publish a notice to the public prior to the start of the negotiations, and if pursued under Competitive Challenge, the 3<sup>rd</sup> stage as defined below may be dispensed with.

(d) The Competitive Challenge process shall be divided into three (3) Stages, described as:

Stage One/ Unsolicited Proposal – The steps are:

- (v) A PSP submits an unsolicited proposal accompanied by a Project Study and draft JV Agreement to the Province/ City/ Municipality for a projected JV Project.
- (vi) The JV-SC shall make a determination of the completeness of the unsolicited proposal, the eligibility of the PSP, the necessity for the proposed project, the consistency of the terms of the draft JV Agreement with this Ordinance,, and the appropriateness of the JV modality.
- (vii) Upon completion of the initial evaluation, the Provincial Governor/ City Mayor/ Municipal Mayor, upon recommendation of the JV-SC, shall either issue a certificate of acceptance or non-acceptance of the proposal for purposes of detailed negotiations. Upon the issuance of the certificate of acceptance, the PSP is *ipso facto* conferred original proponent status and no other proposal for the same project may be subjected to the competitive challenge process.
- (viii) If there is more than one unsolicited proposal submitted for the same JV Project, the Provincial Governor/ City Mayor/ Municipal Mayor, upon recommendation of the JV-SC, may reject all proposals and pursue competitive selection, or accept the unsolicited proposal that is complete and provides the greater advantage and benefits to the community and revenues to the Province/ City/ Municipality.

Stage Two/ Detailed Negotiations – The steps are:

- (v) The parties shall negotiate and agree on the terms and conditions of the JV Project concerning its technical and financial aspects.
- (vi) Once negotiations are successful, the Parties shall issue a joint certification stating that an agreement has been reached and specifying the eligibility of the PSP and the technical and financial aspects of the JV Project as agreed upon.
- (vii) The issuance of the certification commences the activities for the solicitation for comparative proposals.
- (viii) However, should negotiations not result to an agreement acceptable to both parties, the Province/ City/ Municipality shall have the option to reject the proposal by informing the PSP in writing stating the grounds for rejection and thereafter may accept a new proposal from other PSPs, decide to pursue the proposed activity through other PPP Modalities or subject the JV Project to a Competitive Selection.

Stage Three/ Competitive or Swiss Challenge – The steps are:

- (vii) The JV-SC shall prepare the tender documents. The eligibility criteria used in determining the eligibility of the private sector entity shall be the same as those stated in the tender documents. Proprietary information shall, however, be respected and protected, and treated with confidentiality. As such, it shall not form part of the tender and related documents.
- (viii) The Provincial Governor/ City Mayor/ Municipal Mayor shall approve all tender documents including the draft contract before the publication of the invitation for comparative proposals.
- (ix) The JV-SC shall publish the invitation for comparative proposals.
- (x) The PSP or Original Proponent shall post the proposal security at the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.
- (xi) In the evaluation of proposals, the best offer shall be determined to include the original proposal of the PSP. If the Province/ City/ Municipality determines that an offer made by a comparative PSP or challenger other than the negotiated terms with original proponent is superior or more advantageous to the Province/ City/ Municipality than the original proposal, the PSP who submitted the original proposal shall be given the right to match such superior or more advantageous offer. Should no matching offer be received within the stated period, the JV Project shall be awarded to the comparative PSP submitting the most advantageous proposal. If a matching offer is received within the prescribed period, the JV Project shall be awarded to the original proponent. If no comparative proposal is received by the Province/ City/ Municipality, the JV Project shall be immediately awarded to the original proponent.

(xii) In the event that the Original Proponent is not able to match the superior offer of the challenger, the winning challenger shall reimburse, within 30 days from issuance of the notice of award, the original proponent the cost of preparing the project study, provided, that this reimbursement arrangement and the cost of preparing of the project study are expressly stated in the terms of reference for the competitive challenge, and that the JV-SC has determined that the cost is reasonable.

(e) The Provincial Governor/ City Mayor/ Municipal Mayor through an executive order, upon recommendation of the JV-SC, shall have the authority to adopt and prescribe the appropriate schedules and timelines for each PSP selection process: provided, that the periods are reasonable and will not undermine free competition, transparency and accountability.

Sec. 14. *JV Regulatory Authority's Mandate.* – (a) There shall be a JV Regulatory Authority (JV-RA) which shall be composed of the following:

- (viii) Chairperson – The Provincial Governor/ City Mayor/ Municipal Mayor or the Provincial/ City/ Municipal Administrator if so designated by the Mayor;
- (ix) Vice-Chairperson – Vice-Governor/ Vice-Mayor or a member of the Sanggunian Panlalawigan/ Panlungsod/ Bayan to be chosen by the Sanggunian as evidenced by an appropriate resolution;
- (x) Two (2) representatives of the Sanggunian Panlalawigan/ Panlungsod/ Bayan belonging to two (2) distinct registered political parties to which the Provincial Governor/ City Mayor/ Municipal Mayor does not belong to chosen on the basis of proportional representation of all parties represented in the Sanggunian Panlalawigan/ Panlungsod/ Bayan;
- (xi) Provincial/ City/ Municipal Legal Officer;
- (xii) Provincial/ City/ Municipal Treasurer;
- (xiii) Provincial/ City/ Municipal Planning and Development Officer; and
- (xiv) Two (2) representatives from and chosen by the accredited civil society groups, people's and non-governmental organizations who are members of the Provincial/ City/ Municipal Development Council. These representatives shall not be the same representatives in the JV-SC.

A quorum of the JV-RA shall be composed of a simple majority of all voting members. The Chairperson shall vote only in case of a tie.

The JV-RA with the approval of the Provincial Governor/ City Mayor/ Municipal Mayor may invite third party experts to attend its meetings to act as advisors and observers. Such third party experts may represent national government agencies, regulatory agencies, the NEDA, the DILG, COA, private sector, non-governmental organizations and civic groups.

The JV-RA may form a support staff composed of employees and personnel of the Province/ City/ Municipality. The JV-RA may also engage consultants hired pursuant to law.

(b) The JV-RA, on behalf of the Province/ City/ Municipality, shall be tasked with performing contract management functions, such as partnership management (i.e., corporate governance, communication and information sharing, and dispute resolution), performance or service delivery management (i.e., risk management and performance management), and contract administration (i.e., variation management, contract maintenance and financial administration). Aside from these, the JV-RA shall be responsible for setting and monitoring the tariff, and administering the subsidy pursuant to the JVA.

Sec. 15. *Accountability Mechanisms.* (a) Before commencing their functions, each member of the JV-SC and JV-RA shall sign a Code of Conduct, which shall guide each member in the performance of their duties as such.

Such Code of Conduct shall require each member to, among others:

1. act at all times in accordance with relevant legislation and regulations;
2. act at all times with fidelity, honesty, integrity and in the best interests of the Province/ City/ Municipality and its constituents;
3. recognize the public's right to access to information in accordance with law;
4. not misuse his or her position and privileges of a member of the JV-SC and JV-RA, whether or not such will prejudice the interest of the public, the PSP, or any third person;
5. to take the utmost care in ensuring reasonable protection of the records of each JV project, and to not disclose any confidential and proprietary information to persons without a need to know such information, or in violation of any non-disclosure requirements under law or contract;
6. carry out his or her duties with the skill and care expected from a person of knowledge and experience, and to exercise prudent judgment;
7. forthwith report to the appropriate authorities any act of negligence, fraud, corruption, misuse of government funds, failure or refusal to perform duties, or any other act which may constitute a crime or offense, or which is

- prejudicial to the public interest, in the selection of the PSP and implementation of a JVA;
8. forthwith declare any personal or business interest that he or she, or any of his or her relatives within the fourth degree of affinity or consanguinity, may have in any business of a PSP, in which case, the official or representative shall no longer be a member of the JV-SC and JV-RA;
  9. forthwith declare any conflict of interest, insofar as the JV Project concerned, that he or she may have or will have, in which case, the official or representative shall not longer be a member of the JV-SC and JV-RA;
  10. not vote or act in a particular way on any matter in consideration of any offer, promise, gift or present, from a member of the public, government, a political party, social group or non-governmental organization, or any stakeholder or potential stakeholder;
  11. not receive any gift or anything else of value which is or may be viewed as aimed at influencing or directing his or her vote or actions; and
  12. to disclose immediately to the JV-SC or JV-RA as the case may be, any attempted inducement that may be construed as aimed at influencing or directing his or her acts as a member of the JV-SC and JV-RA.

(b) The Province/ City/ Municipality shall ensure, promote and eliminate all obstacles to social accountability and allow and enhance constructive engagement between citizens' groups, academe, consumers, rate-payers, general public, Province/ City/ Municipality, national government agencies, regulatory agencies, and PSP.

Sec. 16. *Appropriations.* – To carry out the provisions of this Code, the amount of (amount) Pesos (P [figures]) shall be appropriated. Thereafter, such sums as may be necessary for the continuous implementation of this Code shall be included in the annual budget of the Province/ City/ Municipality.

Sec. 17. *Alternative Dispute Resolution.* – All JVAs of the Province/ City/ Municipality shall include a provision on the use of Alternative Dispute Resolution (ADR) mechanisms in resolving disputes arising from the JVA. All controversies in connection with JV undertakings and projects of the Province/ City/ Municipality shall likewise be addressed using ADR.

Sec. 18. *Implementing Rules.* – While this Code and the provisions hereof are already operative upon the Code's effectivity, the Provincial Governor/ City Mayor/ Municipal Mayor may issue the appropriate and relevant rules and regulation for the proper implementation of the Code or its provisions.

