



PPPs for LGUs

# The PPP Code (RA 11966) and **IRR Working Draft** 02.17.2024

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# Quizzer: Yes or No



## *Does the PPP Code:*

1. Provide for a **definition** of a PPP?
2. Allow **LGUs** to enact their own **PPP ordinances**?
3. Allow **any type** of project?
4. Cover all forms/ types of **Joint Ventures** and **Leases**?
5. Mandate the preparation of **Feasibility Studies** for projects?
6. Require **NEDA** approval for LGU PPPs?
7. Mandate that when the realized rate of return exceeds the prescribed RRoR, the **excess** shall be retained by the LGU and Private Proponent?
8. Permit LGUs to entertain **multiple Unsolicited Proposals**?
9. Empower the **PPP Center** to determine whether **unsolicited proposals** are complete?
10. Set a maximum of **50 years** for a PPP contract?

# Presentation Flow: 7 Ps



1  
Policies

2  
Parties

3  
Projects

4  
Partnership  
Schemes

5  
Permissions  
(Approvals)

6  
Procedures

7  
Pact/  
Provisions



# **(1) Policy**

# PPP Policy Journey



Before

- BOT Law
- NEDA JV Guidelines
- PPP Ordinances

Today (since  
12.23.23)

- PPP Code
- Repeal of laws, guidelines & ordinances

# The PPP Code



Key Dates	Milestones/Activities
December 5, 2023	Republic Act No. 11966 (Public-Private Partnership Code) signed into law.
December 23, 2023	<ul style="list-style-type: none"><li>○ PPP Code takes effect (<i>15 days from publication in Official Gazette or newspaper</i>)</li><li>○ PPP Code Interim Guidelines published</li></ul>
March 23, 2024	Deadline to promulgate the Implementing Rules and Regulations ( <i>90 days from effectivity of Code</i> )
October 4, 2024	Deadline to issue guidelines, frameworks or mechanisms for consultation, review, and approval of initial tolls, fares, fees, rentals, and other charges and adjustments thereof ( <i>180 days from effectivity of IRR</i> )

# Under the **PPP Code**, what happens to **PPP Policies, Contracts** and **Ongoing Activities**?



<b>BOT Law and IRR</b>	Repealed or modified accordingly ( <i>inconsistent provisions</i> )
<b>NEDA JV Guidelines</b>	Repealed or modified accordingly ( <i>inconsistent provisions</i> )
<b>PPP LGU Ordinances</b>	Repealed or modified accordingly ( <i>inconsistent provisions</i> )
<b>Existing Contracts</b>	Governed by the agreements ( <i>PPP Code supplementary application</i> )
<b>Bidding or Challenge not yet commenced</b>	PPP Code applicable except those that govern project approval
<b>BOT Law: Granted Original Proponent Status</b>	2 Options: (1) Proceed with approval process under prevailing policy or (2) Resubmit proposal under the PPP Code
<b>Notice of Award - No Contract</b>	PPP Code applicable ( <i>if rights are infringed, policy in effect applies</i> )
<b>Solicited: Bidding commenced</b>	PPP Code applicable ( <i>if rights are infringed, policy in effect applies</i> )
<b>Unsolicited: Competitive challenge commenced</b>	PPP Code applicable ( <i>if rights are infringed, policy in effect applies</i> )

# What **special laws** are **repealed** by the **PPP Code**?



Laws	Administrative Agencies	Repealed Provisions
RA 7227	Bases Conversion Development Authority	Turnkey or Build-Operate-Transfer of Major Conversion Projects
RA 8292	State Universities and Colleges	Joint Ventures of Economic Assets
RA 9500	University of the Philippines	Leases of Land and Joint Ventures
RA 10844	Department of Information and Communications Technology	Issuance of Public-Private Partnership (PPP) Guidelines for ICT Projects of Government Agencies
PD 857	Philippine Ports Authority	Prescribe Rules for Construction, Operation and Maintenance of Ports; Lease of Land, Port, Wharf or Quay
PD 1112	Toll Regulatory Board	Construction, Operation and Maintenance of Toll Facilities
PD 1113	Construction and Development Corporation of the Philippines	Construction, Operation and Maintenance of Toll Facilities
PD 1894	Philippine National Construction Corporation	Construction, Operation and Maintenance of Extensions, Linkages, Stretches and Toll Facilities
Various	GOCCs, GIs and SUCs	Issuance of PPP Guidelines (financing, designing, constructing, operating, and maintaining)



# Under the **PPP Code**, can **LGUs** still enact **PPP ordinances**?

*Yes, provided ...*



“Upon effectivity of this Code, **no** other **JV** guidelines, **PPP** guidelines, codes, or **ordinances, whatsoever may be enacted**, issued and/or used by any **government entity** to enter into PPPs, **except those that are enacted, issued, and/or used in accordance with this Code and its IRR.**”

*(Last paragraph, Section 35, PPP Code)*

- Under the **Principle of Subordinate Legislation** and **Hierarchy of Policies, local ordinances must not be inconsistent** with statutes such as the PPP Code.
- This is an **implied restriction** in local legislation and rule-making.
- However, the restriction under the PPP Code **cannot prohibit LGUs** from enacting PPP ordinances provided these will not be in conflict with the PPP Code.
- The LGUs’ **power to legislate** is founded on the **Constitution**.
- For example, LGUs can enact ordinances on **management and service contracts, corporatization and LGU subsidiaries** since these PPP schemes are not covered the PPP Code.



## **(1.1) PPP Defined**

# Public-Private Partnership defined



- A **contractual** arrangement between an **Implementing Agency** and a **Private Partner** to **finance, design, construct, operate, and maintain**, or any combination or variation thereof, **infrastructure or development projects** and services which are **typically provided by the public sector**, and where each party **shares in the associated risks**
- The PPP framework serves as a mechanism for **delivering public assets or services**, where both the Implementing Agency and the Private Partner **share risk and management** responsibility and **link investment recovery to performance**



# Public Assets or Services Standard

1. The delivery of the public asset or service is within the **mandate of the Implementing Agency.**
2. The delivery of the asset and/or service is **for the public.**

# Nature of PPPs



**Implementing  
Agency**

**Private  
Proponent**



**PPP  
Project**

## *Aspects:*

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



# Rationale of PPP

- Indispensable role of the **private sector**, encourage private enterprise, and provide incentives to needed investments
- Enabling environment for the private sector to **mobilize its resources** to finance, design, construct, operate, and maintain infrastructure or development projects and services
- **Public interest** by providing affordable, accessible, and efficient public services
- **Financing** infrastructure and other development projects and services through all means available to effectively meet the **objectives of the government**



# Rationale of PPP

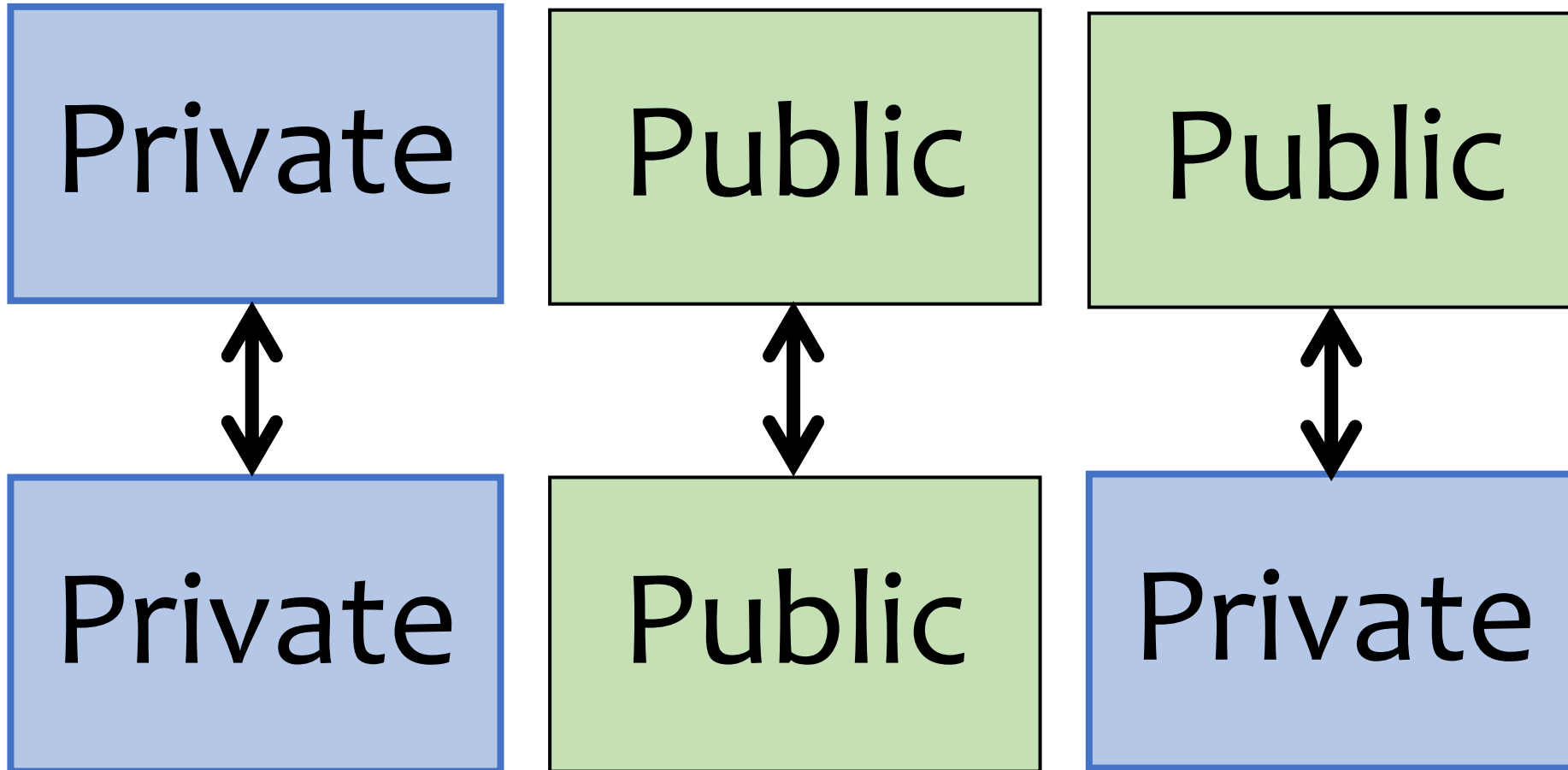
- LGU **local autonomy**, as self-reliant communities, more effective partners in the attainment of national goals
- **Integration** of climate resilience, sustainability, and gender and development policies and programs
- Open, fair, transparent, and competitive **selection** as the central tenet for securing private investment in PPP projects
- Cognizance of **partnerships that have not been submitted through the administrative process** as long as they are PPPs as defined in the Code and shall therefore subject such projects under its jurisdiction and rules



