



# Joint Ventures

## *2023 NEDA Guidelines*

**Alberto C. Agra**

Certified PPP and Regulation Specialist™

PPP Law, Administrative Law, Local Government Law Professor, and  
Political Law Bar Reviewer

PPP Law-for-All Advocate and Author

Television Host, Batas et AL, CNN Philippines

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

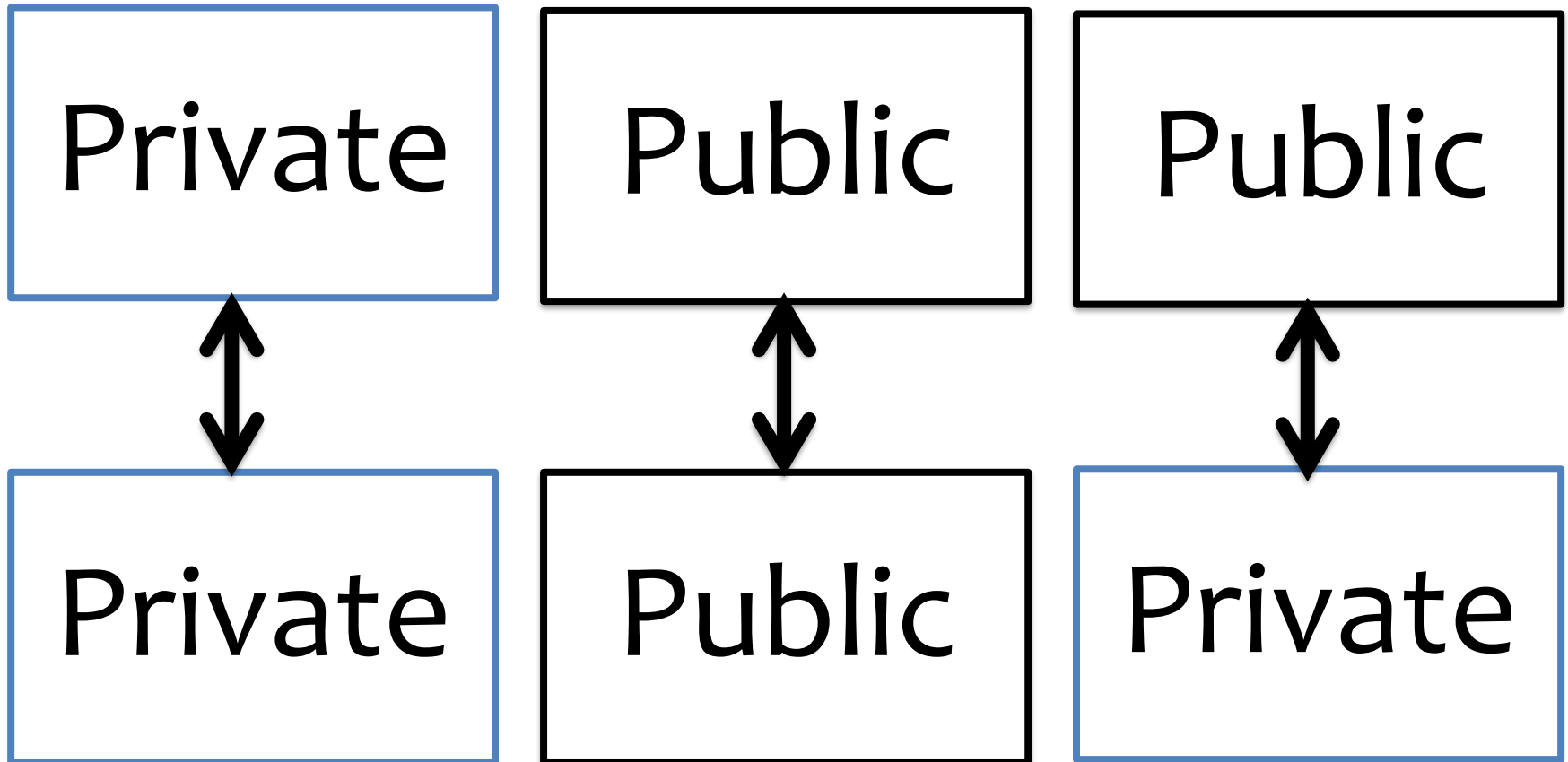
President, Pilipinas Obstacle Sports Federation

Executive Director, 5 Throw for All Association

# Matching Type

	PPP Arrangement x Public		Law/ Rule
A	BOT by <b>LGU</b>	1	2023 NEDA Guidelines
B	JV by <b>LGU</b>	2	COA Circular
C	JV by <b>GOCC</b>	3	BOT Law & September 2022 IRR
D	JV by <b>Disposing GI</b>	4	Special Laws
E	<b>GOCC</b> Lessor	5	GPRA
F	<b>GOCC</b> Lessee – to be Built	6	Civil Code
G	<b>GOCC</b> Lessee – Existing	7	Corporation Code
H	<b>GI</b> Divestment	8	Local Ordinance
I	<b>GI</b> Management Contract	9	GOCC Guidelines
J	<b>GI</b> Concession	10	GI Guidelines