Sec. 19. *Application of Other PPP Laws and Regulations.* – Whenever relevant and appropriate as determined by the Provincial Governor/ City Mayor/ Municipal Mayor

and in the absence of a specific provision to the contrary, upon recommendation of the JV-SC and JV-RA as the case may be, the provisions of the BOT Law, GPRA, Executive Order No. 301 (26 July 1987), COA Circular No. 89-296 (January 27, 1989), and their applicable rules and regulations, and the 2008 or 2013 JV Guidelines adopted by the NEDA shall apply in a supplementary manner.

Sec. 20. *Separability Clause.* – If, for any reason, any section or provision of this Code or any part thereof, or the application of such section, provision or portion is declared invalid or unconstitutional, the remainder thereof shall not be affected by such declaration.

Sec. 21. *Repealing Clause.* – All ordinances and resolutions or parts thereof inconsistent with the provisions of this Code are hereby repealed or modified accordingly.

Sec. 22. *Effectivity.* – This Code shall take effect fifteen (15) days after its posting in two conspicuous places within the Province/ City/ Municipality.

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## C. PROPOSED LGU LEASE ORDINANCE

November 23, 2014

Ordinance No. \_\_\_\_\_

Series of 20\_\_\_\_

### **A PROVINCIAL/ CITY/ MUNICIPAL ORDINANCE PRESCRIBING GUIDELINES AND PROCEDURES FOR ENTERING INTO LEASE AGREEMENTS OVER REAL PROPERTIES OWNED BY THE PROVINCE/ CITY/ MUNICIPALITY WITH PRIVATE ENTITIES, CONSISTENT WITH PERTINENT LAWS, RULES AND REGULATIONS**

WHEREAS, Section 2, Article X of the 1987 Philippine Constitution mandates that all local government units (LGUs) shall enjoy local autonomy and administrative autonomy;

WHEREAS, further Section 5, Article X of the Constitution directs that each LGU shall have the power to create its own sources of revenues and by virtue of this right, LGUs shall enjoy fiscal autonomy;

WHEREAS, Section 2(a) of Republic Act No. 7160, otherwise known as the Local Government Code of 1991 (LGC), declares it a policy of the State that its territorial and political subdivisions shall enjoy genuine and meaningful local autonomy to enable them to attain their fullest development as self-reliant communities and to make them more effective partners in the attainment of national goals;

WHEREAS, Section 5(a) of the LGC further provides that any provision on the power of a LGU shall be liberally interpreted in its favor. Any fair and reasonable doubt as to the existence of the power shall be interpreted in favor of the local government unit concerned;

WHEREAS, Section 18 of the LGC expressly empowers LGUs to establish an organization that shall be responsible for the efficient and effective implementation of their development plans, program objectives and priorities; to create their own sources of revenue and to allocate their resources in accordance with their own priorities; and to acquire, develop, lease, encumber, alienate, or otherwise dispose of real or personal property held by them in their proprietary capacity and to apply their resources and assets for productive, developmental, or welfare purposes, in the exercise or furtherance of their governmental or proprietary powers and functions and thereby ensure their development into self-reliant communities and active participants in the attainment of national goals;

WHEREAS, Section 22 of the LGC vests LGUs with corporate powers and grants them full autonomy in the exercise of their proprietary functions and in the management of their economic enterprises;

WHEREAS, the Province/ City/ Municipality owns real properties that remain undeveloped, underdeveloped and underutilized, which the Provincial/ City/ Municipal Government is very keen on maximizing the potential for development and revenue;

WHEREAS, the Provincial/ City/ Municipal Government believes that entering into lease contracts over real properties of the Province/ City/ Municipality is a viable Public-Private Partnership (PPP) approach worth exploring in view of the simplicity of procedures and approval process, as well as the very reasonable period to negotiate said contracts;

WHEREAS, according to the Governing Procurement Policy Board (NPM 135-2004 dated 14 October 2004), in case the government entity is leasing its existing assets, the activity does not involve expenditure of government funds, inasmuch as the same is not in the nature of procurement. Lease of assets, where the government is the lessor, contemplates income-generating activities and is well beyond the ambit of R.A. 9184;

WHEREAS, when the government, the Province/ City/ Municipality in this case, is the lessor in instances where it intends to lease out of government real property, the governing regulation is Executive Order No. 301, Series of 1987. However, E.O. 301 provides for decentralization of government contracts, leases included. Heads of agencies, like the Provincial/ City/ Municipal Government, shall have the authority to determine the reasonableness of the terms of the lease and the rental rates thereof, and to enter into such lease contracts without need of prior approval from higher authorities, subject to compliance with the uniform standards or guidelines established under the E.O. 301 and to the audit jurisdiction of the Commission on Audit;

WHEREAS, having a Provincial/ City/ Municipal framework on leases and affermage over Provincial/ City/ Municipal real properties, in ordinance form, will simplify, clarify, institutionalize the requirements for a lease arrangement and procedures for the selection of the Private Sector Proponent or Lessee that promote consistency, accountability, transparency and efficiency;

NOW THEREFORE, on motion of Board Member/ Councilor (name), duly seconded by Board Member(s)/ Councilor(s) (name[s]),

BE IT ORDAINED, by the *Sangguniang Panlalawigan/ Panlungsod/ Bayan* of (name) in session assembled that:

SECTION 1. *Title.* – This Ordinance shall be known as the “**Ordinance Governing Lease of Real Properties Owned by the Provincial/ City/ Municipal Government of (name)**” or the “**(Name) Lease Ordinance.**”

Sec. 2. *Statement of Policies.* – It is hereby declared the policy of the Province/ City/ Municipality to fully utilize and benefit from the Province’s/ City’s/ Municipality’s real properties in order to promote the general welfare, attain sustainable development and augment the resources of the Province/ City/ Municipality. A lease or affermage arrangement is considered a viable option for the efficient and productive use of Province’s/ City’s/ Municipality’s real properties, and to cut costs and/or generate resources, while at the same time promote the participation of private sector proponents/ lessees (PSP/Ls) as active partners towards a robust Provincial/ City/ Municipal economy.

Sec. 3. *Principles.* – All lease or affermage contracts entered into by the Province/ City/ Municipality with PSP/Ls shall ensure that the most advantageous terms and conditions to the Province/ City/ Municipality and its constituents.

Sec. 4. *Definition of Terms.* – For purposes of this Ordinance, the terms:

1. *Affermage* – refers to a contractual arrangement providing for use of a real property of the Province/ City/ Municipality and/ or the operation, maintenance, and management services by the PSP/L, including working capital and/or improvements to an existing infrastructure or development facility leased by the PSP/L from the Province/ City/ Municipality for a fixed term. The Province/ City/ Municipality and the PSP/L share revenue from customers/ locators/sub-lessees wherein the PSP/L pays the Province/ City/ Municipality an affermage fee, which varies according to demand and customer tariffs, and retains the remaining revenue;
2. *Bids and Awards Committee (BAC)* – refers to the Bids and Awards Committee of the Province/ City/ Municipality created under Republic Act No. 9184 or the Government Procurement Reform Act. The Provincial Governor/ City Mayor/ Municipal Mayor may expand the composition of the BAC for purposes of this Ordinance which may include representatives of the Sangguniang Panlalawigan/ Panglungsod/ Bayan, civil society organizations, academe, national government offices, regulatory agencies, National Economic and Development Authority, and Commission on Audit;

3. *Province/ City/ Municipality or Provincial/ City/ Municipal Government* – refers to the Provincial/ City/ Municipal Government of (name);
4. *Competitive Challenge* – refers to an alternative selection process wherein third parties or challengers shall be invited to submit comparative proposals to an unsolicited proposal submitted by the PSP/L. Accordingly, the PSP/L who submitted the unsolicited proposal, or the original proponent, is accorded the right to match any superior offers given by a comparative PSP/L;
5. *Competitive Negotiations* – refers to a process where the Province/ City/ Municipality negotiates with eligible and qualified PSP/Ls and awards the project to that PSP/L which offers the best combination of quality and price;
6. *Competitive Selection* – refers to a method of selection initiated and solicited by the Province/ City/ Municipality, based on a transparent criteria, which is open to participation by any interested party;
7. *Real Property* – refers to land, buildings, and/ or real property of the Province/ City/ Municipality;
8. *Lease* – refers to a contractual arrangement providing for use of a real property of the Province/ City/ Municipality and/ or the operation, maintenance, and management services by the PSP/L, including working capital and/or improvements to an existing infrastructure or development facility leased by the PSP/L from the Province/ City/ Municipality for a fixed term. Under a lease arrangement, the PSP/L, subject to the lease contract, retains revenue collected from customers and makes a specified lease payment to the Province/ City/ Municipality;
9. *Lessor* – refers to the Province/ City/ Municipality having absolute ownership over the real property to be leased;
10. *Limited Negotiations* – refers to a process whereby the Province/ City/ Municipality negotiates with the PSP/L in instances when there is only one eligible and qualified PSP/L in a competitive selection process, under Stage 2 of the competitive challenge process, or when there is a prior completed competitive process;
11. *Private Sector Proponent or Lessee (PSP/L)* – refers to the entity temporarily occupying a real property on the basis of a lease contract executed with the Lessor;

12. *Project Study* – refers to a study, full or pre-feasibility study or business case prepared by the Province/ City/ Municipality in a competitive selection or limited or competitive negotiations, or a PSP/L when submitting an unsolicited proposal, containing or indicating, as far as practicable a needs analysis, affordability assessment, value for money assessment, preliminary risk assessment, stakeholder assessment, human resource assessment, bankability assessment, legal viability assessment, market testing if relevant, indicative transaction implementation plan, and draft lease contract;
13. *Rental Rate and/or Share in Revenues* – refers to the amount paid by the PSP/L for the use, enjoyment or occupancy of the real estate to the lessor, where payment is usually made on a monthly basis and/ or a fixed percentage of gross revenues generated by the lessee. The Province/ City/ Municipality may also be entitled to a share in the revenues from the activities and businesses on the leased property; and
14. *Sangguniang Panlalawigan/ Panlungsod/ Bayan* – refers to the Sangguniang Panlalawigan/ Panlungsod/ Bayan of (name).