## **(2) Parties**



# 3 Levels of PPPs



# Implementing Agencies (IAs)

## *Public Partners*



### **National**

1. National Government
2. State University and College
3. Government-Owned and -Controlled Corporation
4. Government Instrumentality with Corporate Powers
5. Water Districts
6. Government Financial Institutions
7. Economic Zones

### **Local**

1. Local Government Unit
2. Local University and College

No IA/ Regulatory Body shall implement a PPP Project that it regulates unless it adopts a conflict mitigation and management plan.



# Private Party

- **Private Partner** - private sector entity determined to be **financially, legally, and technically capable** to undertake obligations under an awarded PPP contract
- **Private Proponent** - private sector entity which has **submitted bid** in relation to a Solicited Project, or a private sector entity which has **submitted an Unsolicited Proposal**; may be **Filipino or foreign-owned**, and may engage the services of a foreign Contractor or foreign Facility Operator, subject to requirements and limitations provided under the Constitution, existing laws, rules, and regulations
- **Facility Operator** - any entity allowed and duly registered and licensed under Philippine laws, which may or may not be the Private Partner, that shall be responsible for **operating and/or maintaining a facility**
- **Contractor** - any entity allowed and duly registered and licensed under Philippine laws, which may or may not be the Private Partner, that shall be responsible for the **construction and/or supply of equipment or services** for PPP Projects

# Private Party: Legal



Project requires Public Utility Franchise	Project does <u>not</u> require Public Utility Franchise
Private Proponent (PP) = Facility Operator (FO): <ul style="list-style-type: none"><li>○ a Filipino</li><li>○ if a corporation, must be duly registered with the SEC and owned up to <math>\geq 60\%</math> by Filipinos</li><li>○ if a consortium of local, foreign, or local and foreign firms, Filipinos must have <math>\geq 60\%</math> interest</li><li>○ if a cooperative, must be duly registered with the Cooperative Development Authority (CDA)</li></ul>	PP or FO: <ul style="list-style-type: none"><li>○ Filipino or</li><li>○ Foreign-owned</li></ul>
PP $\neq$ FO, FO: <ul style="list-style-type: none"><li>○ a Filipino</li><li>○ if a corporation, must be duly registered with the SEC and owned up to <math>\geq 60\%</math> by Filipinos</li><li>○ if a cooperative, must be duly registered with the CDA</li></ul>	

# Private Party: **Legal**



<b><i>If form a consortium</i></b>	<ul style="list-style-type: none"><li>○ Members or participants disclosed during the pre-qualification stage and shall undergo pre-qualification</li><li>○ Bind themselves to be jointly and severally liable for the PPP obligations</li></ul>
<b><i>If organized as a corporation</i></b>	Corporation shall execute such an undertaking binding itself to the rights and obligations of the PP under the PPP contract
<b><i>Contractor</i></b>	<ul style="list-style-type: none"><li>○ Filipino Contractor - duly licensed by the Philippine Contractors Accreditation Board (PCAB)</li><li>○ Foreign Contractor - duly licensed by an equivalent accreditation institution in the Contractor's country of origin</li></ul>
<b><i>Not Blacklisted</i></b>	IA may require a certification under oath indicating that the prospective PP: <ul style="list-style-type: none"><li>○ is not included in blacklists issued by any government agency</li><li>○ has no pending case 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 prospective PP to carry out its obligations</li></ul>



# Private Party: **Track Record**

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



# Private Party: **Waiver**

## *Prospective Bidder*

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



# Private Party:

## *Special Purpose Company (SPC)*

### IA may require formation of an SPC:

- SPC shall be **wholly-owned** by the winning Private Proponent, subject to the nationality and ownership requirements
- In the case of a **consortium**, all members thereof shall present proof of contractual or other legally binding ties to or relationships with the SPC for the development and implementation of the project in accordance with their submitted business plan
- An **accession undertaking** is executed by the SPC and the winning Private Proponent in favor of the IA, making the SPC principally liable for the performance of the winning Private Proponent's obligations under the Notice of Award and/or the contract
- In the case of SPC, the Private Proponent which are members of the SPC, may engage in other concessions, businesses, or undertakings only with the approval of the Approving Body and the relevant Regulatory Body





## **(2.1) Public Governance**



# PPP Governing Board

- **Overall policy-making body** for all PPP-related matters, including the Project Development and Monitoring Facility (PDMF)
- Responsible for setting the **strategic direction** of the PPP Program and PPP Projects
- Responsible for creating an **enabling policy** and institutional environment for PPP
- Members form part of **IRR Committee**

## **Composition**

1. NEDA - Chairperson
2. DOF - Vice-Chairperson
3. DBM
4. DOJ
5. DTI
6. DILG
7. DENR
8. CHED
9. ES
10. PPP Center ED
11. Private Sector Representative from Infrastructure Sector

# National Economic and Development Authority (NEDA)



## Board

- Approve National Projects ( $\geq$  P15B Project Cost)

## ICC

- Recommend to Board ( $\geq$  P15B )
- Approve National Projects ( $<$  P15B) **subject to conditions**
- Approve Local Projects with **Government Undertakings** using national government funds
- Approve **Availability Payments**
- Formulate guidelines, forms, and templates that shall be used by IAs and Approving Bodies in **reviewing and approving the PPP Project**
- Review, evaluate and **update P15B Threshold**
- Issue **Generic Preferred Risk Allocation Matrix (GPRAM)**

# PPP Center



1. Assist IAs in identifying, prioritizing, developing, and maintaining a pipeline of **PPP Projects**
2. Provide project **advisory services** and technical assistance to IAs, Approving Bodies
3. Facilitate the **appraisal and approval** of PPP Projects by **NEDA**
4. Review **contracts** for National PPPs
5. Require the submission of PPP Project **documents** from IAs
6. Provide **regular monitoring** and status reports on the implementation of all PPP Projects
7. Manage and administer the **PDMF**
8. Serve as **Secretariat for IRR Committee**
9. Manage and administer the **PPP Risk Management Fund**
10. Coordinate with NEDA-ICC in formulation of **guidelines, forms, and templates** that shall be used by IAs and Approving Bodies in **reviewing and approving** the PPP Project
11. Coordinate with Regulatory Agencies in the drafting of **guidelines, frameworks, or mechanisms** for consultation, review, and approval of initial **tolls, fares, fees, rentals, and other charges**
12. Determine **completeness** of unsolicited proposals and appropriate Approving Body
13. Assist IA during **negotiations** of unsolicited proposals
14. Act as **procuring entity**

# IA Pre-qualification, Bids and Awards Committee (PBAC) **Composition**

## *Minimum*



### **National IAs**

- Chairperson – At least a third ranking IA official
- Secretary – A legal IA officer
- IA officer knowledgeable in finance
- IA officer knowledgeable in procurement and in the management/ operation of the PPP Project
- IA officer knowledgeable in the technical aspects or requirements of the PPP Project