# 3 Levels of PPPs





# **PUBLIC SECTOR PPP PROPONENTS**

**NATIONAL  
GOVERNMENT**

**GOVERNMENT  
CORPORATIONS**

**STATES** 

**AUTONOMOUS  
REGIONS**

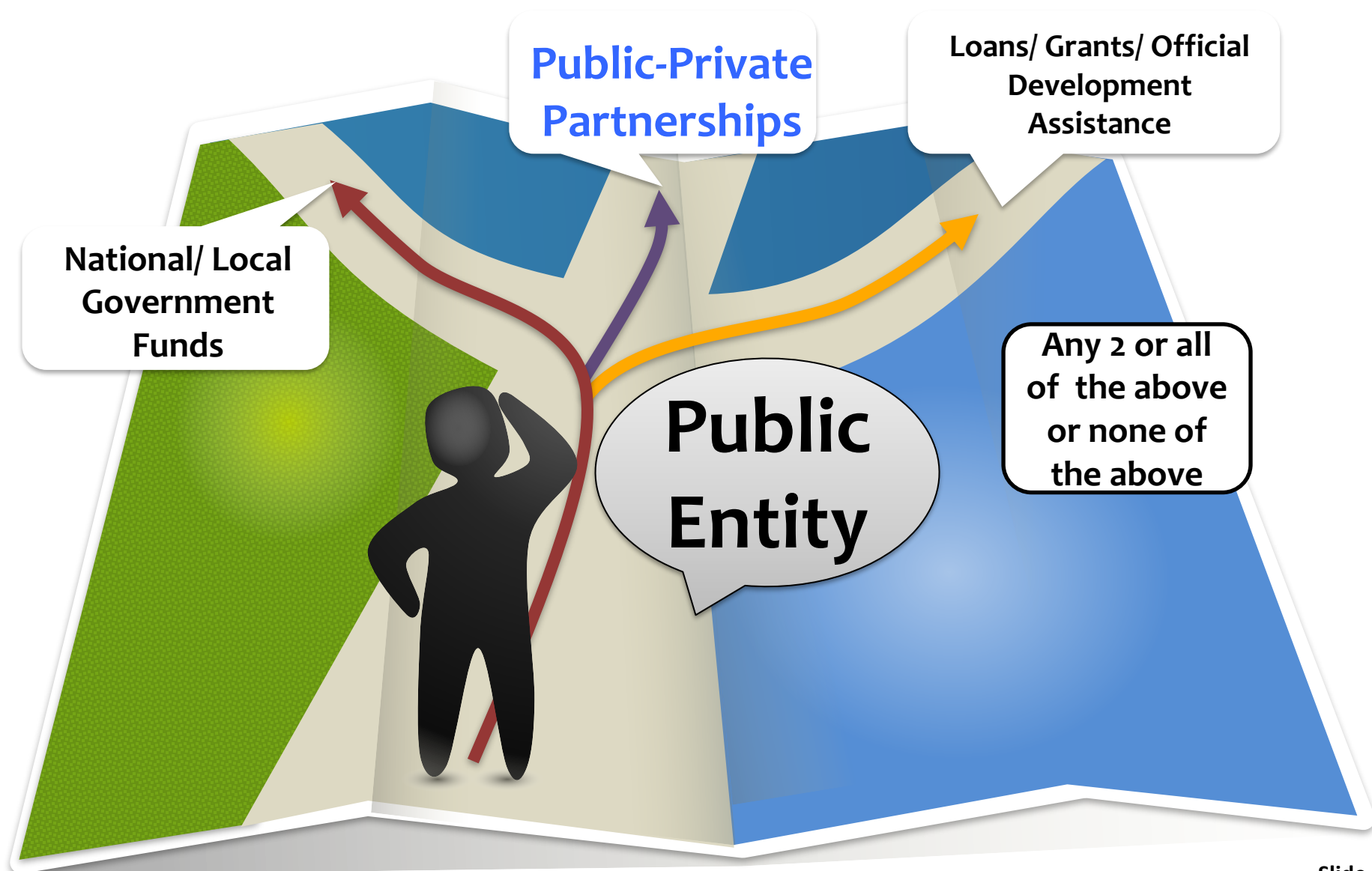
**PROVINCES**

**CITIES**

**MUNICIPALITIES**

**BARANGAYS**

# Implementation/ Funding Schemes



# Nature of PPPs

**Public Sector**

**Private Sector**

**Project**



## *Components:*

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

# WHY PPP?

## THE 7 MAIN VALUE DRIVERS



**IMPLEMENT  
CHANGE  
POLICY**



**ENCOURAGE  
INNOVATION**



**SERVE THE  
PEOPLE**



**PROVIDE  
BETTER  
VALUE-FOR-  
MONEY**



**ACCELERATE  
DELIVERY OF  
SERVICES**



**SOLVE  
RESOURCE  
SCARCITY**



**SPREADING  
RISKS**





## PPP PROJECTS

# HARD

### INFRASTRUCTURE ASSETS



Road



Water



Power



Ports



Reclamation



Sports Complex



Markets



Transport Systems



Terminal



Government Buildings



Parks



Information Technology



Cemetery



Solid Waste Management



Bridges



Malls

# SOFT

### SOCIAL ASSETS AND SERVICES



Classroom



Hospital



Agriculture



Housing



Evacuation Center



Prisons

# BUNDLED



+



Hard and Hard



+



Hard and Hard



+



Hard and Hard



+



Soft and Soft



+



+



Hard, Soft and Soft



+



+



Hard, Hard and Soft





























# 26+ PPP Modalities

1. Build-Transfer
2. Build-Lease-Transfer
3. Build-Operate-Transfer
4. Build-Own-Operate
5. Build-Transfer-Operate
6. Contract-Add-Operate
7. Develop-Operate-Transfer
8. Rehabilitate-Operate-Transfer
9. Rehabilitate-Own-Operate
10. Rehabilitate-Lease-Transfer
11. Rehabilitate-Transfer
12. Rehabilitate-Transfer-Operate
13. Concession Arrangement
14. Joint Venture
15. Lease or Affermage
16. Lease-to-Own
17. Real Property Swap
18. Management Contract
19. Management Contract (No Public Funds)
20. Service Contract
21. Service Contract (No Public Funds)
22. Divestment or Disposition
23. Corporatization
24. Subsidiary with Private Equity
25. Onerous Donation
26. Gratuitous Donation
27. Others



# PPP RESOURCE EXCHANGE



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



# Governing Laws/ Rules

PPP Modality	Governing Law
BOT Law Variants (9+)	BOT Law and <b>September 2022 IRR</b>
Concession	Special Laws/ <b>Special Guidelines/ Local Ordinance</b>
Joint Ventures	<b>2023</b> NEDA JV Guidelines/ <b>Special Guidelines/ Local Ordinance</b>
Management and Service Contract*	GPRA/ <b>Local Ordinance</b>
RT, RLT, RTO	[BOT Law]/ <b>Local Ordinance</b>
Lease/ Lease-to-Own/ Realty Swap/ Affermage/ Donations	Civil Code/ <b>Special Guidelines/ Local Ordinance</b>
Divestment/ Disposition	COA Circular No. 89-296/ <b>COA Decision 2009-064</b>
Corporatization	Corporation Code

