

PPPs: Act and Actors

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

Act and Actors

ACT

- Main PPP Contract
- Ancillary Contracts (“Contract Suite”)
- Implementing Agency
- Regulatory Agency

ACTORS

- Signatory(ies)
- Governing Board
- Guarantor
- Selection Committee
- Contract Review Authority
- Counsel
- Technical Review
- Consultants
- Consent Providers/ Endorsers

ACT

PROCESS

1. 6 Evils
2. Not comply with Procedures
3. Not secured required Approvals
4. Procedure not follow ACT
5. No WAP/ Consultation
6. Pre-Award or Pre-NTP

SUBSTANCE

1. Lack of Authority of Implementing Agency
2. Lack of Authority by Signatory
3. Moral Hazard Risks
4. Inappropriate Modality
5. Material Deviation
6. Unlawful Provisions

Nature of PPP Contracts

- Trust and Fiduciary Contracts
- Accountability Instruments (both the Implementing Agency and PSP)
- Non-Impairment (except valid exercise of police power)

Signatory

Contracting Authority of Public Officers as Agent of Government

- Contracts in behalf of the **Republic of the Philippines** shall be executed by the President unless authority therefor is expressly vested by law or by him in any other public officer.
- Contracts in behalf of the **political subdivisions and corporate agencies or instrumentalities** shall be approved by their respective governing boards or councils and executed by their respective executive heads.

Apparent Authority

- The government is not bound by unauthorized acts of its agents, even though within the apparent scope of their authority.

Contract Review Authority

- BOT Law: DOJ, OSG and OGCC
- GOCC JV: OSG and OGCC
- LGU PPPs: Higher/ Supervising LGU (Ordinance); not OP/ NGAs
- Ombudsman/ Sandiganbayan: Grossly or Manifestly Disadvantageous Contract
- Courts: Judicial Review

Question: Which extends only to questions of law? Which ones include questions of fact? Which covers act/ contract only? Which ones cover act/ contract and actor?

Estoppel and Ratification

Void ultra vires act

- an act which is performed beyond jurisdiction
- entered into beyond the express, implied or inherent powers of Government
- contract does not comply with the substantive requirements of law

Ratifiable ultra vires act

- an act attended only by an irregularity but remains within jurisdiction
- subject to ratification and/or validation
- entered into by the improper department, board, officer or agent and do not comply with the formal requirements of a written contract

Suability and Liability

- **Suability** is the ability to sue and be sued; it is the result of the express or implied consent of the State to be sued.
- **Liability** is determined after hearing on the basis of the relevant laws and the established facts.

Immunity

General Rule: the State may not be sued.

- Exception: If it consents to be sued, either expressly or impliedly.
 - Express Consent - when a law so provides
 - Implied Consent - when the State enters into a contract or it itself commences litigation. The State will be deemed to have impliedly waived its non-suability only if it has entered into a contract in its proprietary or private capacity.

Remedies Against Contracts (Act)

Between Parties

- Arbitration
- Judicial:
 - Review
 - Enforcement
 - Confirmation

3rd Parties/ Losing Bidders

Taxpayers

- Assail contract itself
- Injunctions

Losing Bidders

- Question disqualification
- Question rejection of proposal

Rule on Injunctions (RA 8975)

Prohibition on the Issuance of Temporary Restraining Orders, Preliminary Injunctions and Preliminary Mandatory Injunctions. — No court, except the **Supreme Court**, shall issue **any temporary restraining order, preliminary injunction or preliminary mandatory injunction** against the **government, or any of its subdivisions, officials or any person or entity, whether public or private**, acting under the government's direction, to restrain, prohibit or compel the following acts:

- (a) Acquisition, clearance and development of the right-of-way and/or site or location of any **national government project** (BOT Law)
- (b) Bidding or awarding of contract/project of the **national government** as defined under Section 2 hereof;
- (c) Commencement, prosecution, execution, implementation, operation of any such contract or project;
- (d) Termination or rescission of any such contract/project; and
- (e) The undertaking or authorization of any other lawful activity necessary for such contract/project.