### **Local IAs**

- Chairperson – the Administrator or at least a third ranking permanent official of the local IA
- IA Treasurer or Accountant
- IA Planning and Development Coordinator or Engineer of the Implementing
- Legal officer of the LGU (if none, external legal advisor or higher LGU)
- A representative from and selected by the local *Sanggunian* or by the LUC Board designated through a resolution
- 2 representatives from and chosen by the accredited CSOs, POs, and NGOs who are members of the local development council

# IA PBAC



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

# IA PBAC



- Declare failure of bidding
  - In no case shall a motion for reconsideration or an appeal from any decision by the PBAC stay or delay the bidding process.
  - No award shall however be made until a decision on any pending appeal is rendered

# IA PPP Units

- IA may create PPP Units (planning, overseeing, implementing, and monitoring the PPP Projects)
- Composition (IA may add)
  1. Senior Official (3<sup>rd</sup> ranking)
  2. Technical – Project Development
  3. Technical – Planning
  4. Technical – Contract Procurement and Management
  5. Finance
  6. Legal
  7. Local Economic Development and Investment Promotions
- PPP Center to assist





# Regulatory Agencies

## Mandate (defined by Charters)

- Issue and publish **guidelines**, frameworks, or mechanisms for consultation, review, and approval of **initial tolls**, fares, fees, rentals, and other charges and adjustments thereof
- Approve and uphold the **initial tolls**, fares, fees, rentals, and other charges and adjustments thereof
- Approve any **decrease in IA revenues or profit**
- Adopt a **conflict mitigation and management plan** if will implement a PPP Project that it regulates
- Approve **Alternative Sources of Funding** like bonds

## Considerations

- When **no appropriate regulatory body** – regulation by contract; LGUs may create a local rate-setting body
- Regulatory approvals must be made **prior to the approval of a PPP Project**
- Regulatory action is considered a **contingent liability event**
- **MAGA** includes unanticipated regulatory risks



# Courts

- Courts (except the SC) cannot issue temporary restraining order, preliminary injunction, preliminary mandatory injunction, temporary environmental protection order, or similar **temporary or provisional reliefs or remedies**
  - Against any **IA or the PPP Center**, its officials or employees, or any person or entity, whether public or private acting under the government direction
  - Applies in all cases, disputes, or controversies instituted by any **person**, including cases filed by bidders or those claiming to have rights through such bidders
- Not apply when the matter is of **extreme urgency** involving a **constitutional issue**, such that unless a temporary restraining order is issued, **grave injustice and irreparable injury** will arise



# Courts: Covered *PPP-related Acts*

1. Evaluation, acceptance, and rejection of UPs
2. Bidding, rebidding, or declaration of failure of bidding
3. Awarding of any PPP contract
4. Acquisition, clearance, and development of the ROW, site, or location of any PPP Project
5. Construction, operation, and maintenance of any PPP Project
6. Commencement, execution, implementation, termination, or rescission of any PPP contract
7. Undertaking or authorization of any other lawful activity necessary for such PPP Project



## **(3) Projects**



# PPP Projects

## Nature

- **Infrastructure or development projects** and services which are **typically provided** by the **public sector**
- Consistent and responsive to national, local, and sectoral **development and investment plans**
- Part of list **submitted** to appropriate oversight agencies, NEDA, RDC, Sanggunian and the PPP Center
- Included in the **Consolidated Investment Program**
- All PPP Projects which will **interconnect or interface** with a local or national facility shall be required to submit a MOA containing an interconnection and/or interface plan



# Consolidated Investment Program

## Requirements

- All plans must be submitted to NEDA and PPP Center within 30 days from IRR effectivity
- If not submitted, excluded from list of PPP Projects
- Allows for updating of list
- For National Projects: NEDA, RDCs and PPP Center
- For Local Projects: NEDA, RDCs, PPP Center and Local Sanggunian

## Information Needed

- Name and brief description of the project
- Indicative Project Cost
- Project location
- Plan or investment program where the PPP Project is included
- Status of the Project (e.g., under implementation, under procurement, for approval, pending approval, ongoing negotiation, under development, under conceptualization)
- Development costs



# Delisting of PPP Project

○ Voluntary: Through written notice

○ Automatic:

- If the allowable period for procurement has lapsed, in case of Solicited Projects
- If there is a failure of bidding, in the case of Solicited Projects, provided that the IA decides not to subject the PPP Project to re-bidding
- If the Implementing Agency rejects the Unsolicited Proposal, unless the IA accepts a new Unsolicited Proposal for the same project or bids out the project as a Solicited Project
- If there is a failure of negotiation in the case of Unsolicited Proposals, unless the IA accepts a new Unsolicited Proposal for the same project or bids out the project as a Solicited Project
- If the OPS has expired and the comparative challenge process for the subject Unsolicited Proposal has not yet commenced
- If the Implementing Agency revoked the OPS granted for the Unsolicited Proposal
- If the project has been terminated and discontinued for whatever reason



# PPP Projects

## Characteristics

- Legal, technical, economic, financial, and commercial **feasibility** of the project
- **VfM** of the proposed project
- Optimal **risk allocation**
- Affordability of **fees** or tariffs
- **Climate resilience** and sustainability
- Social and environmental **safeguards**
- **Commercial feasibility**
- **Market acceptability**
- Product of **stakeholder consultation**

## Guiding Principles

- Effectiveness in meeting government objectives
- Appropriateness of the chosen procurement modality and source of funding
- VFM, economic viability, and financial viability
- Accountability and transparency
- Consumer rights
- Affordability
- Market acceptability and commercial attractiveness
- Public access, safety, and security




**Infrastructure Project** - construction, improvement, rehabilitation, repair, and/ or maintenance of facilities or provision of services for use by the public that underlie and enable, sustain, and enhance the economic and social development of the country.

## PPP PROJECTS



# HARD

### INFRASTRUCTURE ASSETS















- |  |  |
|--|--|
|  Road              |  Terminal               |
|  Water             |  Government Buildings   |
|  Power             |  Parks                  |
|  Ports             |  Information Technology |
|  Reclamation       |  Cemetery               |
|  Sports Complex    |  Solid Waste Management |
|  Markets           |  Bridges                |
|  Transport Systems |  Malls                  |

# SOFT

### SOCIAL ASSETS AND SERVICES

- |  |   |
|--|---|
|  Classroom   |  Housing           |
|  Hospital    |  Evacuation Center |
|  Agriculture |  Prisons           |

# BUNDLED

- |   |  |
|---|--|
|  + <br>Hard and Hard |  + <br>Soft and Soft   |
|  + <br>Hard and Hard |  +  + <br>Hard, Soft and Soft |
|  + <br>Hard and Hard |  +  + <br>Hard, Hard and Soft |

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# 26+ Eligible Types of Projects

1. Highways, including expressways, roads, bridges, interchanges, tunnels, viaducts, and related facilities
2. Land transportation systems, including railways, road-based transportation systems, bus rapid transit, high priority public utility vehicle systems, active transportation, transit-oriented developments, public utility vehicle stations, transport plazas, intermodal terminals, park & ride, and related facilities
3. Transport and traffic management projects, including transportation databases, automated fare and toll collection systems, traffic signaling, traffic monitoring systems, traffic enforcement systems, congestion and management systems, and related facilities
4. Port infrastructures like piers, wharves, quays, storage, handling, ferry services, roll- on roll-off facilities, and related facilities, navigable inland waterways, and related facilities
5. Airports, air navigation, and related facilities



# 26+ Eligible Types of Projects

6. Power generation, transmission, sub-transmission, distribution, including hydropower plants, and related facilities
7. Energy efficiency and conservation, renewable energy, and electric vehicle charging stations, and related facilities
8. Telecommunications, backbone network, terrestrial, aerial, and space infrastructure, and related service facilities
9. Information technology (IT) networks and database infrastructure, geo-spatial resource mapping, cadastral survey for resource accounting and planning, and related facilities
10. Irrigation and related facilities
11. Water supply, sewerage, drainage, water treatment, desalination, and related facilities
12. Educational infrastructure and related facilities



# 26+ Eligible Types of Projects

13. Health infrastructure, hospitals, clinics, research facilities, and other related facilities
14. Multi-purpose water resources projects covering a combination of irrigation, power, water supply, flood control, and related facilities
15. Land reclamation, dredging, flood control projects, and related facilities
16. Industrial and tourism estates or townships, including ecotourism projects such as terrestrial and coastal/marine nature parks, among others and related infrastructure facilities and utilities
17. Government buildings
18. Urban redevelopment, townships, and housing projects
19. Heritage preservation and adaptive reuse projects
20. Markets, slaughterhouses, trading posts, and related facilities
21. Warehouses and post-harvest facilities