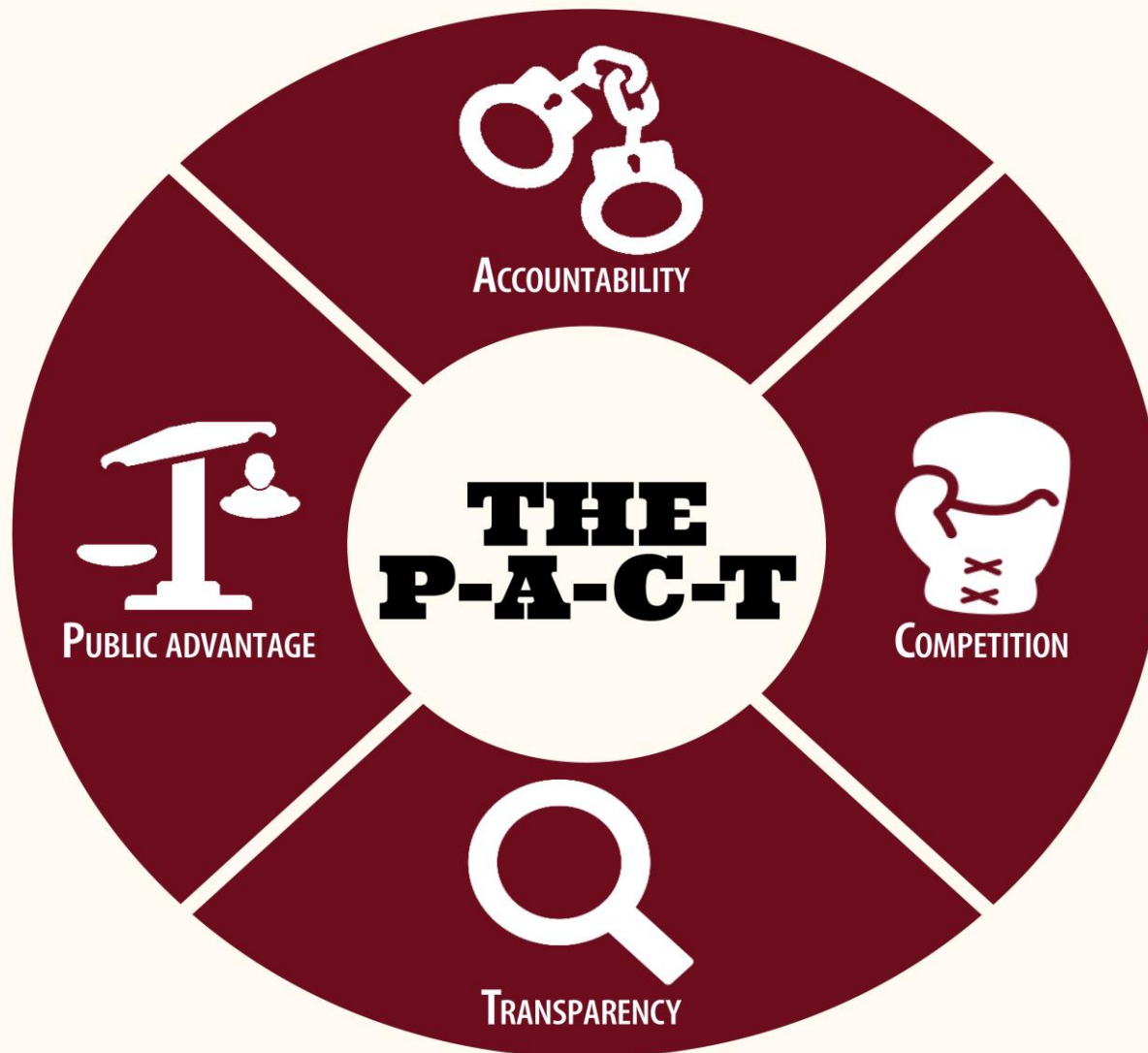


# NEDA Checkpoints

4-pass	3-pass	2-pass	1-pass	0-pass
1) BOT-UP	1) BOT-Sol, National ₱300m up	1) BOT-Sol, National ₱300m 2) BOT-Local P200m up 3) JV-GOCC	Any project Rejection	1) BOT-Local ₱200m low 2) JV-local 3) JV-GOCC 4) JV-other GOCCs 5) lease, concession
NEDA-ICC-TB NEDA-ICC (IRR) NEDA-ICC (Nego) NEDA-Board	NEDA-ICC-TB NEDA-ICC NEDA-Board	NEDA-ICC-TB NEDA-ICC	NEDA-ICC-TB	NA



# PPP SELECTION REQUIREMENTS



# And the **winner** is ...

## Highest

- Payment to Government (BOT Law)
- Share in Revenues (JV)
- Purchase Price (Divestment)
- Rated Bid (Service/ Management Contract)
- Rental Payment to Government (Government as Lessor)

## Lowest

- Government Subsidy (BOT Law)
- Tariff by End-User (BOT Law)
- Calculated Bid/ Price (Procurement of Goods and Infrastructure)
- Rental Payment by Government (Government as Lessee)