Sec. 5. *General Guidelines.* – The general guidelines in lease or affermage arrangements are:

1. As a general rule, rental rates are considered reasonable when they represent or approximate the value of what the LSP/L gets in terms of the business, activity, accommodation, facility, amenities, and convenience from the leased real property, and the Province/ City/ Municipality gets an equitable share in the revenues, return of capital or investment.
2. Rental rates may consider the prevailing market rates for lease of real estate or venue with the same or similar condition or classification and located within the vicinity.
3. The contract of lease shall be embodied in a public instrument and shall integrate all the covenants, understanding and agreements of the Province/ City/ Municipality and the PSP/L.
4. The lease contracts should be recorded in the Registry of Property.
5. The lessee cannot sublease the real property subject of the lease contract, *unless* otherwise agreed upon, *provided*, that such agreement is expressly spelled out in the lease contract that was duly executed by the Province/ City/ Municipality and the PSP/L.

6. The PSP/L cannot assign the lease without the consent of the Province/ City/ Municipality, *unless* there is a stipulation to the contrary in the lease contract that was duly executed by the Province/ City/ Municipality and the PSP/L.
7. The lease contract shall not contemplate a divestment or disposition of the real property of the Province/ City/ Municipality, *unless* there is a stipulation to the contrary in the lease contract that was duly executed by the Province/ City/ Municipality and the PSP/L, *provided*, that a competitive process or public auction is undertaken by the Province/ City/ Municipality.

Sec. 6. *Procedures.* – (a) Subject to the guiding principle that the lease contract should provide the most advantageous terms and conditions to the Province/ City/ Municipality and its constituents, the Provincial Governor/ City Mayor/ Municipal Mayor, as duly authorized by the Sanggunian Panlalawigan/ Panlungsod/ Bayan, shall enter into a lease contract through either competitive selection, limited or competitive negotiations with PSP/Ls; *Provided*, that the real property involved in the lease contract should be identified in said authority given by the Sangguniang Panlalawigan/ Panlungsod/ Bayan; *Provided further*, that the PSP/L should be lawfully authorized to execute said lease contracts; *Provided finally*, that the minimum terms and conditions contained in this Ordinance shall have been faithfully incorporated in the said lease contract.

(b) Upon favorable endorsement by the BAC and authorization by the Sangguniang Panlalawigan/ Panlungsod/ Bayan, the Provincial Governor/ City Mayor/ Municipal Mayor may choose any of the procedures set forth herein.

(c) *Competitive Selection.* – (i) The Competitive Selection procedure shall consist of the following steps: advertisement, issuance of instructions and tender documents, conduct of pre-bid conferences, eligibility screening of prospective bidders, receipt and opening of bids, posting of proposal securities, evaluation of bids, post-qualification, and award of contract.

(ii) The Provincial Governor/ City Mayor/ Municipal Mayor, acting on the recommendation of the BAC, shall approve the tender documents and the draft lease contract before they are issued to the prospective PSP/Ls/ bidders.

(d) *Limited Negotiations.* – Where the Province/ City/ Municipality:

(i) fails to identify an eligible PSP/L for the lease project when there is only one qualified bidder after subjecting the same to a competitive selection; or

(ii) considers a project or activity on the leased property either through competitive selection or competitive challenge where an indispensable or integral component thereof has already been subjected to a competitive process by the appropriate administrative agency, government instrumentality or government-owned and - controlled corporation which gives the PSP/L a vested and exclusive right over that component without which, the lease project cannot be implemented as envisioned,

Limited Negotiations may take place. The negotiations will cover all the aspects of the lease arrangement; *provided*, that conditions and parameters stated in the Study and tender documents are complied with. The Provincial Governor/ City Mayor/ Municipal Mayor shall approve the terms of the Limited Negotiations prior to the award of the contract to the PSP/L. Under the 2<sup>nd</sup> instance, the Province/ City/ Municipality shall publish a notice to the public prior to the start of the negotiations, and if pursued under Competitive Challenge, the 3<sup>rd</sup> stage as defined below may be dispensed with.

(e) *Competitive Negotiations*. – The Province/ City/ Municipality may invite two or more qualified PSP/Ls to enter into negotiations for a lease project, informing all the qualified PSP/Ls-offerors that there is more than one offeror, if that is the case, and simultaneous negotiations are being conducted and that the lease contract shall be awarded to the PSP/L which offers the best combination of quality and price based on the study prepared by the Province/ City/ Municipality. Prior to the start of the negotiations with the identified PSP/Ls, the Province/ City/ Municipality shall notify the public of the process.

(f) *Competitive Challenge*. – The Competitive Challenge process shall be divided into three (3) Stages, described as:

Stage One/ Unsolicited Proposal – The steps are:

- a. A PSP/L submits an unsolicited proposal accompanied by a Study and draft lease contract to the Province/ City/ Municipality for a projected lease Project.
- b. The BAC shall make a determination of the completeness of the unsolicited proposal, the eligibility of the PSP/L, the necessity for the proposed lease project, the consistency of the terms of the draft lease contract with this Ordinance, and the appropriateness of the proposed PPP modality.
- c. Upon completion of the initial evaluation, the Provincial Governor/ City Mayor/ Municipal Mayor, upon recommendation of the BAC, shall either issue a certificate of acceptance or non-acceptance of the proposal for

purposes of detailed negotiations. Upon the issuance of the certificate of acceptance, the PSP/L is *ipso facto* conferred original proponent status and no other proposal for the same project may be subjected to the competitive challenge process.

- d. If there is more than one unsolicited proposal submitted for the same lease project, the Provincial Governor/ City Mayor/ Municipal Mayor, upon recommendation of the BAC, may reject all proposals and pursue competitive selection, enter into competitive negotiations if appropriate, or accept the unsolicited proposal that is complete and provides the greater advantage and benefits to the community and revenues to the Province/ City/ Municipality.

Stage Two/ Detailed Negotiations – The steps are:

- a. The Parties shall negotiate and agree on the terms and conditions of the lease project.
- b. Once negotiations are successful, the Parties shall issue a joint certification stating that an agreement has been reached and specifying the eligibility of the PSP/L and the aspects of the lease project as agreed upon.
- c. The issuance of the certification commences the activities for the solicitation for comparative proposals.
- d. However, should negotiations not result to an agreement acceptable to both parties, the Province/ City/ Municipality shall have the option to reject the proposal by informing the PSP/L in writing stating the grounds for rejection and thereafter may accept a new proposal from other PSP/Ls, decide to pursue the proposed activity through other PPP modalities, subject the lease to a competitive selection or competitive negotiations.

Stage Three/ Competitive or Swiss Challenge Proper – The steps are:

- a. The BAC shall prepare the tender documents. The eligibility criteria used in determining the eligibility of the PSP/L shall be the same as those stated in the tender documents. Proprietary information shall, however, be respected and protected, and treated with confidentiality. As such, it shall not form part of the tender and related documents.
- b. The Provincial Governor/ City Mayor/ Municipal Mayor shall approve all tender documents including the draft lease contract before the publication of the invitation for comparative proposals.

- c. The BAC shall publish the invitation for comparative proposals.
- d. The PSP/L which is the Original Proponent shall post the proposal security at the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.
- e. In the evaluation of proposals, the best offer shall be determined to include the original proposal of the PSP/L. If the Province/ City/ Municipality determines that an offer made by a comparative PSP/L or challenger other than the negotiated terms with original proponent is superior or more advantageous to the Province/ City/ Municipality than the original proposal, the PSP/L who submitted the original proposal shall be given the right to match such superior or more advantageous offer. Should no matching offer be received within the stated period, the lease project shall be awarded to the comparative PSP/L submitting the most advantageous proposal. If a matching offer is received within the prescribed period, the lease project shall be awarded to the original proponent. If no comparative proposal is received by the Province/ City/ Municipality, the lease project shall be immediately awarded to the original proponent.
- f. In the event that the original proponent is not able to match the superior offer of the challenger, the winning challenger shall reimburse, within 30 days from issuance of the notice of award, the original proponent the cost of preparing the study, *provided*, that this reimbursement arrangement and the cost of preparing of the project study are expressly stated in the terms of reference for the competitive challenge, and that the BAC has determined that the cost is reasonable.

(g) The Provincial Governor/ City Mayor/ Municipal Mayor, through an executive order, upon the recommendation of the BAC, shall have the authority to adopt and prescribe the appropriate schedules and timelines for each selection procedure, *provided*, that the periods are reasonable and will not undermine free competition, transparency and accountability.

**Sec. 7. Minimum Terms and Conditions.** – The contract of lease shall include, but not limited to, the following terms and conditions:

1. *Obligations of the Province/ City/ Municipality* – (a) To allow the PSP/L free and interrupted use of the real property, building or facility for the use stipulated under the lease contract; and

(b) To grant an exclusive right to the PSP/L over the property for the use thereof based on the activities and businesses agreed upon.

2. *Obligations of the PSP/L* – (a) To pay promptly and regularly the rentals and the share of the Province/ City/ Municipality as agreed upon in a manner specified in the contract;

(b) To surrender the real property upon expiration of the lease contract and to shoulder damages which the Province/ City/ Municipality may suffer for failure to surrender the same; and

(d) To faithfully comply with the terms and conditions of the agreement.