## 26+ Eligible Types of Projects

22. Public fish ports and fishponds, including storage and processing facilities
23. Agri-fishery industrial hubs, agribusiness facilities, agricultural research facilities, agricultural estates, agrilogistics systems, contract farming, and related facilities
24. Prisons, lease of patrol vessels/rescue helicopters, O&M of military facilities and equipment, and other national defense or security-related facilities
25. Environmental and solid waste management related facilities such as but not limited to waste collection, transportation and disposal facilities, transfer stations, composting plants, material recovery, landfill and tidal barriers, among others
26. Climate change adaptation and mitigation and disaster risk reduction and management Infrastructure Projects, and related facilities
27. Other infrastructure or development projects and services, as may be authorized by the Implementing Agency pursuant to the Code and this IRR



# Value for Money (VfM)

- Effective, efficient, and economic **use of resources**, which requires the evaluation of relevant costs and benefits, along with an assessment of risks, and of non-price attributes and/or life cycle costs, as appropriate.
- Price alone may not necessarily represent VfM
- All PPP Projects must yield sufficient VfM
- IAs shall identify, develop, and prepare their respective lists of PPP Projects guided by VfM
- Approving Body shall assess PPP Project based on VfM



## **(4) Partnership Schemes**



# Universe of PPP Arrangements



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





# PPP Code-Covered Arrangements

Finance, Design, Construct, Operate and Maintain (*any combination or variation thereof*)

1. Joint Ventures
2. Construct, Operate and Maintain (*combination or variation thereof*) Toll Facilities
3. Lease
4. BOT, BT, BLT, BOO, BTO, CAO, DOT, ROT and ROO
5. Operate and Maintain
6. Arrangement which possesses characteristics or elements of a PPP
7. Arrangement approved by appropriate Approving Body



# 10 Exclusions

1. Procurement of Infrastructure Projects (GPRA)
2. ODA-Funded Infrastructure Projects
3. Management Contracts under GPRA
4. Service Contracts (coal service, petroleum, mining, renewable energy and per COA and DBM)
5. Divestments or Dispositions (taking away, depriving, withdrawing of an authority, power or title over a government asset)
6. Corporatization or transfer of government assets into a public corporation
7. Incorporation of Subsidiaries with Private Sector Equity



























# 10 Exclusions

8. Onerous Donations (subject to burdens, charges, or future services equal to or more in value than the thing donated)
9. Gratuitous Donations (disposed by a person without charge, in favor of another who accepts it)
10. JV Agreements and leases involving **purely commercial arrangements** that neither provide nor include public infrastructure or development services  
“Purely commercial arrangement”:
  - a) an arrangement for profit that solely involves or seeks to address a **private or business issue** (such as sale of goods, supply of equipment, and the like)
  - b) where the private partner develops government land into **private real estate projects** such as commercial buildings, condominium, non-socialized housing and subdivisions, malls, office buildings, private schools, retail outlets, resorts, health clinics, health spas, hotels and lodging facilities, service areas such as gas stations with retail/commercial components, sports facilities, and mixed-use development
  - c) where the private partner **sub-leases lots and building space** for commercial use, as enumerated above

# PPP RESOURCE EXCHANGE



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

AUTHOR: ALBERTO C. AGRA

BM GRAPHICS: JOB RUZGAL



# Joint Venture

## *Definition*

- IA (proprietary function) and the PP
- Parties pool resources comprising of capital, services, or assets, including equipment, land, or intellectual property
- Joint undertaking
- Specific investment activity
- Infrastructure or Development Project (typically provided by Public Sector)
- Within a specific period of cooperation



# Joint Venture

## *Requirements*

- Consistency with IA **mandate/ charter**
- IA and Approving Body-approved **Parameters, Terms and Conditions (PTCs)**
- Equity contribution **not exceed 50%** of Project Cost/ Outstanding Capital Stock
- Fair **valuation** of Equity Contribution
- Formation of JV not prevent the parties from entering into other JV PPP contracts with other parties or from profitably entering into other business ventures or markets, provided not compete with the first JV for the same product and geographic market
- Profit share **proportionate** to contribution (Government may get higher share/ favorable terms)
- Reversion to Government or **Divestment**



# Joint Venture

In case of JVs involving the formation of a JVC, the JV Partners shall be further guided by the following parameters:

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



# Lease

- Lease with:
  - Rehabilitate
  - O&M, and
  - Provision for Working Capital and/or Improvements
  - Includes public infrastructure or development services
- Lease as component of PPP





## **(5) Permissions (Approvals)**

# Approval of Local PPPs

## *Regardless of Project Cost*



- Approved by **Sanggunian** (if LGU) or **Board** (if LUC) (**cannot be delegated**)
- Endorsement/ **confirmation** by **LDC** prior to approval (30 days, *approval by inaction*)
  - Review if aligned/ consistent with local development plans
  - Review project and identify concerns
  - Submit confirmation
- PPP Center
  - Assess compliance with the approved PTCs
  - Determination of completeness of unsolicited proposals



# Approval of Local PPPs

## *Regardless of Project Cost*

- Approved by **NEDA-ICC** (RDC endorsed) - Government Undertakings using national government funds
- Endorsement by **National Government** (through RDC) - Local PPP Projects affecting national or sectoral development plans and national projects (**once endorsement secured, LDC shall endorse**)
- Clearance from **Statutory Counsel** - compliance with approved PTCs and applicable laws
- Clearance from **DOF** - if there is national government undertaking (**prior to LDC confirmation**)



# Approval of Inter-LGU PPPs

## ***May be implemented by the:***

1. National government, subject to the approval process for National PPP Project
  2. Next higher level of LGU
  3. LGUs concerned, subject to the approval process for Local PPP Projects
- Approved by the local Sanggunians of the LGUs concerned
  - Respective RDCs may assist in the coordination of LGUs in the development, approval, and implementation of the Local PPP Project



# Government Undertakings

*Not allowed for Unsolicited Proposals*

Any **form of contribution and/or support**, which the **Government** may extend to a PP for the implementation of PPP Projects:

- VGF and other forms of subsidy
- Payment of ROW related costs (allowed if gov't received appropriate compensation but not lower than value of costs)
- Performance undertaking
- Additional exemptions from any tax other than those provided for by law **at the time of submission of UP**



# Government Undertakings

## *Not allowed for Unsolicited Proposals*

- Guarantee on Demand
- Guarantee on Loan Repayment
- Guarantee on Private Sector Return
- Government Equity (allowed for JVs)
- Contribution (allowed for JVs) of assets, properties, and rights (allowed if gov't received appropriate compensation but not lower than value of costs)
- Credit Enhancements
- Legal and Security Assistance



# Not Government Undertakings

- Availability Payments
- Permits, clearances, licenses, or endorsements from national government agencies required for Local PPP Projects
- [Allowed for Solicited Projects and Unsolicited Proposals]*

# Approval of PPPs: **Criteria**



- Project context and objectives are clearly specified
- Scope, outputs, and performance indicators of the project are clearly specified
- Proposed project is technically feasible and is optimal
- Proposed project has an environment, climate change, and social safeguards framework including identified risks and mitigating measures
- Project Cost is sufficient to achieve the technical requirements of the project, including the general performance standards and targets set for the project, and those components needed to meet gender, social and environmental standards
- Operating costs are sufficient to achieve the operational requirements
- Project is economically viable, and the information used are reasonable and robust to determine viability
- VFM analysis shows that PPP modality is the more viable procurement option



# Approval of PPPs: **Criteria**



- Project is financially viable for investors at the project level, and the information used are reasonable and robust to determine viability
- Project's cash flows are healthy and sufficient to service debt obligations
- Risk allocation complies with the GPRAM
- Proposed bid parameter is the most advantageous to the government, fosters competition, fairness, and transparency, and ensures the best interest of the public
- Government undertakings and investment recovery schemes are justified by IA
- IA has the capability to deliver its assumed obligations for the project
- Proposed tariff regime is affordable to users
- Fiscal considerations are sufficiently provided, including Contingent Liabilities, foregone government revenue streams, and indirect costs associated with the project

# Approval of PPPs: **Completeness**

*7 days from receipt*



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



# Changes and Disapproval

- If after approval by Approving Body, the IA intends to **convert** such project to a **different procurement modality**, such shall be accompanied with a justification, and shall be made pursuant to the guidelines to be issued by the ICC
- In case the PPP Project has been **disapproved** and returned by the appropriate Approving Body for whatever reason, the IA may **resubmit** the project for approval: *Provided*, That such resubmission shall be considered a submission of a **new** project
- The decision of the appropriate Approving Body in all cases above shall be **final and executory**.