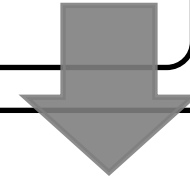


# Nature and Coverage of the **2023** NEDA JV Guidelines

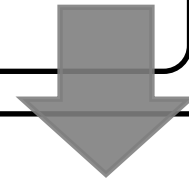


# Evolution of NEDA JV Guidelines

2008 Version



2013 Version



2023 Version



# Coverage of Guidelines

## 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:

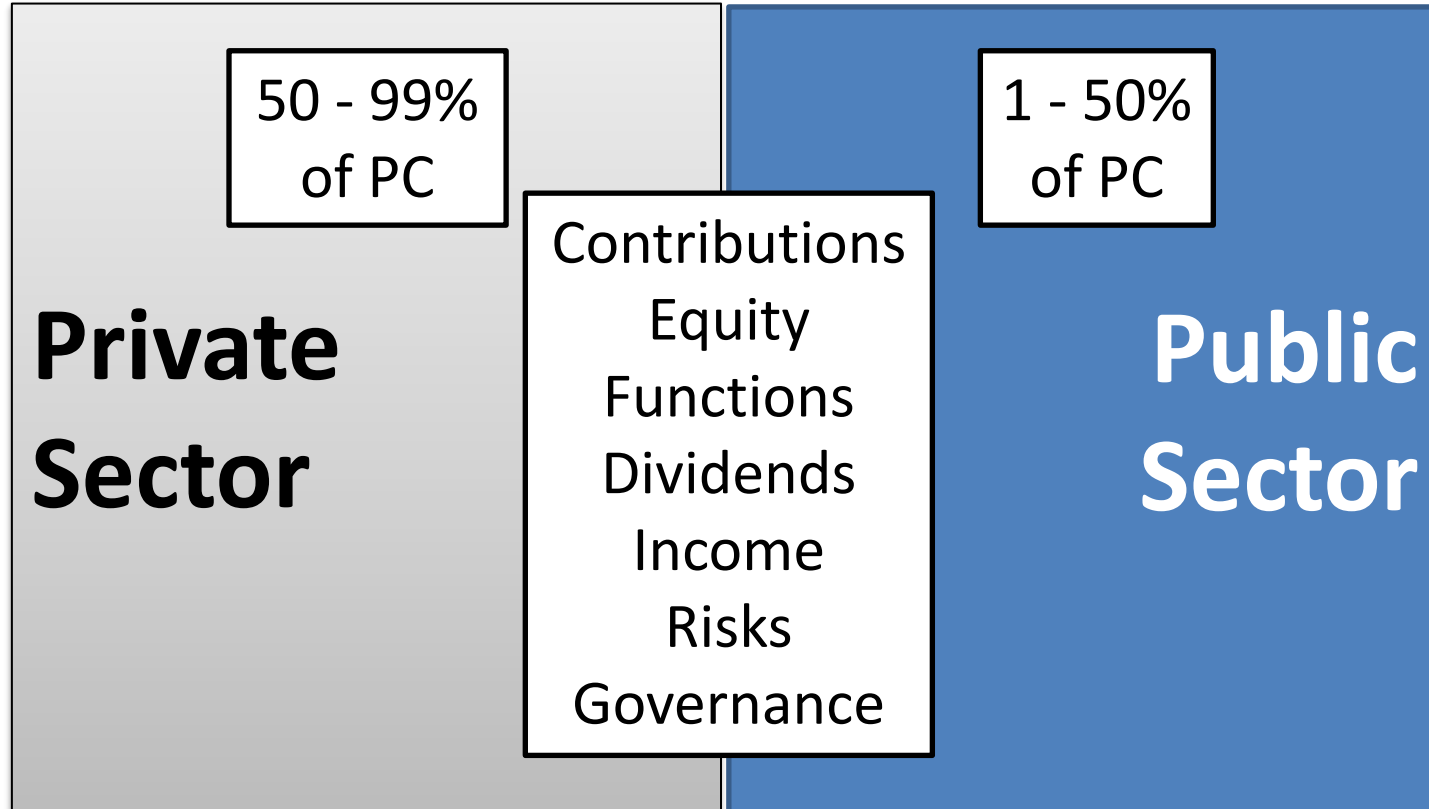
1. GFIs in the ordinary course of business as part of their normal and ordinary banking, financial or portfolio management operations
2. (JV activities) GCEs in the exercise of their primary mandate to dispose government assets or properties
3. Local Government Units (LGUs)
4. JVs of Government Entities in the exercise of their primary mandate to undertake exploration of energy resources, such as oil and gas reserves
5. JVs which are purely Operations and Maintenance Contracts having no initial capital expenditures



# Definition

An arrangement whereby a **Private Entity** or a group of Private Entities on one hand, and a **Government Entity** or a group of Government Entities on the other hand, provide **contribution** to undertake a **time-bound investment activity**. Such investment activity or undertaking 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 Entity under competitive market conditions or to the Government. The JV involves a **community or pooling of interests** in the performance/ implementation 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 JV Partners. A JV may be through a **Contractual JV** or a **JV Company**.

# Structure



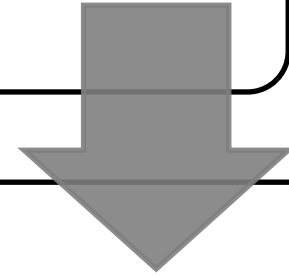
**Project Cost** = total costs to be expended to plan, develop and construct the project to completion stage including but not limited to the costs of feasibility studies, engineering and design, construction, equipment, land/ right-of-way, taxes imposed on said cost, and development cost.

# 5 Key Areas: Infrastructure or Development Projects

1. Transportation (*roads and traffic management, rail, airports and ports, among others*)
2. Energy (*power plants, transmission and distribution systems, biofuel or fossil fuel production, among others*)
3. Water (*bulk water source and supply, water transmission structures, sewerage systems, septage management projects, irrigation and flood management facilities, raw water treatment plants, wastewater treatment plants, among others*)
4. Information and Communications Technology (*telecommunications, network and databases, among others*)
5. Social Infrastructure (*health, education, housing, solid waste management facilities, among others*)
6. Other infrastructure and development projects (*e.g., land reclamation and dredging, agricultural commodity production, harvesting and post-harvesting processing, among others*)

# JV Contract Period

Maximum 50 Years



Maximum 25 years then  
Maximum 25 years

Maximum total of 50 years



# Contribution

Cash

Property

Stocks

Actual  
Labor

*2013 Version:* Money, Asset, Equipment, Land and Services or anything capable of pecuniary valuation



# 2-Part 3<sup>rd</sup> Party Valuation

Private  
Sector

*Bidding:* Part of Technical  
Proposal

*Unsolicited Proposal:*

- Part of submission
- Evaluated in Stage 1

Government

*Bidding:* Part of Tender  
Documents

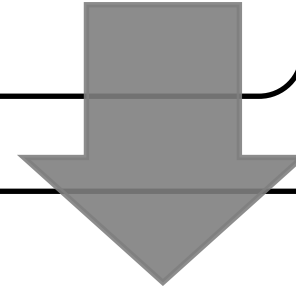
*Unsolicited Proposal:* Prior to  
submission to Approving  
Authority



# Gearing Ratio

Preferred

50%-50%



Mandated

50%-50%

# Tolls, Fees, Rentals, Tariffs and Charges

## 2013 Version

Fixed term and price indices to be used in the adjustments of tolls/ fees/ rentals/ charges, if applicable (*in Minimum Designs, Performance Standards/ Specifications and Economic Parameters*)

## 2023 Version

- Based on an approved formula/ adjustment schedule
- Stated in the approved JVA
- Prior to tender, GE shall secure advice/ approval of the Regulatory Body
- If disapproved, GE may allow PSP to recover difference