3. *Rights of the Province/ City/ Municipality* – (a) In the event the real property is deserted by the PSP/L before the expiration of the lease without the justifiable cause, the Province/ City/ Municipality shall have the right to enter and re-let the same and receive the rentals corresponding to the unexpired period of the lease; and

(b) To terminate the lease contract and eject the PSP/L for failure or refusal of the latter to pay the rentals and share of the Province/ City/ Municipality as agreed upon during the period stipulated in the lease contract or for violation of contract conditions by the lessee.

4. *Rights of the PSP/L* – (a) To withhold payment of rentals in the event the Province/ City/ Municipality fails to make the necessary repairs of damages leased facilities to any portion of the leased building which is its obligation to repair under the agreement within reasonable time and to undertake such repairs applying the rentals due to cover the cost thereof;

(b) To occupy and use exclusively the real property leased to the exclusion of the Province/ City/ Municipality or its representatives; and

(c) To introduce improvements in the real property, subject to prior consent of the lessor under such terms and conditions as may be agreed upon.

5. *Project Oversight Committee* – A Project Oversight Committee composed of representatives of the Province/ City/ Municipality and the PSP/L shall be established that will responsible for overseeing, monitoring the lease

project and ensuring compliance with the terms and conditions of the lease contract.

*Sec. 8. Duration of Lease Contracts.* – Subject to the guiding principle that that the lease contract should provide the most advantageous terms and conditions to the government, the Province/ City/ Municipality shall exercise discretion in determining the reasonable period for the lease contract.

*Sec. 9. Termination of Lease Contracts.* – Except for causes expressly stipulated in the lease contract, neither party shall have the authority to unilaterally terminate the contract. Termination that is not due to causes provided in the contract shall be mutually agreed upon.

*Sec. 10. Prior Authorization from the Sanggunian.* Prior to signing the lease contract by the Provincial Governor/ City Mayor/ Municipal Mayor, the lease contract will have to be presented to Sangguniang Panlalawigan/ Panglungsod/ Bayan for review and approval. The Sangguniang Panlalawigan/ Panglungsod/ Bayan shall issue the appropriate resolution authorizing the Provincial Governor/ City Mayor/ Municipal Mayor to sign and execute the lease contract on behalf of the Province/ City/ Municipality.

*Sec. 11. Separability Clause.* – If any provision/s of this Ordinance is held unconstitutional or invalid, the other provisions unaffected thereby shall remain in full force and effect.

*Sec. 12. Repealing Clause.* – All ordinances, executive orders and issuances, or parts thereof, inconsistent with the provisions of this Ordinance are hereby repealed or modified accordingly.

*Sec. 13. Effectivity Clause.* – This Ordinance shall take effect fifteen (15) days after its posting in two conspicuous places within the Province/ City/ Municipality.

## D. PROPOSED LGU CORPORATIZATION ORDINANCE

November 23, 2014

Ordinance No. \_\_\_\_\_

Series of 20\_\_\_\_

### **A PROVINCIAL/ CITY/ MUNICIPAL ORDINANCE CREATING THE (NAME) DEVELOPMENT CORPORATION; APPROVING THE ARTICLES OF INCORPORATION AND BY-LAWS THEREFOR; ESTABLISHING A BOARD OF DIRECTORS TO GOVERN THE AFFAIRS OF THE CORPORATION; AND PROVIDING HOW THE CORPORATION SHALL CONDUCT ITS AFFAIRS**

BE IT ORDAINED, by the *Sangguniang Panlalawigan/ Panlungsod/ Bayan* of (name) in session assembled that:

SECTION 1. *Declaration of Policy.* – It is hereby declared the policy of the Province/ City/ Municipality of Pampanga to fully exercise genuine and meaningful local autonomy in the exercise of its proprietary functions and in the management of its economic enterprises through the creation of a stock corporation under Batas Pambansa Blg. 68, otherwise known as the Corporation Code of the Philippines.

Sec. 2. *Authority Created.* – The creation of a corporation is hereby authorized, with powers and limitations as set forth in its Articles of Incorporation, By-Laws, and this Ordinance, to carry out lawful business activities for the economic development of the Province/ City/ Municipality, including: undertaking, assisting or otherwise facilitating or providing economic stimulus to the Province/ City/ Municipality; acting as liaison between private entities and the Provincial/ City/ Municipal Government to evaluate the suitability of the Province/ City/ Municipality as an expansion, location, or relocation site; shepherding private development projects through public processes; developing the use of publicly-owned property for economic development purposes; providing direct and/or indirect financial assistance to development projects; ensuring the availment of appropriate workforce recruitment, retention, and training services; and serving as holding company of subsidiary companies which may now or hereafter be created.

Sec, 3. *Name.* – The name of the Corporation shall be “**(Name) Development Corporation (Corporation).**”

Sec. 4. *Authorized Capital Stock.* - The authorized capital stock of the Corporation shall be (amount in words), Philippine Pesos (PhP [amount in figures]) divided into (amount in words) (amount in figures) shares with a par value of (amount in words), Philippine Pesos (PhP [amount in figures]) per share. The authorized capital stock shall be wholly owned by the Province/ City/ Municipality as follows, subject only to

the qualifying shares of the members of the Board of Directors as provided in Section 11 hereof:

<i>Name of Shareholder</i>	<i>Number of Shares</i>	<i>Percentage of Ownership (%)</i>
Province/ City/ Municipality	(total less 5)	100.00
(name) (Incumbent Provincial Governor/ City Mayor/ Municipal Mayor)	1	0.00
Provincial/ City/ Municipal Treasurer	1	0.00
Provincial/ City/ Municipal Planning and Development Coordinator	1	0.00
Nominee	1	0.00
Nominee	1	0.00
Total	(value)	(value)

Sec. 5. *Principal Office.* – The principal office of the Corporation shall be established in the the Province/ City/ Municipality.

Sec. 6. *Term.* – The Corporation shall exist for a term of Fifty (50) years from and after the date of issuance of its Certificate of Incorporation by the Securities and Exchange Commission.

Sec. 7. *Provincial/ City/ Municipal Liability Limited* - The Corporation is an independent legal entity exclusively responsible for its own debts, obligations, and liabilities. All liabilities incurred by the Corporation shall be satisfied exclusively from the assets and credit of the Corporation. No creditor or other person shall have any recourse to the assets, credit, or services of the Province/ City/ Municipality on account of any debt, obligation, liability, act, or omission of the Corporation.

Sec. 8. *Powers.* – Except as limited by the Constitution, law, this Ordinance, or the Articles of Incorporation and By-Laws of the Corporation, the Corporation shall have and may exercise all lawful powers and perform all corporate functions which are necessary or convenient to effect the purposes for which it is organized.

Sec. 9. *Limitation of Powers.* – The powers of the Corporation shall be limited in the following respects:

- (a) The Corporation shall have no power of eminent domain nor any power to levy taxes or special assessments.
- (b) The Corporation may not incur or create any liability that permits recourse by any party or member of the public to any assets, services, resources, or credit of

the Province/ City/ Municipality. All liabilities incurred by the Corporation shall be satisfied exclusively from the assets and credit of the Corporation. No creditor or other person shall have any recourse to the assets, credit, or services of the Province/ City/ Municipality on account of any debts, obligations, liabilities, acts, or omissions of the Corporation.

- (c) No funds, assets, or property of the Corporation shall be used for any political activity or to further the election or defeat of any candidate for public office; nor shall any funds or a substantial part of the activities of the Corporation be used for publicity designed to support or defeat legislation.

Sec. 10. *Articles of Incorporation and By-Laws* – The Articles of Incorporation and By-Laws of the Corporation are hereby approved.

Sec. 11. *Board of Directors*. – The powers and functions of the Corporation shall be exercised by a Board of Directors composed of five (5) members as follows:

- (a) The Provincial Governor/ City Mayor/ Municipal Mayor as *ex officio* Chairperson;
- (b) The Provincial/ City Municipal Treasurer and the Planning and Development Coordinator as *ex officio* members;
- (c) Two (2) regular members who shall be nominated, elected, or designated by the Sangguniang Panlalawigan/ Panlungsod/ Bayan on behalf of the Province/ City/ Municipality as the majority shareholder.

The members of the Board of Directors shall each own one (1) qualifying share in the Corporation subject to the execution of a Declaration of Trust in favor of the Province/ City/ Municipality.

Unless otherwise provided by law, the corporate powers of the Corporation shall be exercised, all business conducted, and all property of the Corporation controlled and held by the Board of Directors.

Sec. 12. *Maintenance of and Access to Records*. – The Corporation shall file and maintain a current listing of all corporate officials, their positions and home addresses, their business and home phone numbers, and all other documents which the Sangguniang Panlalawigan/ Panlungsod/ Bayan may require. Maintenance of records shall be done in a manner consistent with pertinent laws, rules and regulations. The Corporation shall keep an official journal consisting of the minutes of proceedings at all meetings of the Board of Directors, and the resolutions of the Board of Directors. Any person shall have access to records and information of the Corporation to the extent allowed by law.

Sec. 13. *Reports and Information.* – The Corporation shall file an annual financial report with the Sangguniang Panlalawigan/ Panlungsod/ Bayan. The annual financial report shall be in a form and include content acceptable to the Sangguniang Panlalawigan/ Panlungsod/ Bayan.

Sec. 14. *Audit.* – The Corporation shall make available for examination to the Sangguniang Panlalawigan/ Panlungsod/ Bayan and the Provincial/ City/ Municipal Auditor all of its financial records, and shall permit the Sangguniang Panlalawigan/ Panlungsod/ Bayan and the Provincial/ City/ Municipal Auditor to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment, and other data relating to all the aforesaid matters.