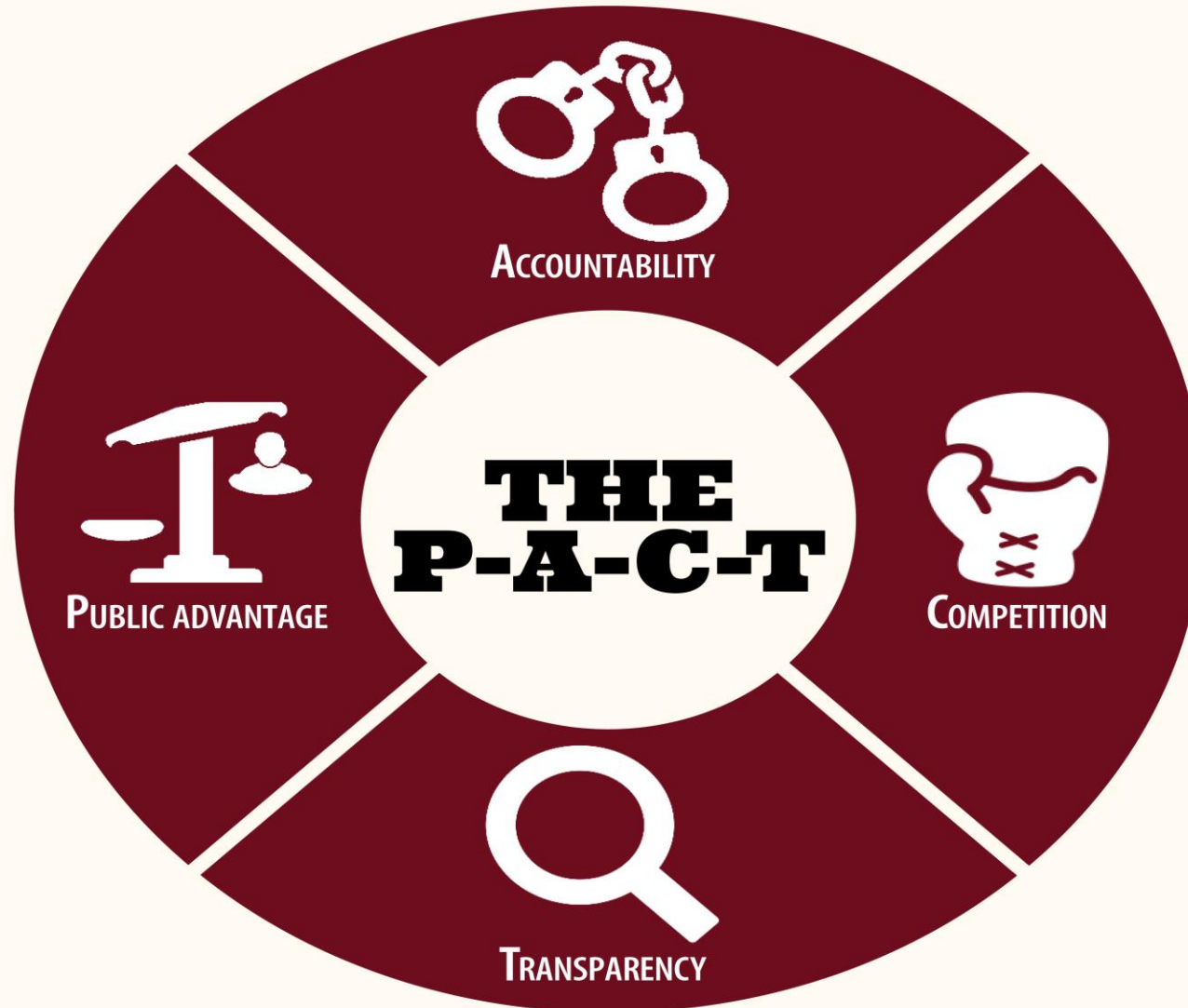


## **(6) Procedures**

# PPP SELECTION REQUIREMENTS



1. Open
2. Fair
3. Transparent
4. Competitive





# Solicited Project

## ***Tender Documents***

- Instructions to Bidders
- Draft PPP contract reflecting the PTCs as approved by the appropriate Approving Body
- “Bid Form” reflecting the required information to properly evaluate the bid proposal
- Forms of bid and performance securities
- Requirements and timelines/ milestones of agencies concerned in granting of franchise, if applicable
- Other documents as may be deemed necessary by the IA



# Solicited Project

- Public bidding initiated by IA
  - Stages: Single-Stage or Two-Stage (qualification requirements and/ then bid proposals)
  - Manner: Manual or Electronic
- Private Partner/ Awardee
  - Satisfies all pre-qualification and eligibility requirements
  - Submitted the most responsive bid to the bid parameter proposed by the IA (next most responsive)
  - Complied with PTCs
  - Allows substitution in composition of pre-qualified PP prior to bid submission (substitute has equal or better qualified)

# Solicited Project: **Technical Proposal**



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



# Solicited Project: **Technical Proposal**



- **Project Cost** as proposed by the bidder
- **Financing plan** and third-party valuation of the bidder's contribution, in the case of JV arrangements
- **Bid security** (cash, certified check, manager's check, letter of credit, or bank draft/ guarantee issued by a reputable local/foreign bank, or a surety bond callable on demand issued by the GSIS or an entity duly registered and recognized by the Office of the Insurance Commission):
  - Project Cost < P5B – 2%
  - $P5B < x < P10B - P100M + 1.5\%$  of the Project Cost excess over P5B
  - $\geq P10B - P175M + 1.0\%$  of the Project Cost excess over P10B



# Solicited Project: **Financial Proposal**

- Compliance statements with regard to the **financial parameters** as stated in the bid/tender documents
- **Propose Project Cost**, operations and maintenance cost and other related costs
- **Project Financial Scheme**, which may include the amount of equity to be infused, debt to be obtained for the PPP Project, and sources of financing
- **Financial Proposal** corresponding to the bid parameters set by the IA
- Other documents



# Solicited Project: Most Responsive Bid

## Highest

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

## Lowest

- Government Subsidy/ Support
- Tariff by End-User
- Rental Payment by Government (IA as Lessee)

**MRB:** Bid that conforms, in all material respects, to the bid solicitation requirements and approved bid parameters, and the one that is **most advantageous** to the government. A bid that is most advantageous to the government includes one that protects the public by providing **affordable, accessible, and efficient public service**, taking into account the totality of circumstances.



# Solicited Project

## Failed Bidding

- No bids are received
- No complying bids
- Winner bidder refuses to accept award

## Single Complying Bid

- After advertisement
  - >1 bidder applied for pre-qualification but only 1 met the pre-qualification requirements
  - 1 bidder applied for and met the pre-qualification requirements
- After pre-qualification
  - >1 bidder, only 1 submitted a bid
  - >1 bidder submitted bids but only 1 compliant

*Effect: IA may negotiate on financial proposal*



# Unsolicited Proposal

## *Stage 1*

- Private Proponent prepares UP
- UP submitted **first** to PPP Center (**not processed by PPP Center = UP not deemed submitted**)
- Determination by PPP Center of: (10 days)
  - Completeness (**if incomplete, PPP decision is final and non-appealable**)
  - Appropriate Approving Body
- **Similar UPs may be entertained by the PPP Center within the 10 calendar days from the receipt of the 1<sup>st</sup> UP (beyond the 10<sup>th</sup> day, PPP Center shall no longer assess)**

# UP Completeness



1. Complete Feasibility Study
2. Traceable Economic Model
3. Traceable Financial Model
4. Minimum Parameters, Terms and Conditions
5. Information on the qualifications of the Private Proponent
6. Certification that UP has no Government Undertakings
7. Draft PPP Contract
8. Valuation Report for the usufruct
9. (Gender Responsive Checklist)
10. (Right of Way Acquisition/Resettlement Plan)

# Complete Feasibility Study



1. Problem Definition/ Objectives
2. Project Description
3. Project/ Sectoral Program/  
Regional and Spatial Context
4. Expected Outcomes and Key  
Success Indicators
5. Analysis of Technical Solutions
6. Project Costs
8. Legal Due Diligence
9. Demand and Supply/ Market  
Analysis
10. Proposed Tariff Structure
11. Financial Analysis
12. Economic Analysis
13. Social and Environmental Analysis
14. Risk Allocation
15. Value for Money Analysis (for  
Solicited)
16. Contractual Arrangement Options
17. Job Creation Information
18. Description of Supply Chain
19. Description of Products or Services  
to be provided
20. Description of the Geographic and  
Catchment Area
21. Results of Stakeholder Consultation

# Parameters, Terms & Conditions (PTCs)



1. Project Scope
2. Contractual Arrangement
3. Term
4. Rights and Obligations of Parties
5. Performance Standards and Key Performance Indicators
6. Investment Recovery Schemes
7. Revenue share, if any
8. Government Undertakings
9. Proposed Risk Allocation
10. Contingent Liabilities
11. Bid Parameter
12. Ceiling for Debt-to-Equity Ratio
13. Proposed Public Bidding Process – single or 2-stage (if solicited)
14. Proposed Period for Comparative Challenge (90 days to 1 year)





## 2 Required Traceable Models

### Economic Model

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

### Financial Model

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



# Unsolicited Proposal

## *Stage 2*

- IA upon receipt of UP endorsed by PPP Center:
  1. Continue to process
  2. Reject UP if project not aligned with IA development plans or IA is developing a similar project
  3. Continue processing UP even if Solicited Project being developed



