

# Joint Ventures with Public Corporations

**Alberto C. Agra**

Certified PPP Specialist™

Certified Regulation Specialist™

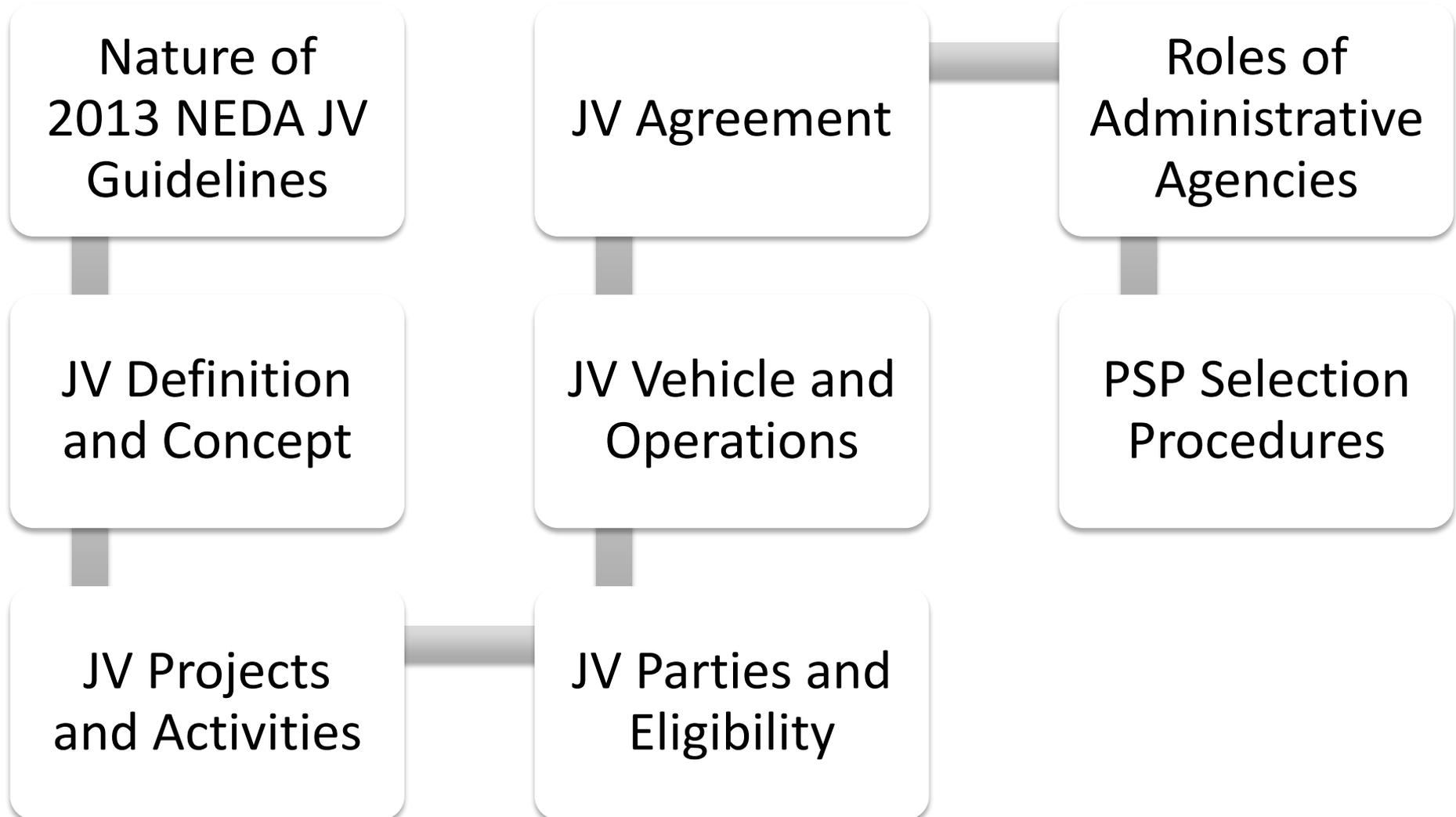
PPP Law and Local Government Law Professor,  
Ateneo Law School

President, Forensic Solutions

PhD Candidate, Leadership Studies

Former Acting Secretary of Justice, Acting Solicitor  
General and Government Corporate Counsel