Sec. 15. *Review Power of the Sanggunian.* – The Sangguniang Panlalawigan/ Panlungsod/ Bayan, acting for the Province/ City/ Municipality as majority stockholder, shall have no right, power, or duty to supervise the daily operations of the Corporation, but shall oversee such operations through its powers to audit, modify the Articles of Incorporation and By-Laws of the Corporation, to remove Board members in accordance with the By-Laws of the Corporation, and to participate in other matters where stockholder participation is required by law all for the purpose of correcting any deficiency and ensuring that the purposes of the Corporation are reasonably accomplished.

Sec. 16. *Conflict of Interest.* –

- (a) Except as provided in this section, a Board member or employee may not participate in Board decisions if that person or a member of that person's immediate family has a financial interest in the issue being decided, whether as an individual or a director or holder of at least one percent (1%) of the shares of a corporation, unless the financial interest is remote and participation is approved under Subsection (b) of this section.
- (b) A Board member or employee who has a financial interest, or who has an immediate family member who has a financial interest in the issue to be decided, whether as an individual or a director or holder of at least one percent (1%) of the shares of a corporation, may participate in a decision if that person or a member of that person's immediate family only has a remote financial interest, the fact and extent of the interest is disclosed to the Board and is noted in the minutes of the meeting before any participation by the member in the decision, and thereafter the Board by vote authorizes or approves the participation. For purposes of this Subsection, "remote financial interest" means:

- (1) that of a non-salaried officer or director of a non-profit corporation;
  - (2) that of an employee or agent of a contracting party where the compensation of the employee or agent consists entirely of fixed wages or salary and the contract is awarded by bid or by other competitive process;
  - (3) that of a landlord or tenant of a contracting party, except in cases where the property subject of the lease or sublease is owned or managed by the Corporation;
  - (4) that of a holder of less than one percent (1%) of the shares of the corporation that is the contracting party; or
  - (5) that of an owner of a savings and loan bank savings or share account or credit union deposit account if the interest represented by the account is less than two percent (2%) of the total deposits held by the institution.
- (c) A Board member or employee is not considered to be financially interested in a decision when the decision could not affect that person in a manner different from its effect on the public.
- (d) No Board member or employee of the Corporation shall accept, directly or indirectly, any gift, favor, loan, retainer, entertainment, or other thing of monetary value from any person, firm, or corporation having dealings with the Corporation when such acceptance would conflict with the performance of the Board member or employee's official duties. A conflict, or possibility of conflict, shall be deemed to exist where a reasonable and prudent person would believe that it was given for the purpose of obtaining special consideration or influence.
- (e) The Board may adopt additional conflict of interest and ethical rules it considers appropriate.
- (f) For purposes of this section, "participate in a decision" includes all discussions, deliberations, preliminary negotiations, and votes.
- (g) For purposes of this section, "immediate family" means a spouse, any parent, parent-in-law, child, son-in-law, daughter-in-law, sibling, or other relative within the third degree of consanguinity or affinity.

Sec. 17. *Bond.* – Each director or officer responsible for handling accounts and finances shall, as soon as practicable, file a bond in an amount determined by the Corporation to be adequate and appropriate, and may hold the corporate office only as long as such a bond continues in effect.

Sec. 18. *Amendment of the Articles of Incorporation.* – The Articles of Incorporation may be amended by authority of the Board of Directors, subject to the approval of

the stockholders as may be required by law, or by an ordinance passed by the Sangguniang Panlalawigan/ Panlungsod/ Bayan.

Sec. 19. *Powers of the Sanggunian.* – Except as otherwise provided herein, all powers of the Province/ City/ Municipality as majority stockholder of the Corporation shall be reposed in and be exercised by the Sangguniang Panlalawigan/ Panlungsod/ Bayan.

Sec. 20. *Dissolution.* –

- (a) If the Sangguniang Panlalawigan/ Panlungsod/ Bayan makes an affirmative finding that dissolution is warranted for any reason, the existence of the Corporation may be terminated by ordinance adopted at or after a public hearing held with notice to the Corporation and its Board of Directors and after affording them a reasonable opportunity to be heard and to present testimony. Dissolution shall be accomplished in accordance with the provisions of relevant laws and shall not take effect until proper provision has been made for disposition of all Corporation assets.
- (b) Upon dissolution of the Corporation or the winding up of its affairs, title to the remaining assets or property of the Corporation shall vest in the Province/ City/ Municipality unless otherwise provided by the Sangguniang Panlalawigan/ Panlungsod/ Bayan, by law, or by a court order.

Sec. 21. *Repealing Clause.* – All ordinances, resolutions, or laws of local application and effect inconsistent hereto are hereby modified, superseded, and repealed accordingly.

Sec. 22. *Separability Clause.* – If for any reason, any provision, section or part of this Ordinance is declared unconstitutional or invalid by a court of competent jurisdiction or suspended or revoked by the Sangguniang Panlalawigan/ Panlungsod/ Bayan, the remaining provisions, sections, or parts hereof which are not affected thereby shall continue to be in full force and effect.

Sec. 23. *Effectivity.* – This Ordinance shall take effect fifteen (15) days after its posting in two conspicuous places within the Province/ City/ Municipality.

## E. PROPOSED EXECUTIVE ORDER ON TIMELINES AND SCHEDULE

November 23, 2014

Executive Order No. [•] Series of 20[•]

### AN EXECUTIVE ORDER PRESCRIBING AND SETTING THE SCHEDULES AND TIMELINES FOR COMPETITIVE SELECTION, COMPETITIVE CHALLENGE AND COMPETITIVE NEGOTIATIONS IN THE SELECTION OF THE PRIVATE SECTOR PROPONENT FOR [PROVINCIAL/ CITY/ MUNICIPAL] [PUBLIC-PRIVATE PARTNERSHIPS/ JOINT VENTURES]

#### 1. *Enabling Ordinance*

This Executive Order is issued pursuant to and in furtherance of Ordinance No. [•] Series of [•] enacted by the Sangguniang [Panlalawigan/ Panglunsod/ Bayan] (“Sanggunian”) of [name of LGU] entitled “[long title]” or the “[short title].”

#### 2. *Legislative Command*

Under said Ordinance, the [Governor/ Mayor] is expressly mandated and authorized to issue supplementary rules and regulations. The [PPP Code/ JV Ordinance] is complete and bears explicit standards. It states:

Sec. [•]. *Implementing Rules.* – While this Ordinance and the provisions hereof are already operative upon the Code’s effectivity, the [Governor/ Mayor] may issue the appropriate and relevant rules and regulation for the proper implementation of the Code or its provisions.

Sec. [•]. *Schedules and Timelines.* – The [Province/ City/ Municipality] shall have the authority to adopt and prescribe the appropriate schedules and timelines for each PSP selection process: provided, that the periods are reasonable and will not undermine free competition, transparency and accountability.

#### 3. *Schedules and Timelines*

Under the foregoing premises and in compliance with the requirements of competition, transparency and accountability, the [Governor/ Mayor] hereby issues

the following schedules, timelines and periods<sup>1</sup> in connection with the selection of the Private Sector Proponent (“PSP”), the establishment of the [Public-Private Partnership (PPP)/ Joint Venture (JV)]-Selection Committee [PPP/ JV-SC], the approval by the Sanggunian of the PPP/ JV Agreement [“PPPA/ JVA”], and award of the [PPP/ JV] Project through Competitive Selection, Competitive Challenge or Competitive Negotiations.

#### A. Competitive Selection

<i>Steps/ Stage</i>	<i>Days/ Periods</i>
<p><b>1. Preparation of Bid Documents:</b> Pursuant to the [Provincial/ City/ Municipal] Development Plan, programs and priorities, the [Governor/ Mayor] shall direct the [PPP/ JV]-SC and/ or appropriate provincial departments to prepare the Project Study (PS),<sup>2</sup> draft PPPA/ JVA, Tender Documents such as Pre-Qualification documents and Requests for Proposals (collectively referred to as “Bid Documents”) for a particular [PPP/ JV] Project. The [PPP/JV]-SC shall prepare a cover memorandum attaching thereto the Bid Documents. These shall be submitted to the [Governor/ Mayor] for consideration and approval.</p>	<p>Within 60 days from the directive of the [Governor/ Mayor]</p>
<p><b>1.1 Public Consultations:</b> The [PPP/ JV]-SC shall conduct at least one (1) public consultation about the Project with identified end-users, civil society organizations, affected public offices, and other stakeholders.</p>	<p>Within the same 60 day period (#1)</p>
<p><b>2. Action of [Governor/ Mayor]:</b> The [Governor/ Mayor] shall either approve or disapprove the Bid Documents. If the [Governor/ Mayor] disapproves, the proposed Bid Documents shall be returned to the [PPP/ JV]-SC for further study and revision. If the [Governor/ Mayor] confirms the recommendation of the [PPP/ JV]-SC, s/he shall affix his/ her signature to the cover memorandum prepared by the [PPP/ JV]-SC. If the [Governor/ Mayor] takes an adverse position, s/he shall issue a written resolution in support of his/ her action.</p>	<p>Within 10 days from submission of Bid Documents</p>
<p><b>3. Publication of Invitation:</b> After the approval of the Bid Documents, the [PPP/ JV]-SC shall publish the Invitation to Pre-</p>	<p>Within 5 days from the</p>

<sup>1</sup> In working days

<sup>2</sup> A study prepared by the Province/ City/ Municipality in a competitive selection or a PSP when submitting an unsolicited proposal, which indicates the following: needs analysis, affordability assessment, value for money assessment, preliminary risk assessment, stakeholder assessment, human resource assessment, bankability assessment, legal viability assessment, market testing if relevant, indicative transaction implementation plan, and draft [PPPA/ JVA]. The Project Study may be a feasibility study, pre-feasibility study or business case.