# 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**

# Divestment

## Subject

- Ownership of Government Assets
- Interest in JV
- Government Contribution
- JV Activity

## Stipulation

- JV Proposal
- Contract

## Manner

- Competitive Selection
- IPO
- Competitive, Fair and Transparent Means

## Approvals

- Privatization Council
- GCG



# 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
4. No pending case/s filed against it by the Government or by it against the Government or, should there be any, that such cases shall not impact the capability of the private sector to carry out its obligations under the JV



# Eligibility Requirements

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

1. Completed **at least 1** 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.





# 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 **3** income and business tax returns and tax clearance
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

1. If consortia, overall capability
  - a) Describe participation of each
  - b) Identify lead member
  - c) Joint and several liability
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)

**Others**

# 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

## Thresholds

*As Approving Authority*

- 1) Government  
Contribution  $\geq$  ₱150M
- 2) Project Cost  $\geq$  ₱2.5B
- 3) Government  
Contribution  $>$  50%  
Entire Assets

## Projects

- 1) Infrastructure or  
Development
- 2) Public Utilities
- 3) Negotiated JVs
- 4) Not primary mandate  
of public entity



# NEDA-ICC Requirements

1. Endorsement and certification by the Head of the Government Entity that the JV Agreement is compliant with the JV Guidelines and other existing laws
2. For Negotiated JVs that are initiated by the Private Entity, Evaluation Report by the Government Entity on the JV Proposal
3. Feasibility Study
4. Draft JV Agreement
5. Risk Allocation Matrix and List of Contingent Liabilities
6. Valuation Reports by a Third-party Valuator as part of documentation for review
7. Other documents and requirements as may be determined by the NEDA Board – ICC pursuant to its guidelines



# Feasibility Study

1. Objective and scope of the study
2. Analysis of the present condition
3. Approach and methodology
4. Demand and supply/ market analysis
5. Technical analysis
6. Financial analysis
7. Economic analysis
8. Social and environmental analysis
9. Legal and institutional analysis
10. Implementation plan of the recommended scheme based on the alternatives/ configurations/ technologies considered
11. Manpower and administrative support requirements
12. Other relevant information