# Flow of Presentation



# **Nature and Coverage of the 2013 NEDA JV Guidelines**

# Nature of Guidelines

<b>Classification</b>	Guideline-Framework-Rule Supplementary, Substantive and Procedural Rule
<b>Legal Basis</b>	Section 8 of EO 423-2005 No specific statute (Law on Partnerships)
<b>Issuing Authority</b>	NEDA Director General in consultation with GPPB, OGCC and GCG; approved by NEDA Infracom and Economic Development Cluster

# Nature of Guidelines

<b>Amendatory Nature</b>	Amends 2008 JV Guidelines (became effective May 2, 2008)
<b>Effectivity Date</b>	May 26, 2013 (published May 11, 2013; approved May 3, 2013)
<b>Retroactive Effect</b>	2013 Guidelines will apply retroactively except (where 2008 Guidelines will apply): <ul style="list-style-type: none"><li>a) Negotiated JVs: JVA executed</li><li>b) Competitive Selection: bids opened</li><li>c) Vested rights already accruing to a party (<i>SM vs. BCDA case</i>)</li></ul>

# Coverage of Guidelines/ Parties

## Included

1. Government-Owned and - Controlled Corporations (GOCCs)
2. Government Instrumentalities with Corporate Powers (GICPs)
3. Government Corporate Entities (GCEs)
4. Government Financial Institutions (GFIs)
5. State Universities and Colleges (SUCs)

## Excluded: Transactions of:

1. GFIs in the ordinary course of business as part of their normal and ordinary banking, financial or portfolio management operations
2. (JV activities) GCEs in the exercise of their primary mandate to dispose government assets or properties
3. Local Government Units (LGUs)

# **JV Definition and Concept**

# Definition

JV is "[a]n **arrangement** whereby a **private sector entity** or a group of private sector entities on one hand, and a **Government Entity** or a group of Government Entities 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 to undertake an **investment activity**. The investment activity shall be for the purpose of accomplishing a **specific goal** with the end view of facilitating private sector initiative in a particular industry or sector, and **eventually transfer the activity** to either the private sector under competitive market conditions or to the government. The JV involves a **community or pooling of interests** in the performance of the investment activity, and each party shall have the right to direct and **govern the policies** in connection therewith with the intention to **share both profits and risks and losses** subject to agreement by the parties. A JV may be a **Contractual JV or a Corporate JV** (JV Company)."