<i>Steps/ Stage</i>	<i>Days/ Periods</i>
Qualify and Bid/ Participate in the Competitive Competition in one (1) newspaper of general circulation in two (2) consecutive weeks.	approval
<b>4. Release of Bid Documents:</b> The [PPP/ JV]-SC shall release the Pre-Qualification Documents (PQDs) and the interested PSPs shall submit their PQDs to the [PPP/ JV]-SC.	Within 30 days from date of 2 <sup>nd</sup> publication
<b>4.1 No Interested PSPs:</b> If there are no interested PSPs, the [PPP/ JV]-SC shall declare a failed bidding. The [Governor/ Mayor] may shelve the Project, re-bid the same [PPP/ JV] Project under the same or modified Bid Documents or the [Province/ City/ Municipality] may accept Unsolicited Proposals (UPs) for the [PPP/ JV] Project.	On the last day to submit PQDs (#4)
<b>5. Pre-Qualification of PSPs:</b> The [PPP/ JV]-SC shall pre-qualify the PSPs that submitted PQDs. The [PPP/ JV]-SC shall determine which are the qualified and disqualified PSPs and notify the concerned PSPs of the action taken by the [PPP/ JV]-SC. The [PPP/ JV]-SC shall prepare a memorandum justifying its action. If none of the PSPs are qualified, then the [PPP/ JV]-SC shall declare a failed bidding. The [Governor/ Mayor] may shelve the Project, re-bid the same [PPP/ JV] Project under the same or modified Bid Documents or the [Province/ City/ Municipality] may accept UPs for the [PPP/ JV] Project.	Within 15 days from submission of PQDs
<b>5.1. Appeal:</b> The disqualified PSP(s) may file an appeal of the decision of the [PPP/ JV]-SC with the [Governor/ Mayor].	Within 5 days from receipt of notice
<b>5.2. Ruling on Appeals:</b> The [Governor/ Mayor] shall evaluate and decide the appeal(s). The [Governor/ Mayor] shall issue a written resolution in support of his / her action.	Within 5 days from receipt of appeal
<b>6. Notice of Developments:</b> The [PPP/ JV]-SC shall notify the [Governor/ Mayor], [Vice-Governor/ Vice-Mayor], Sanggunian and participating PSPs of the developments.	Within 5 days from notice to concerned PSPs (#5)
<b>7. RFPs Issued:</b> The [PPP/ JV]-SC shall issue the Request for Proposal (RFP) to the qualified PSPs.	Within the same 5-day period (#6)
<b>8. Pre-Bid Conferences:</b> The [PPP/ JV]-SC shall conduct at least one pre-bid conference and set the deadline for the submission of proposals.	All meetings shall be conducted within 10 days from notice to concerned PSPs
<b>9. Submission of Proposals:</b> The pre-qualified PSPs shall prepare and submit their technical and financial proposals	Within 30 days from last pre-bid

<i>Steps/ Stage</i>	<i>Days/ Periods</i>
simultaneously. The technical and financial proposals shall be submitted in one (1) sealed envelope.	conference
<p>9.1 <b>No Proposal Submitted:</b> (1) If there are no proposals submitted by PSPs; (2) if none of the proposals are compliant with the technical and financial parameters stated in the Bid Documents; (3) if there is only one (1) proposal but such proposal is only compliant with the technical aspects of the Bid Documents; or (4) if there are several proposals where only one (1) is compliant with the technical aspects of the Bid Documents and the rest are not compliant with the technical and financial aspects, the [PPP/ JV]-SC shall declare a failed bidding. The [Governor/ Mayor] may shelve the Project, re-bid the same [PPP/ JV] Project under the same or modified Bid Documents or the [Province/ City/ Municipality] may accept UPs for the [PPP/ JV] Project.</p>	
<p>10. <b>Evaluation of Proposals:</b> The [PPP/ JV]-SC shall evaluate the proposals and submit its recommendation to the [Governor/ Mayor]. The [PPP/ JV]-SC shall determine the winning bidder/ PSP. If there are two (2) or more proposals that are compliant, the [PPP/ JV]-SC shall declare a successful bidding. The winning bidder/ PSP shall be determined on the basis of the bid parameters stated in the Bid Documents. The [PPP/ JV]-SC shall prepare a memorandum justifying its action.</p>	Within 20 days from last day of submission of proposals
<p>10.1 <b>Limited Negotiations:</b> (1) Should there be only one (1) eligible PSP that submits technical and financial proposals compliant with the Bid Documents; and (2) should there be more than one (1) proposal but only (1) is compliant, the [PPP/ JV]-SC shall inform the [Governor/ Mayor] of any of this development. The [Governor/ Mayor] may authorize Limited Negotiations or declare a failed bidding. S/he may shelve the Project, re-bid the same [PPP/ JV] Project under the same or modified Bid Documents or the [Province/ City/ Municipality] may accept UPs for the [PPP/ JV] Project. The negotiations will cover all the technical and financial aspects of the [PPP/ JV] project or activity; provided, that the minimum designs, performance standards/ specifications and economic parameters stated in the Bid Documents are complied with. The [Governor/ Mayor] shall set or approve the terms of the negotiations on the part of the [Province/ City/ Municipality] which shall be the scope of the authority of the [PPP/ JV]-SC in negotiating with the lone eligible PSP.</p>	Negotiations to be completed in 10 days
<p>10.2 <b>Best-and-Final-Offer:</b> If there are no PSP that submits a</p>	BAFO must be

<i>Steps/ Stage</i>	<i>Days/ Periods</i>
technically and financially compliant tender but there are two (2) or more proposals that are technically compliant but financially non-compliant, the [PPP/ JV]-SC, upon approval by the [Governor/ Mayor], can require the PSPs concerned to submit their best-and-final-offers (BAFO) on the financial aspect of the Bid Documents. The [Governor/ Mayor] can also declare a failed bidding and may shelve the Project, re-bid the same [PPP/ JV] Project under the same or modified Bid Documents or the [Province/ City/ Municipality] may accept UPs for the [PPP/ JV] Project.	submitted within 10 days from the notice of the [PPP/ JV]-SC
<b>11. Action by [Governor/ Mayor]:</b> The [Governor/ Mayor] shall either confirm or reject the recommendation to award made by the [PPP/ JV]-SC. If the [Governor/ Mayor] confirms the recommendation of the [PPP/ JV]-SC, s/he shall affix his/ her signature to the memorandum prepared by the [PPP/ JV]-SC. If the [Governor/ Mayor] takes an adverse position, s/he shall issue a written resolution in support of his/ her action. If the [Governor/ Mayor] confirms, then the [PPPA/ JVA] shall be submitted to the Sanggunian.	Within 5 days from submission of recommendation by the [PPP/ JV]-SC
<b>12. Notice to the Sanggunian:</b> The [PPP/ JV]-SC shall inform the [Vice-Governor/ Vice-Mayor] and the Sanggunian of the developments.	Within 2 days from the decision of the [Governor/ Mayor]
<b>13. Legislative Action:</b> The [PPP/ JV]-SC shall forward to the Sanggunian a copy of the draft [PPPA/ JVA]. The Sanggunian shall review and thereafter approve or disapprove the PPPA/ JVA or terms and provisions thereof. If the Sanggunian approves, it shall issue a Resolution authorizing the [Governor/ Mayor] to sign the [PPPA/ JVA]. The Sanggunian may conduct public consultation(s) with identified end-users, civil society organizations, affected public offices, and other stakeholders.	Within 15 days from receipt of the draft [PPPA/ JVA]
<b>14. Signing of [PPPA/ JVA]:</b> Acting pursuant to the Resolution, the [Governor/ Mayor] and the representative of the winning PSP shall sign the [PPA/ JVA].	Within 5 days from receipt of Sanggunian Resolution
<b>15. Notice of Award:</b> The [PPP/ JV]-SC shall issue the Notice to Award (NOA) to the winning PSP with the instruction to the latter to comply with the requirements set forth in the NOA.	Within the 2 days from Signing of [PPPa/ JVA]
<b>16. Compliance:</b> The winning PSP shall submit to the [PPP/ JV]-SC all the requirements stated in the NOA.	Within 15 days from receipt of NOA

<i>Steps/ Stage</i>	<i>Days/ Periods</i>
17. <b>Notice to Proceed:</b> The [PPP/ JV]-SC shall issue the Notice to Proceed and Notice of Acceptance (NP/NA) of all compliance statements and conditions precedent if the same are in order.	Within 5 days from receipt of conditions precedent
18. <b>Posting of [PPA/ JVA]:</b> The [PPP/ JV]-SC shall cause the posting of the signed and executed [PPA/ JVA] in at least two conspicuous places in and the official website of the [Province/ City/ Municipality].	Within 2 days from issuance of NP/NA

## B. Competitive Challenge

<i>Steps</i>	<i>Days/ Periods</i>
<b>Stage 1: Unsolicited Proposal</b>	---
1. <b>Receipt of UP:</b> The [Province/ City/ Municipality] receives an Unsolicited Proposal (UP) from the PSP. In order to be considered complete, the UP must be accompanied by: (1) a cover letter expressing interest in a [PPP/ JV] Project with an undertaking to comply with all relevant ordinances, orders and issuances; (2) Project Study (PS); (3) draft [PPPA/ JVA]; and (4) eligibility documents of the PSP showing its legal, technical/ track record and financial capacities.	---
1.1 <b>Public Consultations:</b> The [PPP/ JV]-SC shall conduct at least one (1) public consultation about the UP with identified end-users, civil society organizations, affected public offices, and other stakeholders.	---
2. <b>Convening of [PPP/ JV]-SC:</b> The [Governor/ Mayor] shall convene the [PPP/ JV]-SC.	Within 2 days from receipt of UP
3. <b>Sanggunian Informed of UP:</b> The [PPP/ JV]-SC shall inform the Sanggunian of the submission of the UP by the PSP.	On the day the [PPP/ JV]-SC is convened
4. <b>Action of [PPP/ JV]-SC on UP:</b> The [PPP/ JV]-SC shall evaluate the UP and recommend appropriate action (either acceptance or rejection of the UP) to the [Governor/ Mayor]. The evaluation shall be confined to the determination: (1) of the eligibility of the PSP to undertake the Project; (2) of the consistency of the proposed Project with the development plan, programs and priorities of the [Province/ City/ Municipality]; (3) that the proposed [PPP/ JV] Project is not subject to Competitive Selection/ Bidding by the [Province/ City/	Within 15 days from the convening of the [PPP/ JV]-SC