# Unsolicited Proposal

## Stage 2

- Detailed Evaluation by IA of UP and PP Qualifications by IA (90 days to approve; approval by inaction)
  - Validate absence of prohibited Government Undertakings
  - Validate absence/ presence of physical overlaps
  - Assess appropriateness of contractual arrangement and reasonableness of proposed risk allocation
  - Review the proposed PTCs for the PPP Project
  - Evaluate the robustness of the valuation by Third-party Appraiser(s) for the assets, properties and/or rights contributed by the government, if any



# Unsolicited Proposal

## Stage 2

- Detailed Evaluation by IA of UP and PP Qualifications by IA  
(90 days to approve; approval by inaction)
  - Assess the appropriateness of the compensation to the government for Government Undertakings, if any
  - Conduct detailed review of the technical, financial, and economic viability, the corresponding Economic and Financial Models, and the Project Cost
  - Conduct the VFM analysis for the Unsolicited Proposal
  - Assess the qualifications of the Private Proponent
  - Market sounding feedback
  - Assess the entirety of the proposed project pursuant to the guidelines to be issued by the ICC



# Unsolicited Proposal

## *Stage 2*

- If multiple UPs, IA to determine **most advantageous UP** which have been **endorsed by PPP Center**
  - Economic viability
  - Financial viability
  - Propose project scope and terms
  - Investment recovery scheme
  - Government risks
  - PP qualifications



# Unsolicited Proposal

## *Stage 2*

○ After Detailed Evaluation by IA:

1. Accept the proposal and proceed to negotiation
2. In case multiple UPs for the same or similar project, accept the most advantageous proposal and reject all other proposals
3. Reject the UP or all similar proposals (return)
4. Reject the Unsolicited Proposal or all similar proposals and bid out the project as a Solicited Project (return)



# Unsolicited Proposal

## *Stage 2*

- Decision of IA is final and non-appealable
- If IA fails to act on UP (90 days from end of evaluation period), UP deemed approved
- If IA fails to act on multiple UPs, 1<sup>st</sup> complete UP considered approved



# Unsolicited Proposal

## Stage 3

- Good faith (successful or failed) Negotiations between IA and PP with accepted UP with assistance of PPP Center (≳150 days) (*30-80 days, extendible but ≳150 days*) on PTCs including:
  - Setting a pre-determined rate of return based on prevailing market conditions, risks to be assumed by the private partner, and duration of the PPP Project
  - Sharing by the private partner with the government, of revenues, net revenues, earnings before interest and taxes, net income, or the like if there is an upside
  - Implementing a graduated share in cases where government already has a share in the project revenues, net revenues, earnings before interests and taxes, net income, or the like even without upside
  - Setting a period for monitoring the returns
  - Setting a period for remitting the share of the government in the upside





# Unsolicited Proposal

## IA Designated Representatives

- A team lead officially designated by the Head of the IA
- A legal officer
- An officer knowledgeable in finance
- An officer knowledgeable in the technical aspects and/ or management and operations of the project

## Assisted by:

- PPP Center
- Government lawyers specializing in PPPs from the OSG, the OGCC, or the prescribed statutory counsel
- DOF



# Unsolicited Proposal

## Stage 3

- Upon successful negotiations, Private Proponent becomes **Original Proponent**
- Original Proponent Status valid for ≥1 year (**automatic expiration**)
- IA may **revoke** OPS:
  - It is found that the facts disclosed are incomplete, incorrect, misleading, fraudulent, untrue, inaccurate, or different from what was presented
  - Non-compliance or violation of the Code and this IRR
  - There is a change in the composition of the OP that will affect its legal, technical, and/or financial capability to successfully carry out the PPP Project, or there is a change in control that will affect its majority ownership and/or beneficial ownership.



# Unsolicited Proposal

## Stage 3

- Submission of UP (and approved PTCs) to Approving Body for approval (or rejection) (*120 days to decide; approval by inaction*)
- Comparative Challenge by IA if Approving Body approves UP/PTCs (*90 to 365 days*)
  - Manual or electronic



# Unsolicited Proposal

## Stage 3

- Publication of Invitation (*within 7 days from approval*)
  - At least 1x
  - At least 2 newspapers of general circulation, either print or online
  - For Local PPP Projects, at least 1 local newspaper of general circulation, either print or online, in the region, province, city, or municipality in which the PPP Project shall be implemented
  - Posted continuously starting on the date of the publication:  
Website and/or any official IA digital platform, if available;  
Website and/or any official digital platform of the PPP Center and the NEDA; and any online government portal for the purpose)



# Unsolicited Proposal

## *Confidential Information*

- Any entity, whether public or private, may claim confidentiality of information it submits in relation to any activity being conducted (**Confidential Business Information**)
- Confidential Business Information submitted by entities pursuant to the Code and this IRR, shall not, in any manner, be directly or indirectly disclosed, published, transferred, copies, or disseminated: *Provided*, That the confidentiality rule shall not apply if the entity consents to the disclosure, or if the document or information is mandatorily required to be disclosed by law or by a valid order of a court of competent jurisdiction or of a government or Regulatory Body or may pose threats to national security or public safety.
- Any entity that claims confidentiality on tender documents that will be published by an IA shall submit to the IA, copy furnished the PPP Center, a table identifying the confidential information and giving reasons why the information should be treated as confidential.
- Blanket claims for confidentiality shall not be accepted. Failure to comply with the foregoing shall result in the waiver of the entity's claim for confidentiality.



# Unsolicited Proposal

## Stage 3

- Disclosure of OP Financial Proposal in **Tender Documents (mutual agreement between IA and OP)**
  - If not disclosed, it shall be revealed upon the opening of the financial proposals of the comparative proposals
- Posting of Bid Bond
- Submission, Opening and Evaluation of Comparative Proposals



# Unsolicited Proposal

## Stage 3

- Right to Match by OP (30 days *which is excluded from comparative challenge process*)
- Award to:
  - OP:
    - if no challenger
    - if financial proposal of OP is superior/ more advantageous to government
    - If there a tie between proposals of OP and challenger(s)
  - Winning Challenger - if OP fails to match financial proposal of comparative proponent (if there is a tie between proposals of challengers offering better financial proposals, draw lots)



# Unsolicited Proposal

## *Limitations/ Prohibitions*

- Any change in the composition of the OP that will affect its majority ownership
- Inclusion of Government Undertakings
- IA advances payment for ROW acquisition and related costs
- Valuation of usufruct of assets, properties and rights (GFI or SEC-Accredited Asset Valuer, report not older than 1 year)
- Winning PP: Reimburse (amount in challenge documents) IA for Development Cost (conduct of FS, business case and surveys) for past 3 years not exceed 6% of Project Cost (documentation needed – contracts, copies of outputs, certificates of taxes withheld)