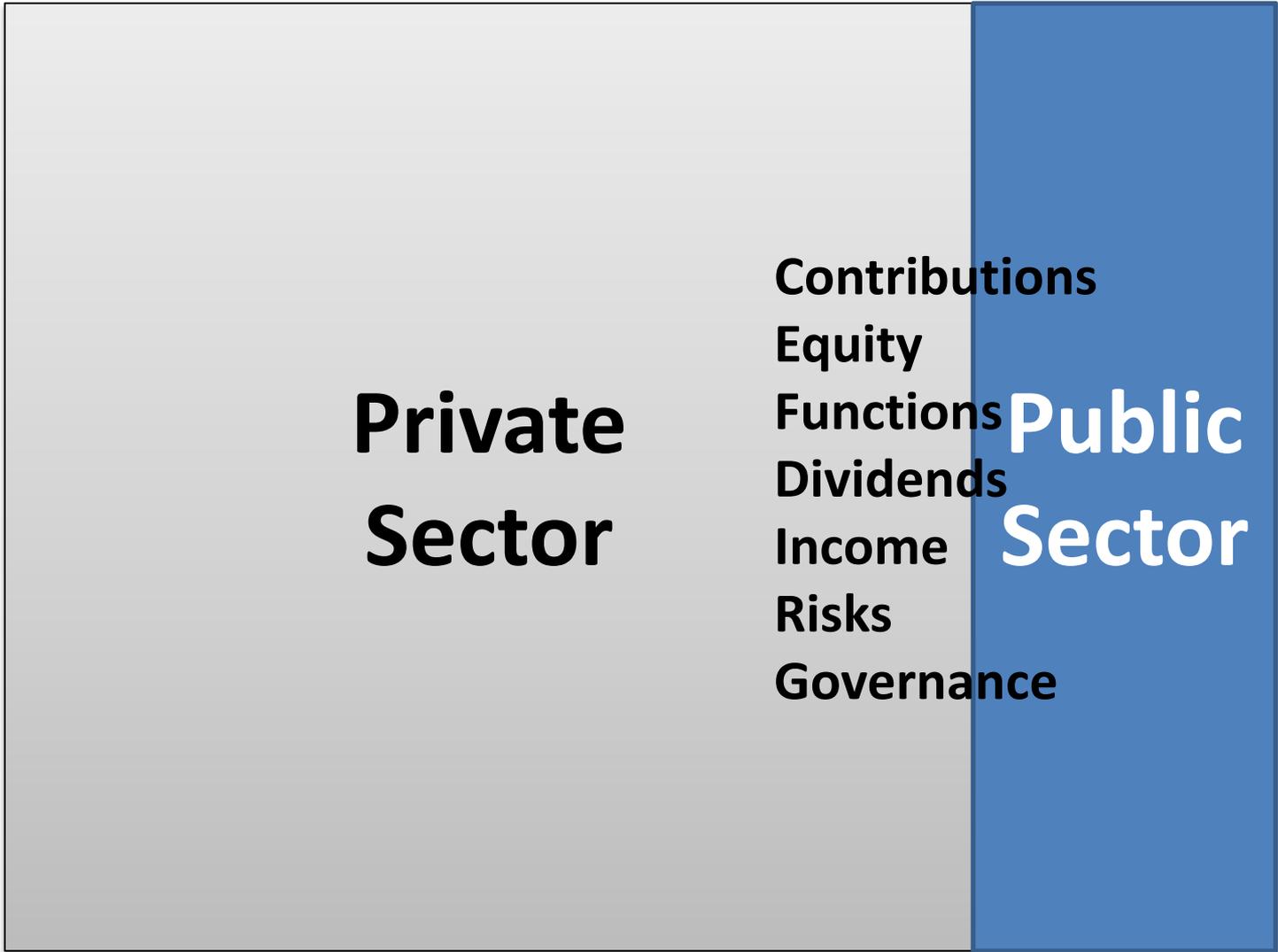
# JV not a BOT Law Variant

## Differences

- Community/ Pooling of Resources, not purely private
- Proportionality, not distinct assumption of benefits and obligations
- PE contributes, unlike BOT Law where PE not contribute as a rule
- JV Company by Parties, not just by Private Sector

## Inapplicable Provisions in BOT Law

- Only for Projects traditionally provided by PE
- Approval Processes
- Debt-Equity Ratio
- Maximum Rate of Return
- Restrictions on Unsolicited Proposals
  - Priority Projects
  - New Technology
  - Subsidy or Equity



# **JV Projects and Activities**

# JV Project Requirements

National/ specific development-responsive

Activity-specific

Mandate-driven

Infrastructure or Development-related

Role-share delineation

# JV Projects-Sectors

power plants • highways • (sea)ports •  
airports • canals • dams • hydropower  
projects • water supply • irrigation,  
telecommunications • railroad and railways •  
transport systems • land reclamation projects •  
industrial estates or townships • commercial/ real  
estates • housing • government buildings •  
tourism projects • public markets •  
slaughterhouses • warehouses • solid waste  
management • information technology networks  
and database infrastructure • education facilities •  
health facilities • sewerage • drainage •  
dredging • others GE may authorize

# **JV Parties and Eligibility**

# JV Parties

## Public Side

Under the NEDA Guidelines:

- GOCCs
- GICPs
- GCEs
- GFIs
- SUCs

Under LGC 1991 and Rules:

- LGUs

## Private Side

Eligible, Local or Foreign:

- Individual
- Partnership
- Corporation
- Consortium
- Firm

No prohibition for NGAs, Commissions

# Eligibility Requirements

## **Legal** (capacity and ownership)

1. Legally capacitated
2. If JV activity, requires a public utility franchise
  - SEC-registered
  - At least 60% Filipino-owned
3. Compliance with nationality/  
ownership requirements

# Eligibility Requirements

**Technical**  
(possess  
Track Record  
to carry out  
JV activity)

1. completed a project similar or related to the JV activity
2. whose value, adjusted to current prices using the NSO CPI, must be at least 50% of the cost of the JV activity
3. Disclosure of related ongoing and completed projects

*Note:* Cost of JV activity is the total amount of the contributions of the parties to the JV activity/ project in present value with discount rate

# Eligibility Requirements

**Financial**  
(capacity to  
fund JV  
activity)

1. Audited FS for past 3 years
2. If Filipino JV partner, submit:
  - BIR-stamped FS
  - Latest tax returns
3. Measured in terms of:
  - proof of ability of the prospective JV Partner to provide a minimum amount of equity to the JV activity (net worth of the company, or equivalent deposit)
  - Bank good financial standing certificate