# 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**

Approves JV activities if required by law

## **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

---

# **Selection Procedures (Private JV Partner)**

## **Competitive Selection (A)**

---

## **Direct-Limited Negotiations (B)**

---

## **Competitive Challenge (B)**

---

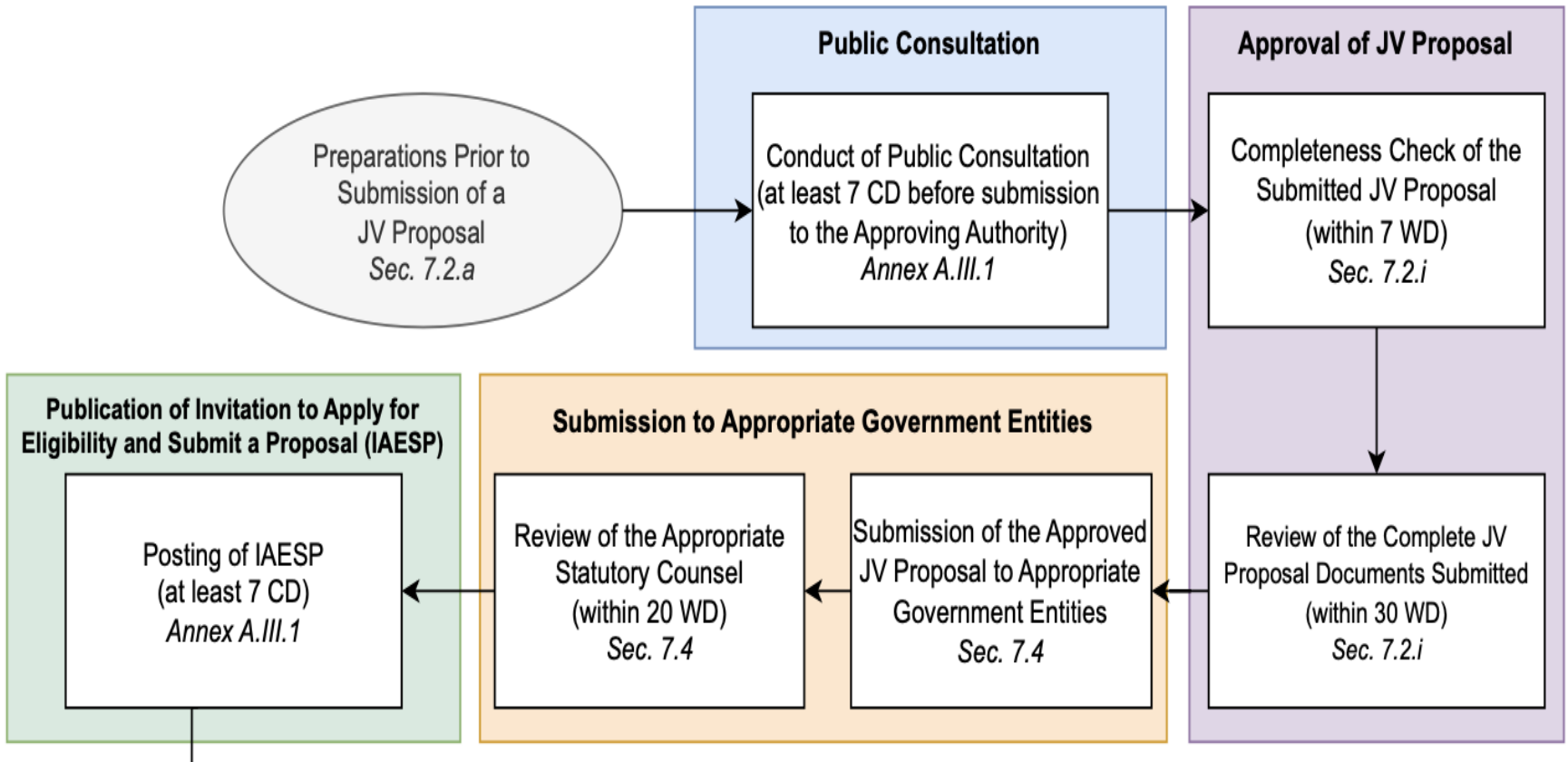
# Competitive Selection

## Legend:

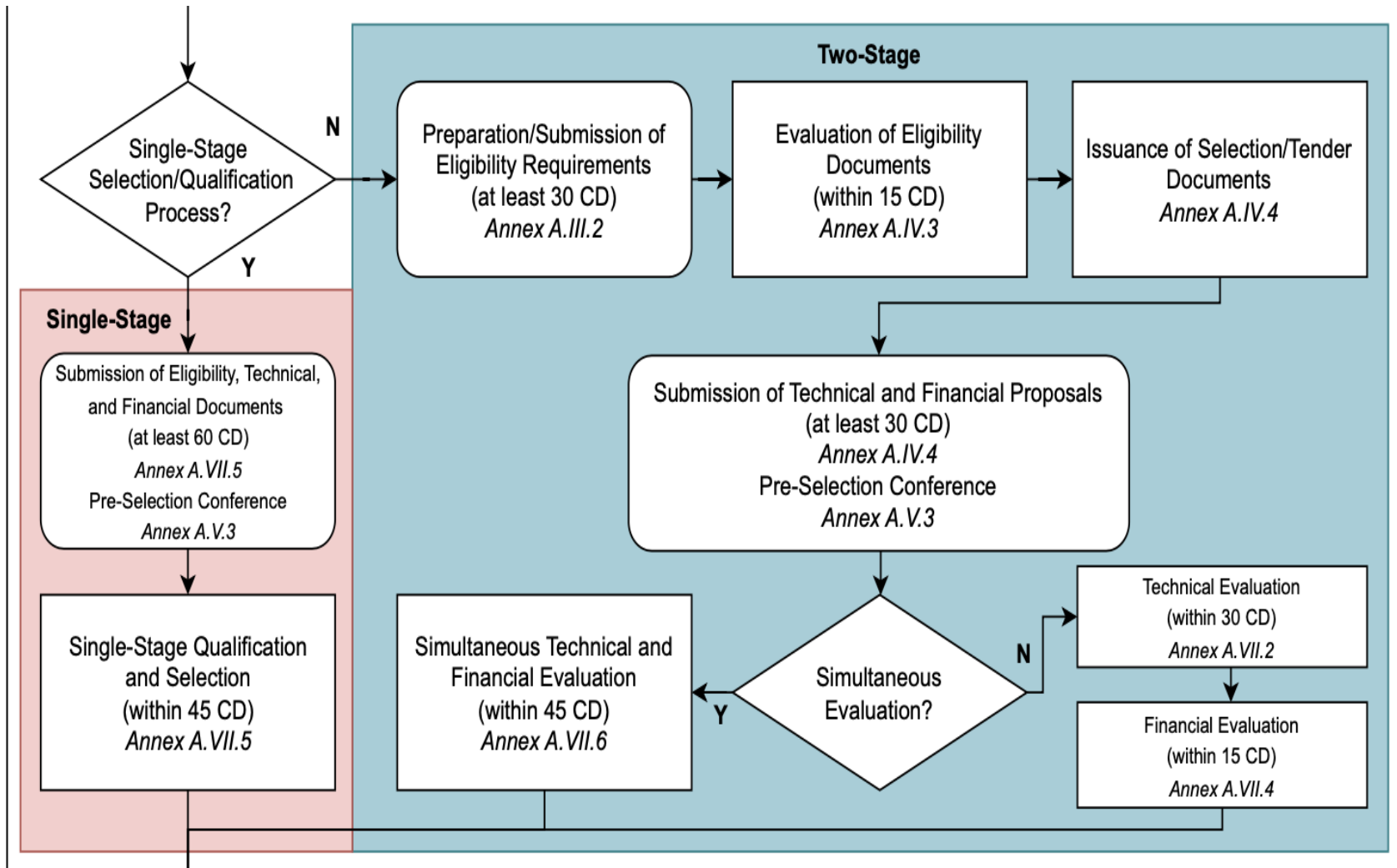
- Rounded Edges: Private Entity Action
- Sharp Edges: Government Entity Action
- Dotted Edges: Both Private and Government Entity Action