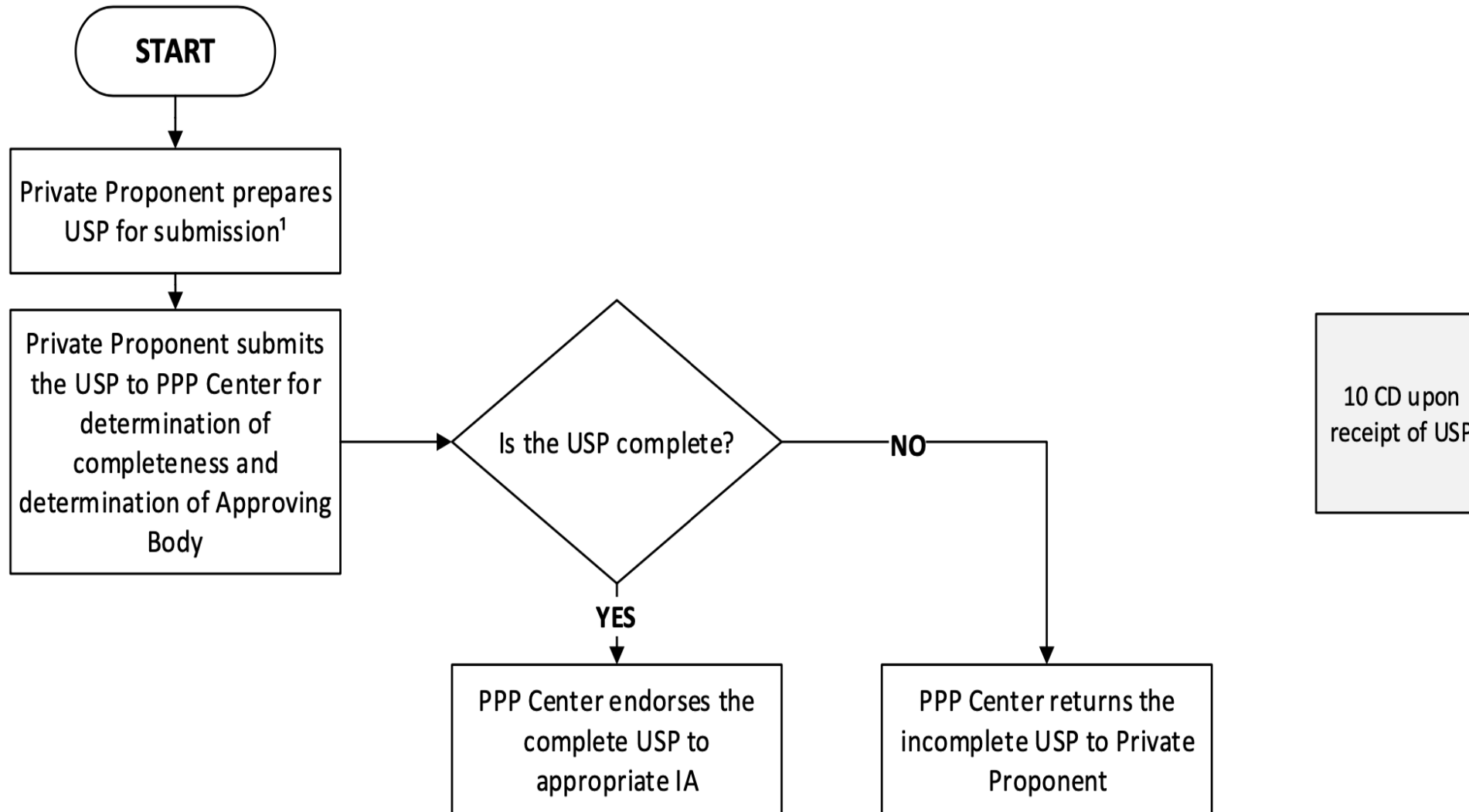


## National - Unsolicited Proposal (USP): Process

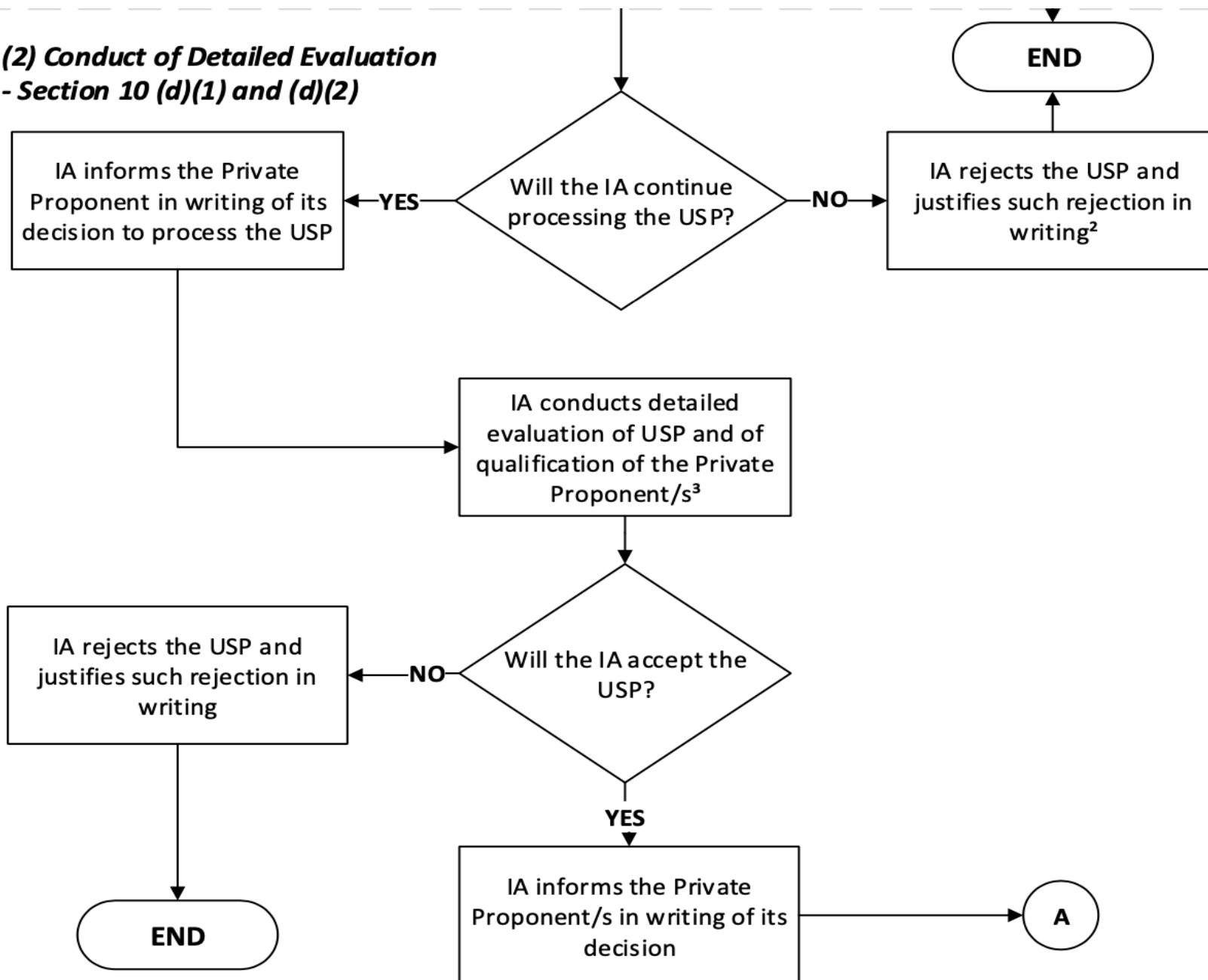
## Timeline



### *(1) Submission, receipt, and determination of completeness of USP- Section 10 (a)*



**(2) Conduct of Detailed Evaluation  
- Section 10 (d)(1) and (d)(2)**

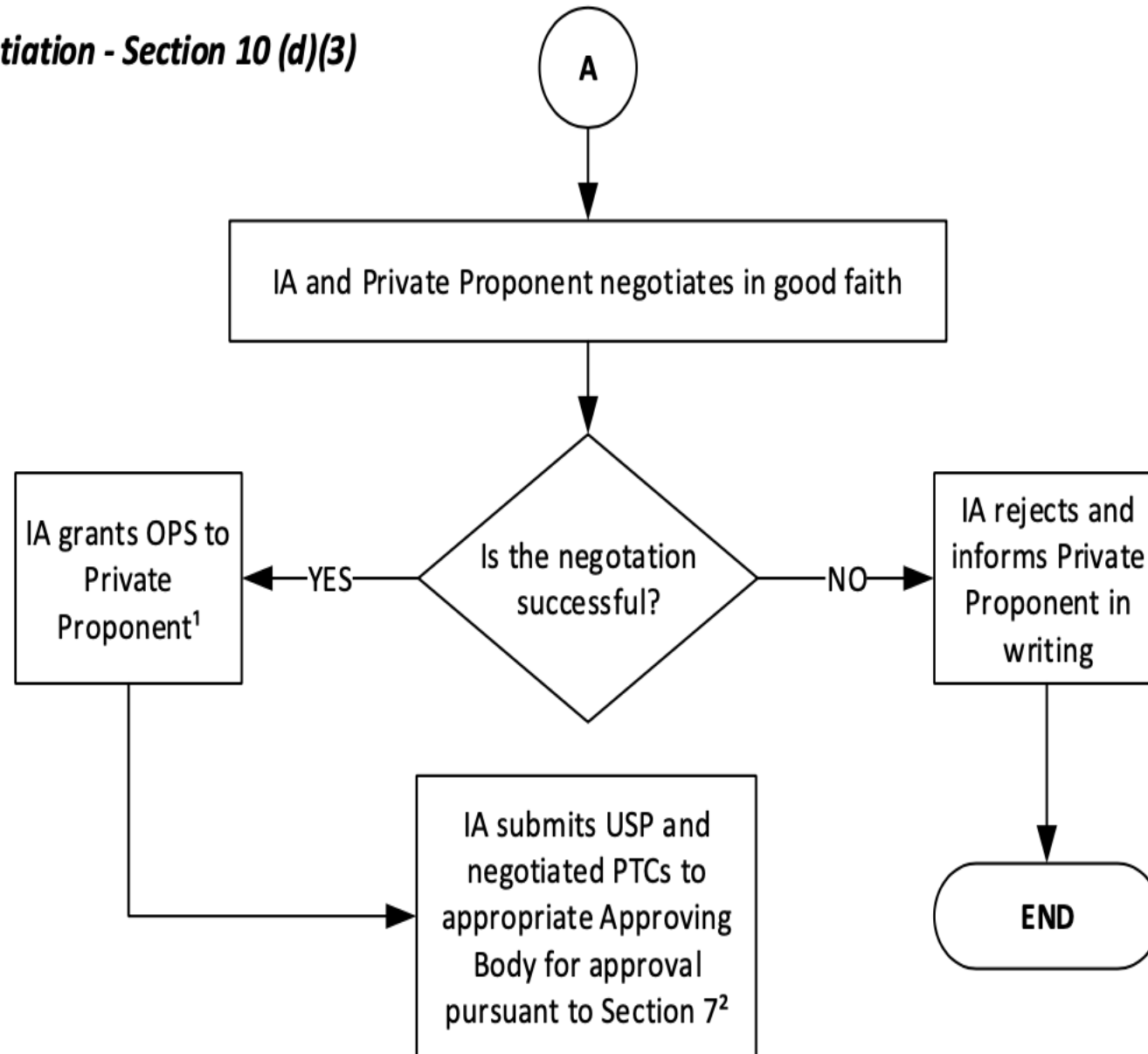


within 90 CD  
after end of  
10 CD from  
IA's receipt of  
USP from PPP  
Center