# Eligibility Requirements

## Others

1. If consortia, overall capability
2. Waiver, Representations and Undertakings
  - a) Acceptance of qualification criteria
  - b) Commitment not to file suit to restrain JV from selection to JV implementation (excludes assailing lawfulness of disqualification or rejection of proposal)

# **JV Vehicle, Contributions and Operations**

# JV Vehicle: 2 Options

**JV Company or  
Corporate JV**  
(Preferred/ Best  
Option)

**1**

**Unincorporated JV or  
Contractual JV**  
(Alternative Option;  
discretion of  
Government Entity)

**2**

# JV Company

Formed by JV  
Partners

SEC-  
Registered

Stock  
Corporation

Follow  
Nationality  
Rules

Government  
Equity (50% or  
less)

Government  
in BoD

50-year Term  
(maximum)

Earn Income  
and Receive  
Dividends

OP/ GCG Pre-  
Incorporation  
Approval

# Government Contribution

Asset

Money

Equipment

Land

Intellectual  
Property

Services

- (1) Anything of (pecuniary) value
- (2) Subject to 3<sup>rd</sup> party independent valuation

# JV Activities and Operations

- Procurement** ○ Financed by Government, governed by GPRA
- Audit** ○ JV activity subject to audit (COA and private)
- Incentives** ○ Approved by Board of Investments
- Termination** ○ Breach of major JVA conditions  
○ Forfeiture of performance security optional

# JV Activities and Operations

## **Pre-JVA Expiration**

- withdrawal of the Government Entity's capital contribution before the expiration of the said period is encouraged
- Via IPO, competitive selection, other means that promote transparency, competition and fairness

## **Post-JV Ownership**

- Transfer to Government or Private
- Based on JVA terms
- Approvals
  1. Privatization Council – public assets
  2. GCG – non-asset/ property public equity

# **Roles of Administrative Agencies**

# Roles and Responsibilities

Head of Government Entity

NEDA Board – Investment  
Coordination Committee

JV-Selection Committee

Privatization Council

Governance Commission for GOCCs

OP, DOF, DBM, DENR, BOI

OGCC, OSG and DOJ

Regulatory and Audit Agencies

# NEDA Board – Investment Coordination Committee

*As Approving Authority*

Projects where government contribution  
amounting to P150m or more:

- 1) Infrastructure or Development (Section 5.9 of 2013 Guidelines)
- 2) Public Utilities
- 3) Negotiated JVs
- 4) Not primary mandate of public entity

# Head of Government Entity

1. Approving Authority
  - a) Projects related to primary mandate of public entity and non-infrastructure projects
  - b) Projects not subject to approval by NEDA ICC
2. After Approving Authority, approves draft JVA
3. Prescribes its participation in JV activity
4. Creates JV-Selection Committee
5. Chooses JV Partner selection procedure
6. Decides whether JV Company or Contractual JV

# JV-Selection Committee

Composition: **Regular Members** (voting)

1. Chairman: at least 3<sup>rd</sup> ranking officer
2. Secretary: legal officer
3. Member: officer knowledgeable in finance
4. Member: officer knowledgeable in JV O&M
5. Member: officer knowledgeable in technical aspect

*Note:* Quorum is majority of all voting (3); Chair only votes to break ties

# JV-Selection Committee

Composition: **Provisional Members** (non-voting)

1. Technical officer from regulatory agency
2. Observer: Counsel from Statutory Counsel
3. 2 Observers: 2 representatives from private sector from:
  - a) Association related to JV project
  - b) Facility user or accounting firm
4. Observer: Representative from COA

# JV-Selection Committee

## Functions

1. Oversees all aspects of the pre-selection and selection process
2. Prepares selection/ tender documents
3. Publishes invitation to apply for eligibility and to submit a proposal
4. Pre-qualifies prospective private sector participants
5. Conducts of pre-selection conferences
6. Issues supplemental notices

# Privatization Council

Approves/ clears divestment of government asset or property to private partner

## Governance Commission for GOCCs

1. Approves formation of JV Company
2. Approves/ clears divestment of government equity that is not in the form of asset or property

# **President**

1. Approves JV activities if required by law
2. Approves creation of JV Company

## **DOF and DBM**

Approves/ clears provision for national government undertakings, subsidies or guarantees