## 2023 Revised JV Guidelines

### ANNEX A

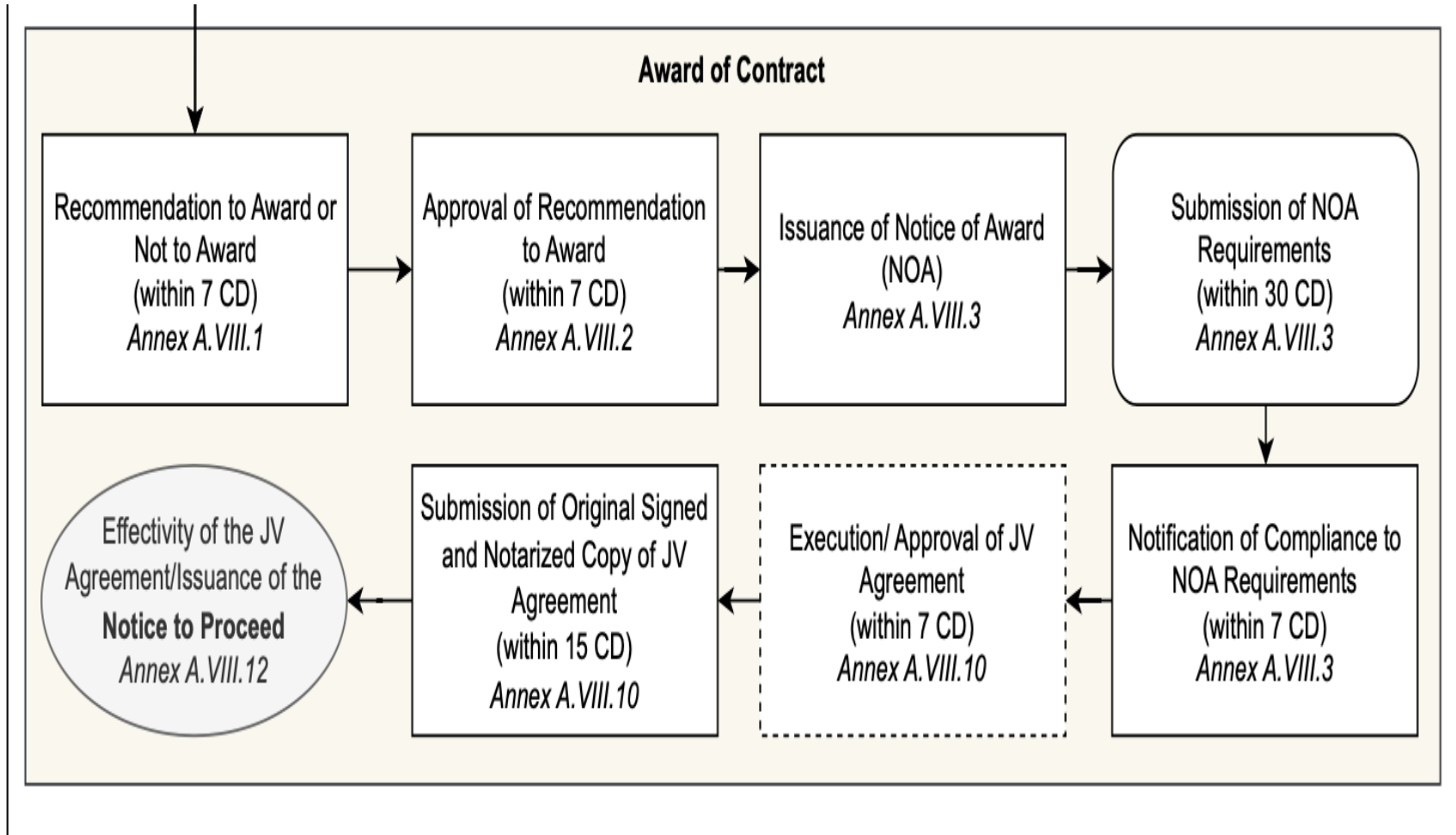


# Competitive Selection

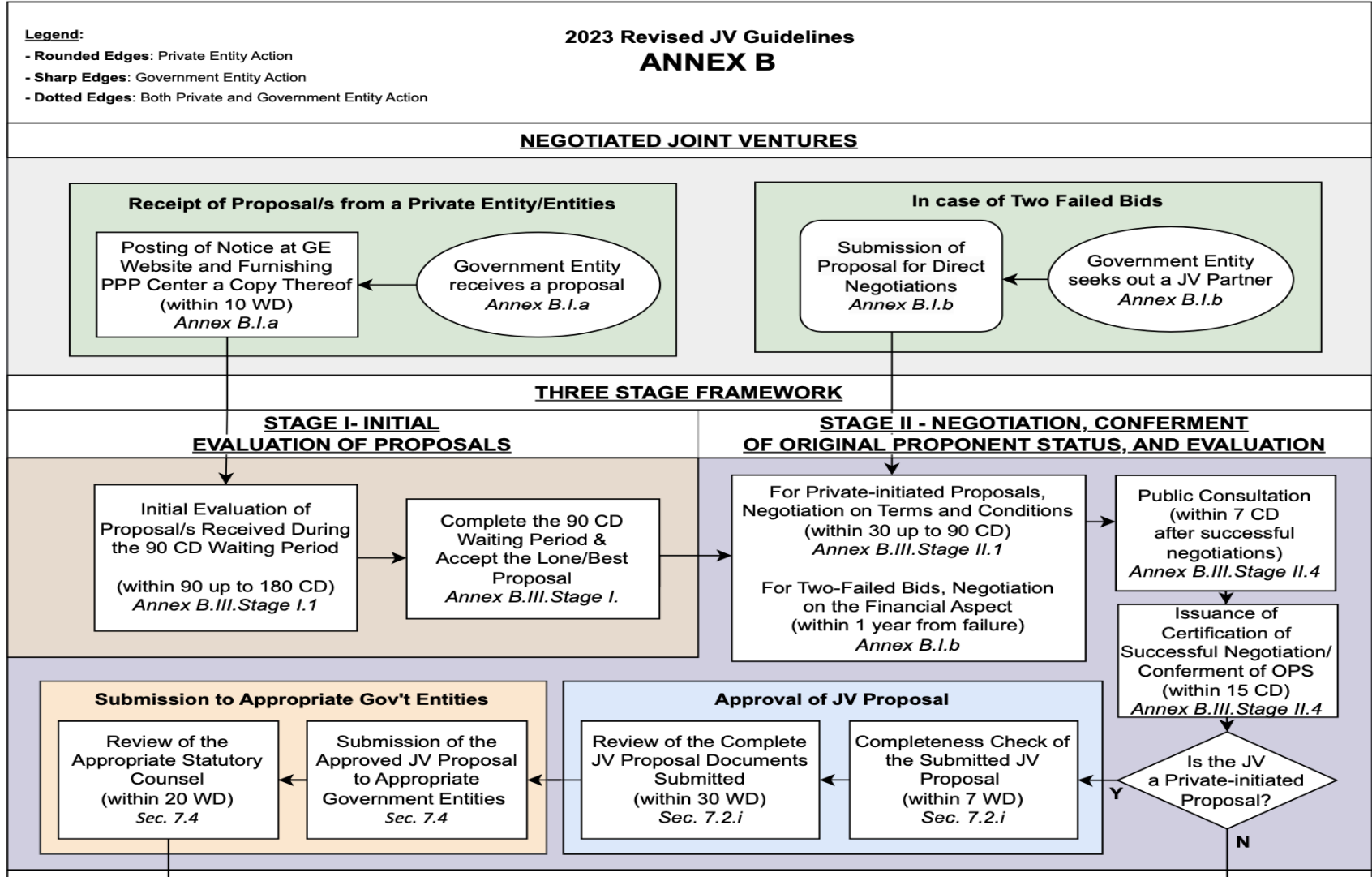




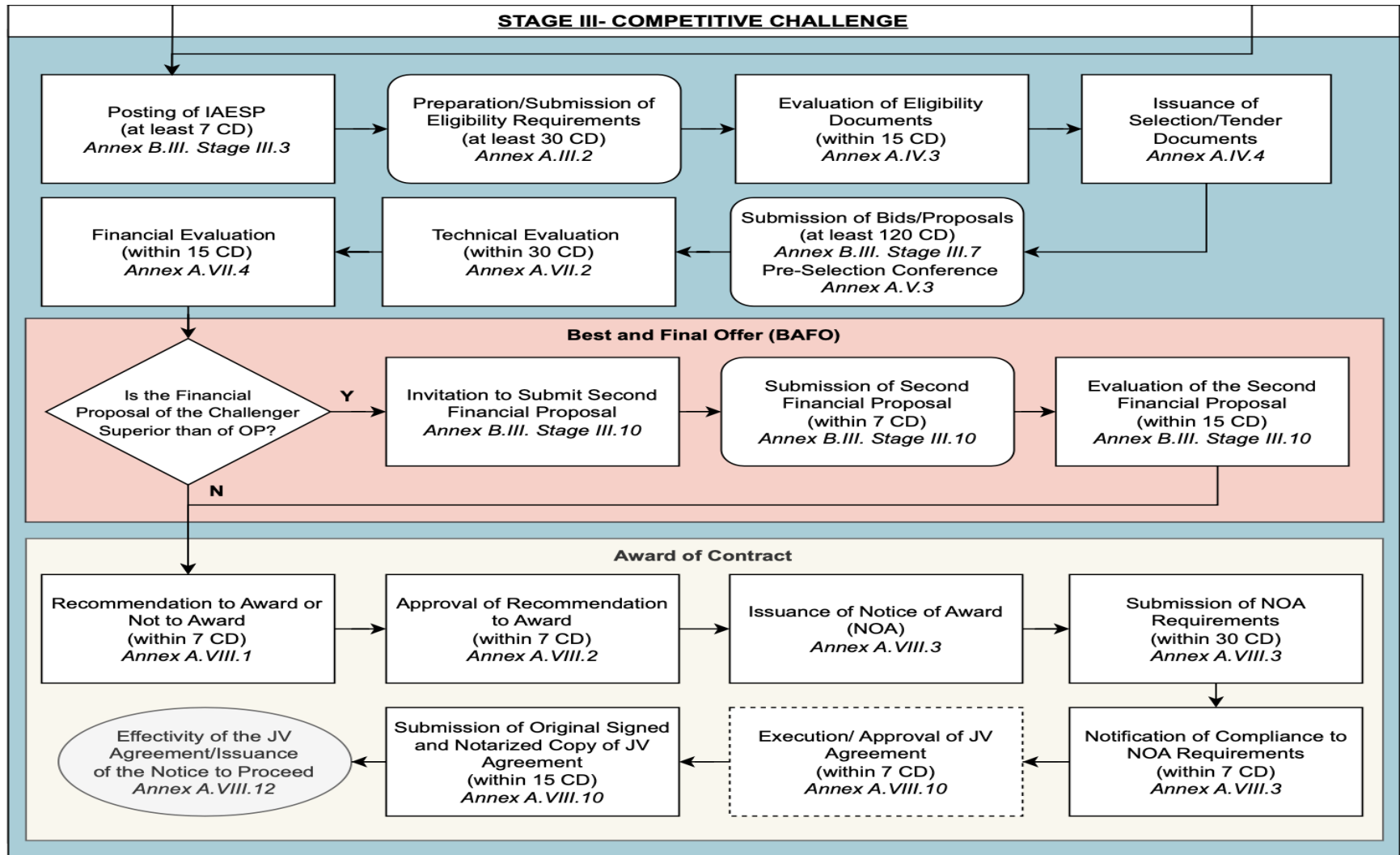
# Competitive Selection



# Competitive Challenge



# Competitive Challenge



# Multiple Proposals prior to Acceptance of 1<sup>st</sup> UP

*2013 Version:* First-in-Time Approach

- GE 3 Options: reject all, conduct bidding or proceed
- If proceed:
  - ❑ GE considers all similar and complete UPs
  - ❑ Rank – Best and Most Advantageous UP
  - ❑ Negotiate with No. 1/ Highest-Ranked UP
  - ❑ If negotiations fail with No. 1 UP, entertain No. 2 UP or other modes



# Public Consultations

<b><i>Who will conduct?</i></b>	GE
<b><i>Who must be consulted?</i></b>	Stakeholders
<b><i>On What?</i></b>	Salient Features and Proposed Terms and Conditions of JV
<b><i>Where post?</i></b>	Website, Reputable Online Publication and Conspicuous Places
<b><i>When hold?</i></b>	7 days after successful negotiations



# Grant/ Revocation of OP Status



## Effects

- [Right of Exclusion]
- Government not precluded from implementing a project that will conflict with negotiated proposal or its components
- OP can file Injunction Case
- No TRO or Injunction (except by SC)

## Revocation

1. It is found that the facts disclosed are incomplete, incorrect, misleading, untrue, inaccurate, or different from what was represented
2. Any non-compliance or violation of JV Guidelines

## Next Steps

1. GE accepts new or
2. Proponent resubmits

# Rights of OP



1. Good Faith Negotiations
2. Proceed to Stage 3
3. Participate in BAFO



1. Exclusivity
2. Match
3. Outbid
4. Reimbursement