This prohibition shall apply in all cases, disputes or controversies instituted by a **private party**, including but not limited to cases filed by bidders or those claiming to have rights through such bidders involving such contract/project. This prohibition shall **not apply when the matter is of extreme urgency involving a constitutional issue**, such that unless a temporary restraining order is issued, grave injustice and irreparable injury will arise. The applicant shall file a bond, in an amount to be fixed by the court, which bond shall accrue in favor of the government if the court should finally decide that the applicant was not entitled to the relief sought.

If after due hearing the court finds that the award of the contract is **null and void**, the court may, if appropriate under the circumstances, award the contract to the qualified and winning bidder or order a rebidding of the same, without prejudice to any liability that the guilty party may incur under existing laws.

Actors' Liability/ 3-Fold Responsibility

Criminal Liability

Civil Liability

Administrative Liability

Distinction

| Administrative Liability | Penal or Civil Liability |
|--|--|
| <p>Purpose is mainly to protect the public services based on the principle that a public office is a public trust; breach of standard of public service</p> | <p>Purpose of criminal prosecution is the punishment of crime; or remuneration, reimbursement or recovery of damages</p> |
| <p>Presumptions: Public officers are presumed to have performed their duties regularly and acted within the bounds of their authority, unless the contrary is shown.</p> | <p>Presumption: Accused is presumed innocent</p> |

Relation with Each Other

- No double jeopardy (Prosecution in one is not a bar to the other)
- No prejudicial question where one case is administrative and the other is civil or criminal (Prejudicial question involves a civil and a criminal case)
- Disposition of the criminal or civil case does not necessarily govern the disposition of the administrative case and vice-versa.

Rules

- As a general rule, if a public officer is performing his official functions, s/he is not liable.
- The exception is when there is grave abuse of right/jurisdiction.
- If s/he is performing his/her tasks outside of the scope of his authority, or without authority, s/he is personally liable.
- If s/he does it beyond the scope of his/her authority, s/he is not entitled to any protection.
- Suit against public officer to enforce liability for personal tort
- Suit against public officer to compel performance of official duty or restrain performance of an act
- Contract process attended by corrupt act
- Entered into a grossly or manifestly disadvantageous contract

Liability of Executive Officers

- **Discretionary Functions:** shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights, unless law provides otherwise
- **Ministerial Officers:** liable for any injury for failure or neglect of the officer to perform the duty at all, or to perform it properly (malfeasance, nonfeasance, misfeasance)
- **Superior-Subordinate:** Public officers, in the performance of their functions, are not civilly liable to 3rd persons, either for the misfeasance or positive wrongs, or for the nonfeasance, negligence, or omissions of duty of their subordinates. Negligence of subordinates cannot always be ascribed to their superior in the absence of the latter's own negligence.

Defenses

- Presumption of regularity
- Acted on advice of counsel/ consultants
- Merely recommended
- Collegial body
- Precedent
- Followed Procedures
- No proof (burden of proof on Petitioner/
Claimant)
- Good faith
- No law violated

Election Ban: March 25 to May 8

Section 261 (v) OEC: Prohibition against release, disbursement or expenditure of public funds. — Any public official or employee including barangay officials and those of government-owned or controlled corporations and their subsidiaries, who, during forty-five days before a regular election and thirty days before a special election, **releases, disburses or expends any public funds** for:

- (1) Any and all kinds of public works, except the following:
 - (a) Maintenance of existing and/or completed public works project: xxx
 - (b) (b) Work undertaken by contract through public bidding held, or by negotiated contract awarded, before the forty-five day period before election xxx
 - (c) (c) Payment for the usual cost of preparation for working drawings, specifications, bills of materials, estimates, and other procedures preparatory to actual construction xxx
 - (d) (d) Emergency work necessitated by the occurrence of a public calamity, but such work shall be limited to the restoration of the damaged facility.
xxx

Election Ban: March 25 to May 8

Section 261 (w) OEC: Prohibition against construction of public works, delivery of materials for public works and issuance of treasury warrants and similar devices. — During the period of forty-five days preceding a regular election and thirty days before a special election, **any person** who (a) undertakes the **construction of any public works, except for projects or works exempted in the preceding paragraph**; or (b) issues, uses or avails of treasury warrants or any device undertaking future delivery of money, goods or other things of value **chargeable against public funds**.

Thank you.

0917-5353823

alberto.c.agra@gmail.com

WWW.ALBERTOCAGRA.COM