## **DENR**

Issues appropriate clearances prior to actual implementation

# **OGCC, OSG or DOJ**

1. Issues Counsel's opinion prior to execution of JVA
2. Attends JV-SC as Provisional Member

## **Board of Investments**

Approves/ grants investment incentives

## **Regulatory and Audit Agencies**

e.g. ERC, TRB, NEA, (LWUA), NTC; COA

Issues concessions, administrative franchises, approvals

# **PSP Selection Procedures**

---

**Selection  
Procedures  
(Private JV  
Partner)**

**Competitive  
Selection (A)**

---

**Direct-Limited  
Negotiations (B)**

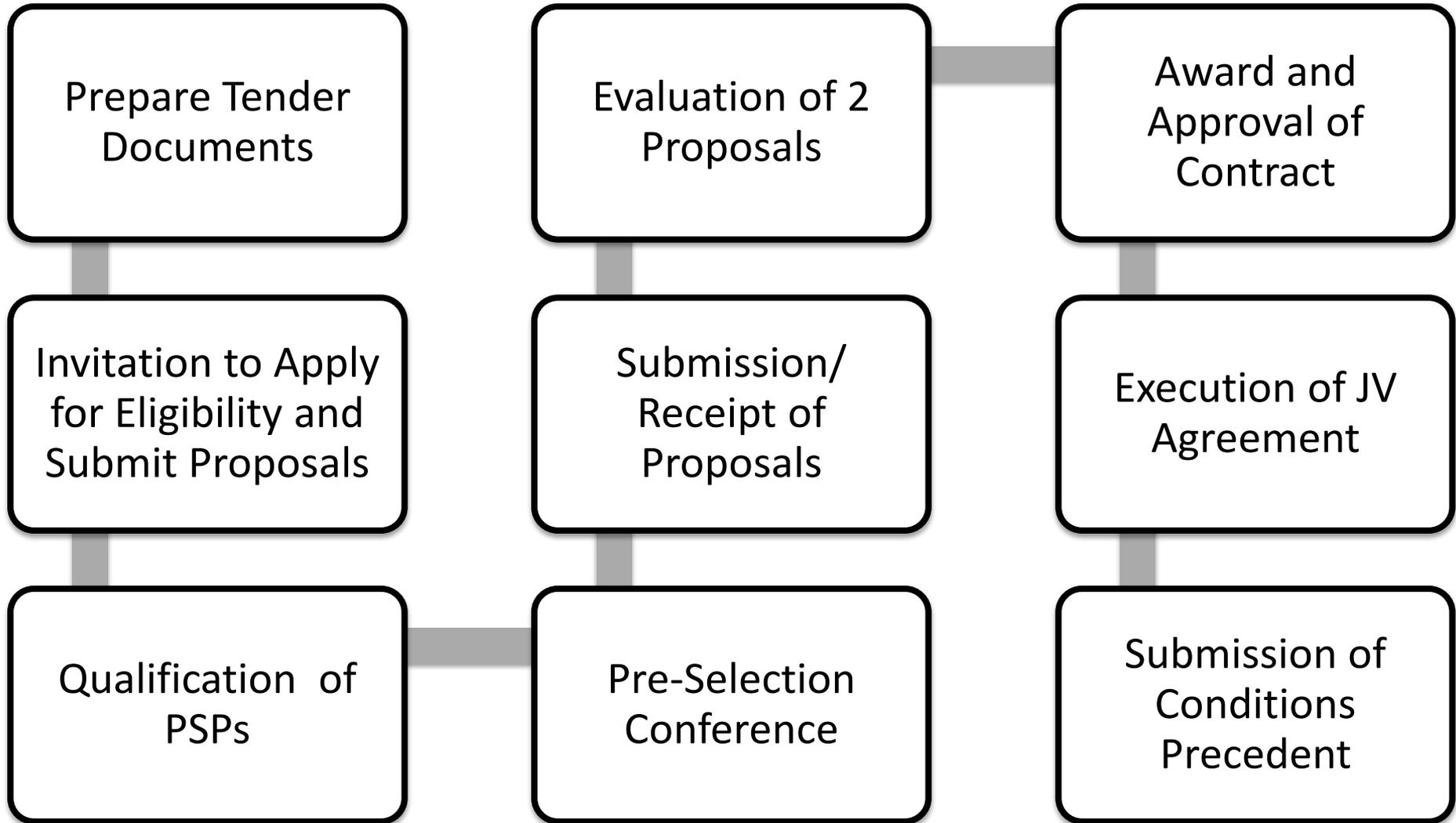
---

**Competitive  
Challenge (B)**

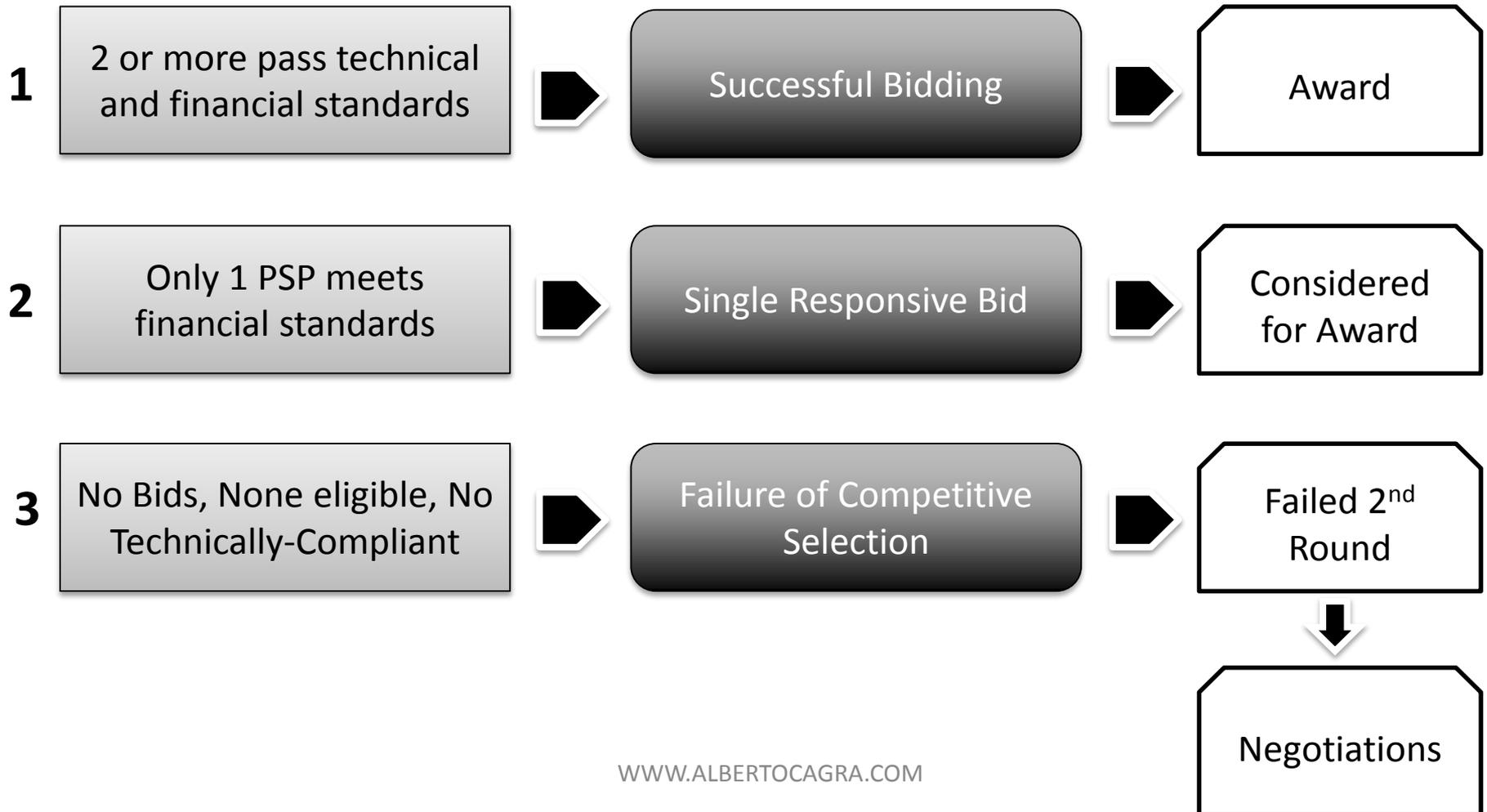
---

	<b>COMPETITIVE SELECTION</b>	<b>(DIRECT-LIMITED) NEGOTIATIONS</b>	<b>COMPETITIVE CHALLENGE</b>
<i>Annex</i>	A	B	B
<i>Similar to:</i>	Solicited Proposal (BOT Law) and Bidding (GPRA)	Negotiations (BOT Law and GPRA)	Unsolicited Proposal (BOT Law) with Right to Outbid
<i>Originator</i>	Government	Government	Private Sector
<i>Conditions</i>	Solicitation by Government Entity	(1) When no successful negotiations in Annex A and Annex A failed 2 <sup>nd</sup> time, then Government seeks out JV Partner to submit proposal manifestly advantageous to Government (2) When single/ multiple bidders pass technical, but fail financial evaluation	Private Sector Initiated
<i>Extent</i>	Legal, Technical and Financial	Financial only	Legal, Technical and Financial