# COA Audit

2013 Version: “A JV activity shall be subject to audit examination under existing laws, rules and regulations, and other legal issuances” deleted in 2023 version.



# Material Adverse Government Action

## Includes:

- any act of the Government
- Project Proponent had no knowledge of, or could not reasonably be expected to have had knowledge of, prior to the effectivity of the contract other than what is permitted in contract
- That occurs after the effectivity of the contract, that:
  - specifically discriminates against the sector/ industry/ project; and
  - has a material adverse effect on the ability of the Project Proponent to comply with any of its obligations under the approved contract.

## Effects/ Impact

- Materiality
- Amount threshold
- Manner of recourse
- Cap if monetary compensation

- *Silent in 2023 Guidelines*
- *Lifted from September 2022 BOT IRR*



# 10 Legal Ways to Shorten Process

1. Government contribution to JV activity less than thresholds (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 SEC and 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
9. Statutory counsel involved in drafting of JVA (or JVA patterned after previously-approved JVAs)
10. 3<sup>rd</sup> party valuation of contribution



[www.albertocagra.com](http://www.albertocagra.com)



09175353823



alberto agra



[alberto.c.agra@gmail.com](mailto:alberto.c.agra@gmail.com)

Thank you.



**BATAS**

**et AL**



**End of Lecture Proper**

# **Question & Answer SEGMENT**



For your query, consulting requirements or request for in-house training programs, please contact:

**Manila lines: (+63 2) 8556-8968 or 69**  
**Telefax: (+63 2) 8842-7148 or 59**

We invite you to visit our website **[www.cgbp.org](http://www.cgbp.org)** for upcoming best practices programs.