<i>Steps</i>	<i>Days/ Periods</i>
Municipality]; (4) that the UP is complete; and (5) legality of the proposed terms of the draft PPPA/ JVA. The [PPP/ JV]-SC may meet with the PSP only for the purpose of seeking clarification and not to negotiate the terms of the UP. The [PPP/ JV]-SC shall prepare a memorandum justifying its action.	
4.1 <b>Multiple UPs:</b> If there are more than one UP submitted for the same [PPP/ JV] Project and no Certificate of Acceptance (CA) has been issued and confirmed to any of the them, the [Governor/ Mayor], upon recommendation of the [PPP/ JV]-SC, may reject all proposals and pursue Competitive Selection, or accept the UP that is complete and provides the greater advantage and benefits to the community and revenues to the [Province/City/ Municipality]. The [PPP/ JV]-SC shall prepare a memorandum justifying its action. If the [Governor/ Mayor] confirms the recommendation of the [PPP/ JV]-SC, s/he shall affix his/ her signature to the memorandum prepared by the [PPP/ JV]-SC. If the [Governor/ Mayor] takes an adverse position, s/he shall issue a written resolution in support of his/ her action.	[Governor/ Mayor] confirms [PPP/ JV]-SC recommendation within 3 days from receipt
5. <b>Acceptance or Rejection of UP:</b> The [Governor/ Mayor] shall either accept or reject the UP. If the [Governor/ Mayor] accepts the UP as recommended by the [PPP/ JV]-SC, s/he shall issue a CA for the purpose of proceeding to Detailed Negotiations (Stage 2). If the [Governor/ Mayor] rejects the UP as recommended by the [PPP/ JV]-SC, a Certificate of Non-Acceptance (CNA) will be issued. The [Governor/ Mayor] can only affirm and approve the recommendation of the [PPP/ JV]-SC. The [Governor/ Mayor] can disapprove the action of the [PPP/ JV]-SC recommending the acceptance of the UP but s/he cannot accept the UP if the [PPP/ JV]-SC recommends to reject the UP. If the [Governor/ Mayor] confirms the recommendation of the [PPP/ JV]-SC, s/he shall affix his/ her signature to the memorandum prepared by the [PPP/ JV]-SC. If the [Governor/ Mayor] takes an adverse position, s/he shall issue a written resolution in support of his/ her action.	Within 5 days from receipt of the recommendation of the [PPP/ JV]-SC
6. <b>Conformity by PSP:</b> The PSP shall affix its conformity to the CA. At this point, the PSP becomes the Original Proponent (OP-PSP) and no other UP may be evaluated, processed and accepted by the [Province/ City/ Municipality] and [PPP/ JV]-SC. In the case of rejection of the UP, the PSP must acknowledge receipt of the CNA.	Within 2 days from receipt of a copy of the CA
7. <b>Sanggunian Updated:</b> The [PPP/ JV]-SC shall inform the	Within 2 days

<i>Steps</i>	<i>Days/ Periods</i>
Sanggunian about the completion of Stage 1.	from receipt of a copy of the CA signed by the OP-PSP
<b>Stage 2: Detailed Negotiations</b>	---
1. <b>Notification:</b> The [PPP/ JV]-SC shall notify the OP-PSP in writing about the commencement of the detailed negotiations.	Within 2 days from receipt of a copy of the CA signed by the OP-PSP
2. <b>Scope of Detailed Negotiations:</b> The [PPP/ JV]-SC shall negotiate with the OP-PSP. The [Governor/ Mayor] shall set or approve the terms of the negotiations on the part of the [Province/ City/ Municipality] which shall be the scope of the authority of the [PPP/ JV]-SC in negotiating with the OP-PSP. The parties shall negotiate and agree on the terms and conditions of the JV Project concerning its technical and financial aspects (“Terms”). Minutes shall be taken of all meetings. The negotiations may include the determination of confirmation of the eligibility of the OP-PSP.	Negotiations to be completed in not more than 30 days from receipt of the OP-PSP of the Notice
3. <b>Recommendation to [Governor/ Mayor]:</b> Upon agreement on all the Terms of the Project and [PPPA/ JVA], the [PPP/ JV]-SC shall recommend to the [Governor/ Mayor] the acceptance of the Terms of the [PPP/ JV] for the sole purpose of submitting the Terms for Competitive Challenge (Stage 3). The [PPP/ JV]-SC shall prepare a memorandum justifying its action.	Within the same 30-day period (#2)
4. <b>Action of [Governor/ Mayor]:</b> The [Governor/ Mayor] shall either accept or reject the Terms of the [PPP/ JV] as negotiated between the [PPP/ JV]-SC and OP-PSP. If the [Governor/ Mayor] accepts the terms as recommended by the [PPP/ JV]-SC, s/he and the OP-PSP shall issue a Joint Certification (JC) stating that: (1) an agreement has been reached for the purpose of submitting the terms for Competitive Challenge; (2) the eligibility of the PSP; and (3) the technical and financial aspects of the [PPP/ JV] Project as agreed upon. The [Governor/ Mayor] may modify the Terms agreed between the [PPP/ JV]-SC and OP-PSP, provided, the OP-PSP agrees to them. If the [Governor/ Mayor] confirms the recommendation of the [PPP/ JV]-SC, s/he shall affix his/ her signature to the memorandum prepared by the [PPP/ JV]-SC. If the [Governor/ Mayor] takes an adverse position, s/he shall issue a written resolution in support of his/	Within 5 days from receipt of the recommendation of the [PPP/ JV]-SC

<i>Steps</i>	<i>Days/ Periods</i>
her action.	
4.1 <b>Non-Agreement:</b> Should negotiations not result to an agreement on the Terms of the Project, the [Governor/ Mayor] shall have the option to reject the UP by informing the OP-PSP in writing stating the grounds for rejection. In which case, the [Province/City/ Municipality] may: (1) accept a new UP from other PSPs; (2) decide to pursue the proposed activity through other PPP Modalities; (3) subject the [PPP/ JV] Project to a Competitive Selection; or (4) shelve the Project. The [PPP/ JV]-SC shall prepare a memorandum in this regard.	---
5. <b>Start of Stage 3:</b> The issuance of the JC commences the activities for Competitive Challenge (Stage 3) or the solicitation for comparative proposals.	---
6. <b>Sanggunian Updated:</b> The [PPP/ JV]-SC shall inform the Sanggunian of the developments and shall be furnished a copy of the agreed Terms. The Sanggunian may issue a resolution confirming the Terms.	Within 2 days from the signing of the JC
<b>Stage 3: Competitive Challenge</b>	---
1. <b>Preparation of Tender Documents:</b> The [PPP/ JV]-SC shall prepare the tender documents or terms of reference (TOR) for the Competitive Challenge based on the agreed Terms. The eligibility criteria used in determining the eligibility of the OP-PSP shall be the same as those stated in the TOR. Proprietary information supplied by the OP-PSP shall, however, be respected and protected, and treated with confidentiality. As such, it shall not form part of the TOR.	Within 30 days from the signing of the JC
2. <b>Submission to [Governor/ Mayor]:</b> The [PPP/ JV]-SC shall submit the TOR and draft [PPPA/ JVA] to the [Governor/ Mayor] for consideration and approval. The [PPP/ JV]-SC shall prepare a cover memorandum.	Within the same 30-day period (#1)
3. <b>Approval by [Governor/ Mayor]:</b> The [Governor/ Mayor] shall approve the TOR and draft [PPPA/ JVA]. S/He shall affix his/ her conformity to the [PPP/ JV]-SC memorandum. The [Governor/ Mayor] may introduce formal amendments to the TOR, provided, there is no substantive or material deviation from the agreed Terms.	Within 5 days from receipt of the documents from the [PPP/ JV]-SC
4. <b>Publication of Invitation:</b> The [PPP/ JV]-SC shall cause the publication in one (1) newspaper of general circulation in two (2) consecutive weeks and posting in at least two (2) conspicuous places and official website of the [Province/ City/	Publication to be made within 3 days from approval of the

<i>Steps</i>	<i>Days/ Periods</i>
Municipality] of the invitation for comparative proposals specifying the period whereby prospective challengers/ other PSPs must submit their written and notarized Expressions of Interest (EOI) to participate in the Competitive Challenge. The publication/ notice may state that if no EOI is submitted within the prescribed period, the [PPPA/ JVA] for the [PPP/ JV] Project shall be awarded to the OP-PSP.	[Governor/ Mayor]; EOIs must be submitted within 10 days from date of 2 <sup>nd</sup> publication
4.1 <b>Posting of Bid Security:</b> The OP-PSP shall post the proposal security on the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.	First day of publication
4.2 <b>Action if no Challenger:</b> If no EOI is submitted by a challenger/ other PSP, the OP-PSP shall be awarded the contract for the JV Project.	---
5. <b>Release of TOR:</b> If there is/ are EOI(s) submitted within the period set, the [PPP/ JV]-SC shall furnish the interested PSPs the TOR for the Competitive Challenge after paying the required amount set by the [PPP/ JV]-SC.	Within the same 10-day period (#4)
6. <b>Submission of Eligibility Documents:</b> Those PSPs which have submitted their LOIs shall submit their respective eligibility documents showing their legal, technical/ track record and financial capacities.	Within the same 10-day period (#4)
7. <b>Eligibility Determination:</b> The [PPP/ JV]-SC shall determine the eligibility of the challengers/ other PSPs. Only those determined to be eligible will be allowed to submit comparative proposals and attend the pre-selection conference. The [PPP/ JV]-SC shall notify the PSPs determined to be eligible and ineligible. The [PPP/ JV]-SC shall prepare a memorandum justifying its action.	Within 15 days from the last day of submission of the LOIs
7.1 <b>Appeal:</b> The disqualified PSPs may file an appeal of the decision of the [PPP/ JV]-SC with the [Governor/ Mayor].	Within 5 days from receipt of notice
7.2 <b>Ruling on Appeals:</b> The [Governor/ Mayor] shall evaluate and decide the appeal(s). The [Governor/ Mayor] shall issue a written resolution in support of his/ her action.	Within 5 days from receipt of appeal
8. <b>Pre-Selection Conferences:</b> The [PPP/ JV]-SC shall conduct at least one (1) pre-selection conference with the OP-PSP and other eligible PSPs.	All meetings shall be conducted within 10 days from day notices were sent to the