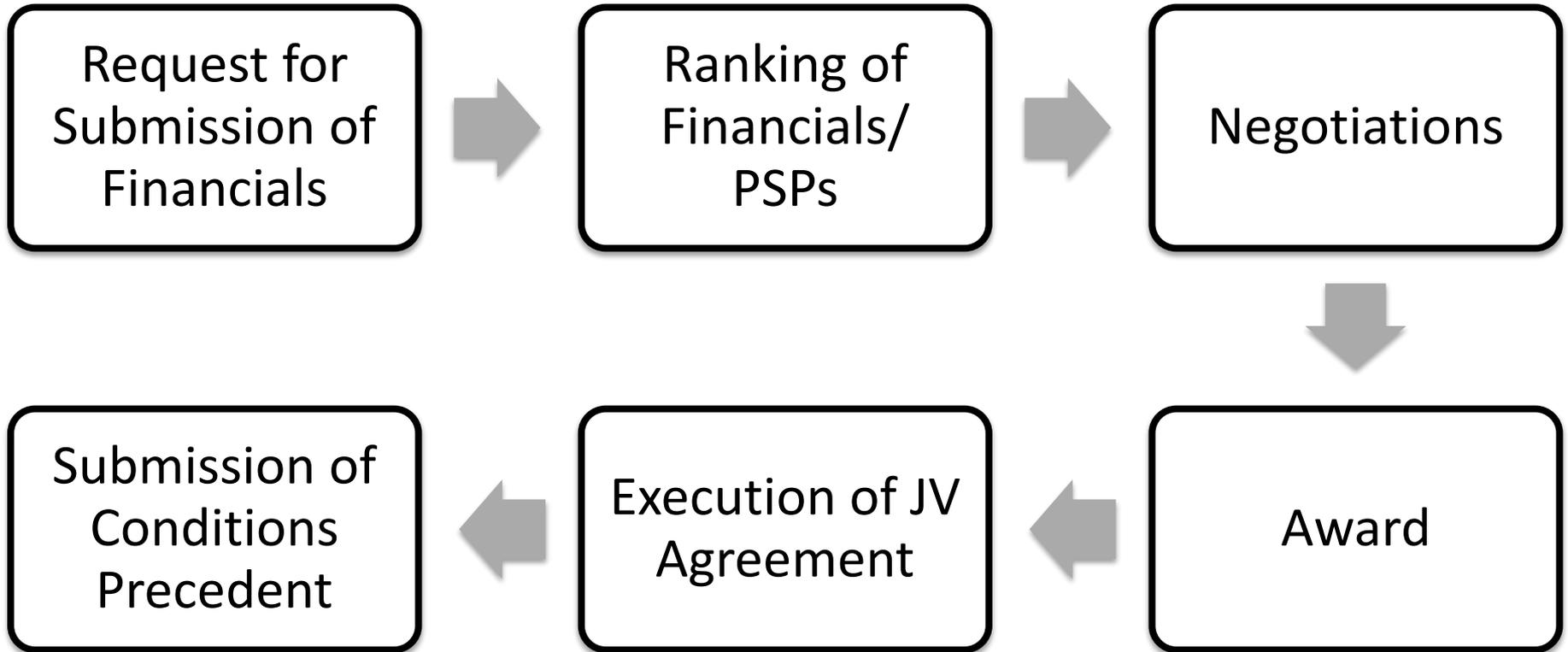
# Competitive Selection



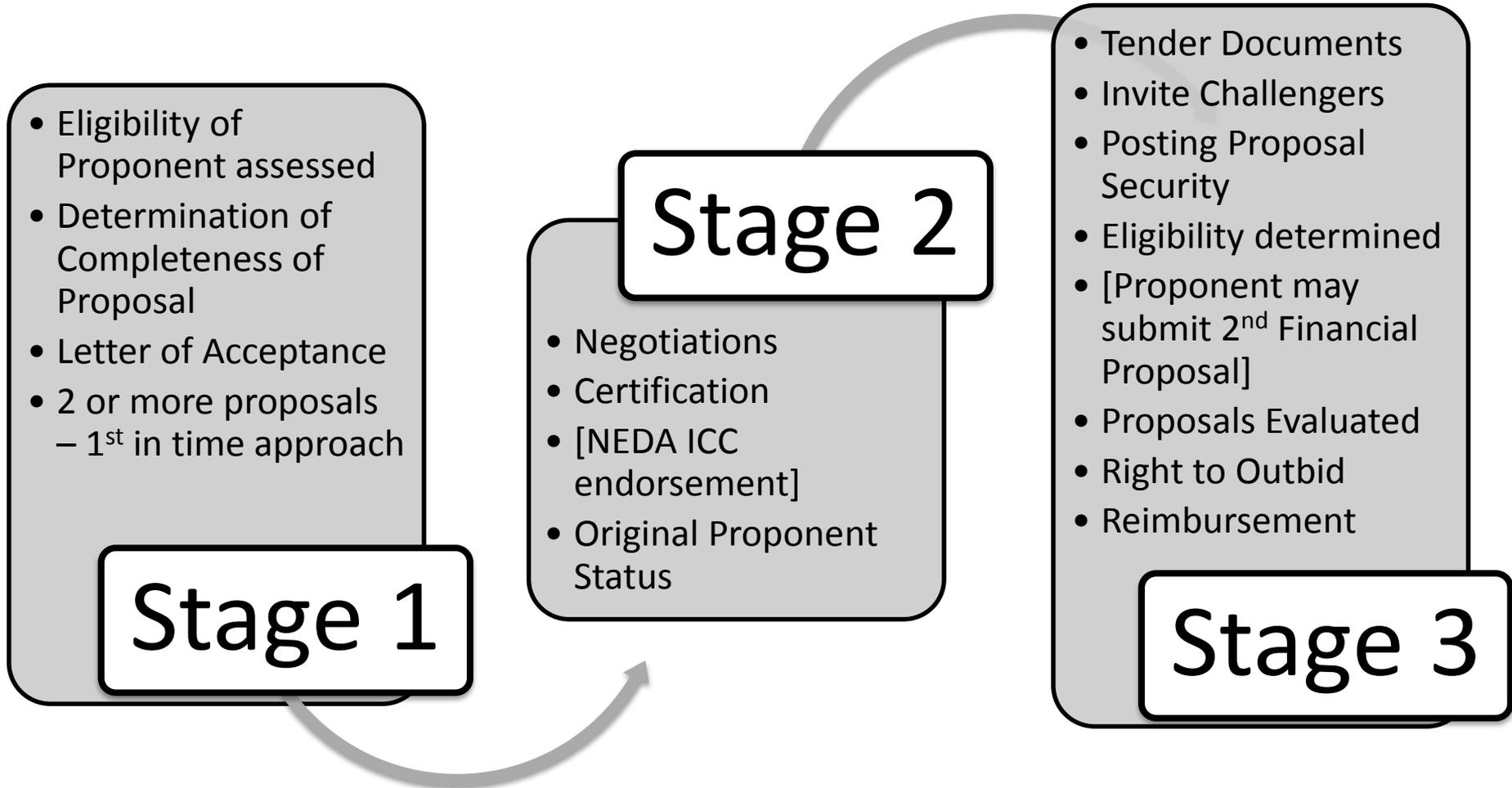
# Scenarios in Competitive Selection



# Direct-Limited Negotiations



# Competitive Challenge



# 10 Legal Ways to Shorten Process

1. Government contribution to JV activity less than P150 million (No NEDA ICC)
2. No government asset or non-asset equity divestment (No PC or GCG)
3. No national government guarantees, undertakings or subsidies (No DBM or DOF)
4. Not form a JV Company (No GCG and OP)
5. Project does not require Presidential approval
6. GE adopts shorter periods
7. Simultaneous evaluation of technical and financial proposals
8. Well-prepared feasibility study/ Pre-FS/ business case
9. Statutory counsel involved in drafting of JVA
10. 3<sup>rd</sup> party valuation of GE contribution by Government

alberto.c.agra@gmail.com

(0917)5353823

**THANK YOU.**