<i>Steps</i>	<i>Days/ Periods</i>
	eligible PSPs
9. <b>Submission of Comparative Proposals:</b> The eligible challengers/ other PSPs shall submit their comparative proposals on the financial and economic aspects of the [PPP/ JV] Project as stated in the TOR. The challengers must agree to the technical aspects of the TOR.	Within 30 days from receipt of notice (#7)
10. <b>Evaluation:</b> The [PPP/ JV]-SC shall evaluate the comparative proposals. In the evaluation of proposals, the best offer shall be determined to include the original proposal of the OP-PSP.	Within 10 days from receipt of comparative proposals
11. <b>Notice to OP-PSP:</b> If the [PPP/ JV]-SC determines that an offer made by a comparative PSP or challenger other than the negotiated terms with OP-PSP incorporated in the TOR is superior or more advantageous to the [Province/ City/ Municipality] than the latter, the OP-PSP shall be given the right to match such superior or more advantageous offer. If there is such an offer, the [PPP/ JV]-SC shall notify the OP-PSP of the latter's prerogative to match the offer by the challenger.	OP-PSP to be notified within 5 days from determination by [PPP/ JV]-SC that there is a superior offer
12. <b>Right to Match:</b> The OP-PSP shall exercise or waive its right to match. Should no matching offer be received within the stated period, the [PPP/ JV] Project shall be awarded to the challenger submitting the most advantageous proposal. If a written matching offer is received by the [PPP/ JV]-SC within the prescribed period, the [PPP/ JV] Project shall be awarded to the OP-PSP.	Within 3 days from receipt of notice (#11)
13. <b>Notice of Developments:</b> The [PPP/ JV]-SC shall inform the [Governor/ Mayor], Sanggunian, OP-PSP and challenger(s) of the outcome of the Competitive Challenge.	Within 2 days from receipt in writing of action of OP-PSP
14. <b>Legislative Action:</b> The [PPP/ JV]-SC shall forward to the Sanggunian a copy of the draft [PPPA/ JVA]. The Sanggunian shall review and thereafter approve or disapprove the PPPA/ JVA or terms and provisions thereof. If the Sanggunian approves, it shall issue a Resolution authorizing the [Governor/ Mayor] to sign the [PPPA/ JVA]. The Sanggunian may conduct public consultation(s) with identified end-users, civil society organizations, affected public offices, and other stakeholders.	Within 15 days from receipt of the draft [PPPA/ JVA]
15. <b>Signing of [PPPA/ JVA]:</b> Acting pursuant to the Resolution, the [Governor/ Mayor] and the representative of the winning PSP shall sign the [PPA/ JVA].	Within 5 days from receipt of Sanggunian Resolution

<i>Steps</i>	<i>Days/ Periods</i>
16. <b>Notice of Award:</b> The [PPP/ JV]-SC shall issue the Notice to Award (NOA) to the winning PSP with the instruction to the latter to comply with the requirements set forth in the NOA.	Within the 2 days from Signing of [PPPa/ JVA]
17. <b>Compliance:</b> The winning PSP shall submit to the [PPP/ JV]-SC all the requirements stated in the NOA.	Within 15 days from receipt of NOA
18. <b>Notice to Proceed:</b> The [PPP/ JV]-SC shall issue the Notice to Proceed and Notice of Acceptance (NP/NA) of all compliance statements and conditions precedent if the same are in order.	Within 5 days from receipt of conditions precedent
19. <b>Posting of [PPA/ JVA]:</b> The [PPP/ JV]-SC shall cause the posting of the signed and executed [PPA/ JVA] in at least two conspicuous places in and the official website of the [Province/ City/ Municipality].	Within 2 days from issuance of NP/NA

### C. Competitive Negotiations

<i>Steps</i>	<i>Days/ Periods</i>
1. <b>Preparation of Study and Recommendation:</b> The PPP-SC shall prepare the feasibility or project study, terms of reference for the competitive negotiations, the draft PPPA, the possible list of PSPs to be invited, and recommends to [Governor/ Mayor] the conduct of competitive negotiations for the PPP Project.	Within 60 days from the directive of the [Governor/ Mayor]
2. <b>Action of [Governor/ Mayor]:</b> The [Governor/ Mayor] shall accept or reject the recommendation of the PPP-SC. If s/he decides to accept, the [Governor/ Mayor] shall issue a Certification in this regard.	Within 5 days from submission of PPP-SC recommendation
3. <b>Final Roster of PSPs:</b> The PPP-SC shall finalize the roster of PSPs and secure their profiles and eligibility documents for specific PPP projects. Part of this list would be the PSPs which have unique specialization.	Within 5 days from action of [Governor/ Mayor]
4. <b>Sending Out of Invitations:</b> The PPP-SC, with the approval of the [Governor/ Mayor], shall invite two or more qualified PSPs to enter into negotiations with the [Province/ City/ Municipality]. In the invitation, the PPP-SC shall state the PPP project, the names of PSPs invited, the parameters of the PPP project and the negotiations, and that simultaneous negotiations will be conducted with all the identified PSPs.	Within 2 days from finalization of Roster
5. <b>Reply from PSPs:</b> The invited PSPs shall submit in writing their	Within 5 days

<i>Steps</i>	<i>Days/ Periods</i>
intentions to participate in the PPP project and enter into good faith and non-exclusive negotiations with the [Province/ City/ Municipality].	from receipt of Letter-Invitation
6. <b>Publication:</b> The PPP-SC shall cause the publication in one (1) newspaper of general circulation in two (2) consecutive weeks and posting in at least two (2) conspicuous places and official website of the [Province/ City/ Municipality] of the invitation for competitive negotiations.	Within 2 days from last day to file Reply
7. <b>Conduct of Negotiations:</b> The PPP-SC shall set the schedule and conduct the negotiations with all the identified PSPs. The PPP contract shall be awarded to the PSP which offers the best combination of quality and price based on the feasibility or project study prepared by the [Province/ City/ Municipality]. The PPP-SC may conduct two (2) rounds of negotiations.	Within 15 days from publication
8. <b>Notice of Developments:</b> The PPP-SC shall inform all the PSPs, Governor/ Mayor], and Sanggunian of the outcome of the negotiations.	Within 2 days from completion of Negotiations
9. <b>Legislative Action:</b> The [PPP/ JV]-SC shall forward to the Sanggunian a copy of the draft [PPPA/ JVA]. The Sanggunian shall review and thereafter approve or disapprove the PPPA/ JVA or terms and provisions thereof. If the Sanggunian approves, it shall issue a Resolution authorizing the [Governor/ Mayor] to sign the [PPPA/ JVA]. The Sanggunian may conduct public consultation(s) with identified end-users, civil society organizations, affected public offices, and other stakeholders.	Within 15 days from receipt of the draft [PPPA/ JVA]
10. <b>Signing of [PPPA/ JVA]:</b> Acting pursuant to the Resolution, the [Governor/ Mayor] and the representative of the winning PSP shall sign the [PPA/ JVA].	Within 5 days from receipt of Sanggunian Resolution
11. <b>Notice of Award:</b> The [PPP/ JV]-SC shall issue the Notice to Award (NOA) to the winning PSP with the instruction to the latter to comply with the requirements set forth in the NOA.	Within the 2 days from Signing of [PPPa/ JVA]
12. <b>Compliance:</b> The winning PSP shall submit to the [PPP/ JV]-SC all the requirements stated in the NOA.	Within 15 days from receipt of NOA
13. <b>Notice to Proceed:</b> The [PPP/ JV]-SC shall issue the Notice to Proceed and Notice of Acceptance (NP/NA) of all compliance statements and conditions precedent if the same are in order.	Within 5 days from receipt of conditions precedent
14. <b>Posting of [PPA/ JVA]:</b> The [PPP/ JV]-SC shall cause the	Within 2 days

<i>Steps</i>	<i>Days/ Periods</i>
posting of the signed and executed [PPA/ JVA] in at least two conspicuous places in and the official website of the [Province/ City/ Municipality].	from issuance of NP/NA

#### **4. Right to Amend**

The [Governor/ Mayor], depending on the nature and complexity of the [PPP/ JV] Project and acting on the recommendation of the [PPP/ JV]-SC, may extend or shorten the above-stated periods, provided, that the new schedule is reasonable, applied fairly, will ensure free competition, transparency and accountability, and will not prejudice vested rights of any PSP.

#### **5. Effectivity**

This Executive Order shall take effect upon approval hereof. Copies of this Executive Order shall posted in at least two (2) conspicuous places and uploaded in the official website of the [Province/ City/ Municipality], and disseminated and made available to all interested parties.