3 CD from  
end of 90 CD  
detailed  
evaluation  
period



### (3) Negotiation - Section 10 (d)(3)



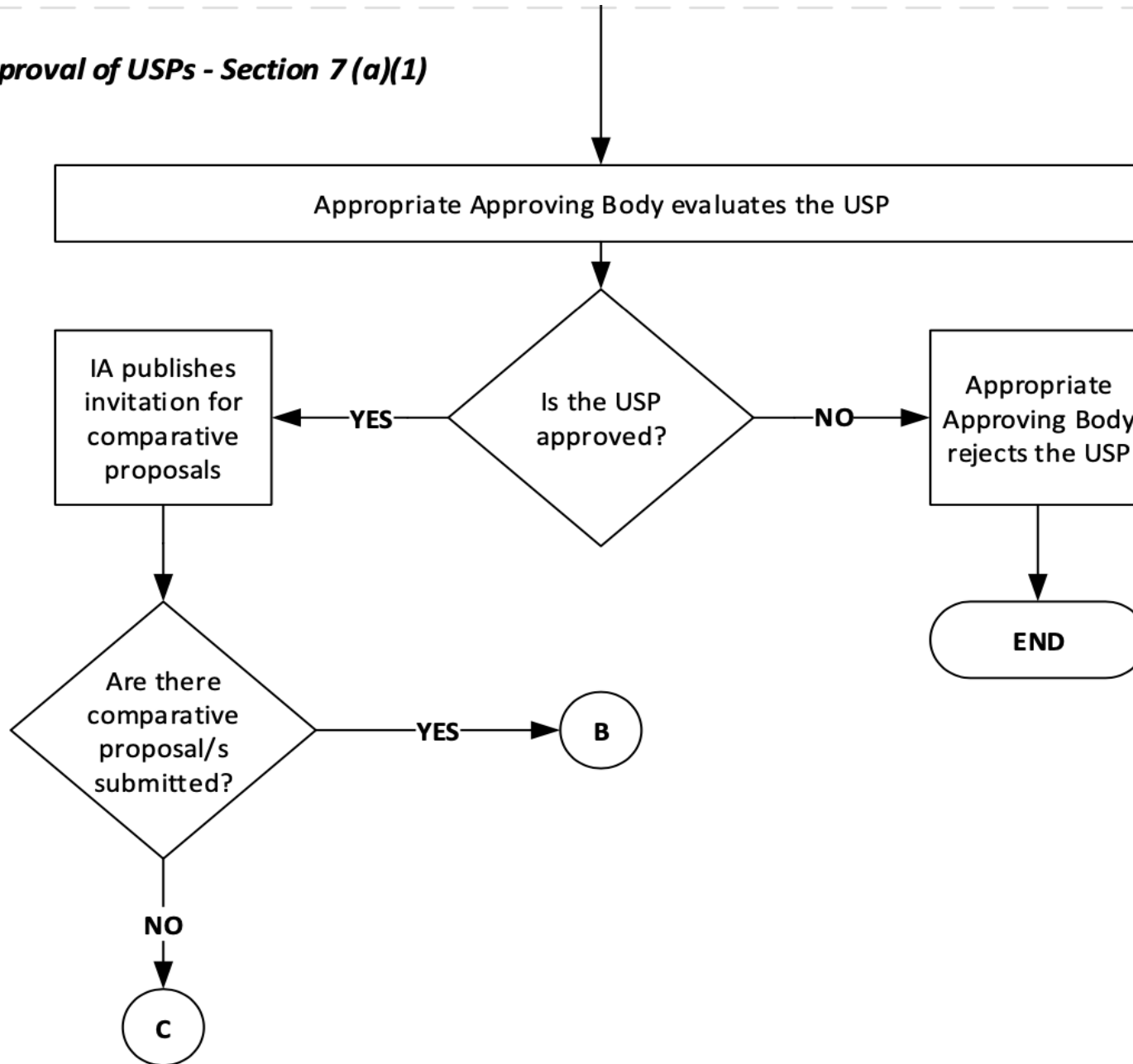
within period  
not exceeding  
150 CD



Local UPs

Secure applicable  
clearance prior to  
submission to the  
appropriate Approving  
Body¹

**(4) Approval of USPs - Section 7 (a)(1)**



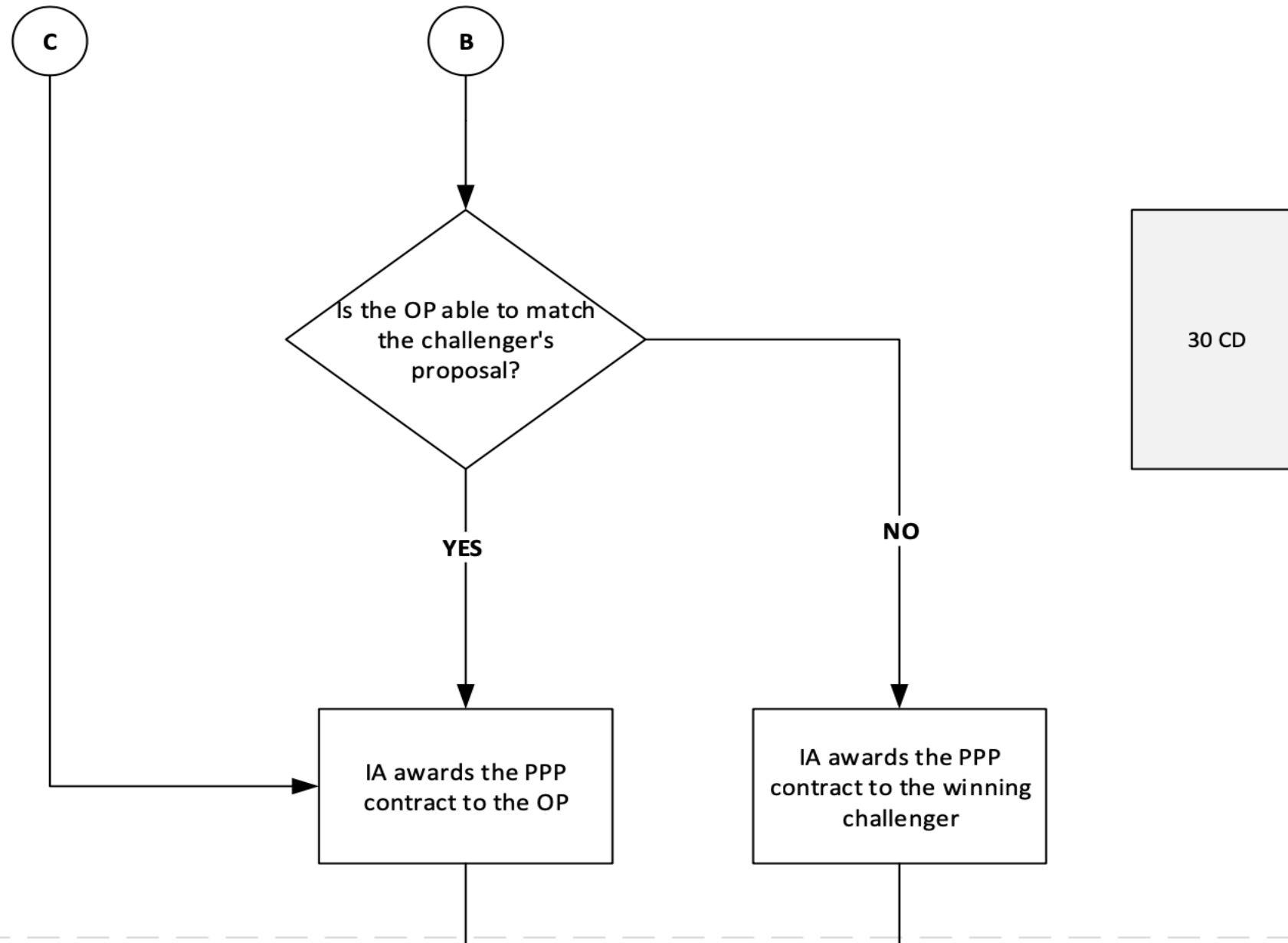
120 CD from receipt of complete requirements

within 7 CD upon approval by the appropriate Approving Body<sup>3</sup>

not less than 90 CD and not exceeding 1 year<sup>4</sup>

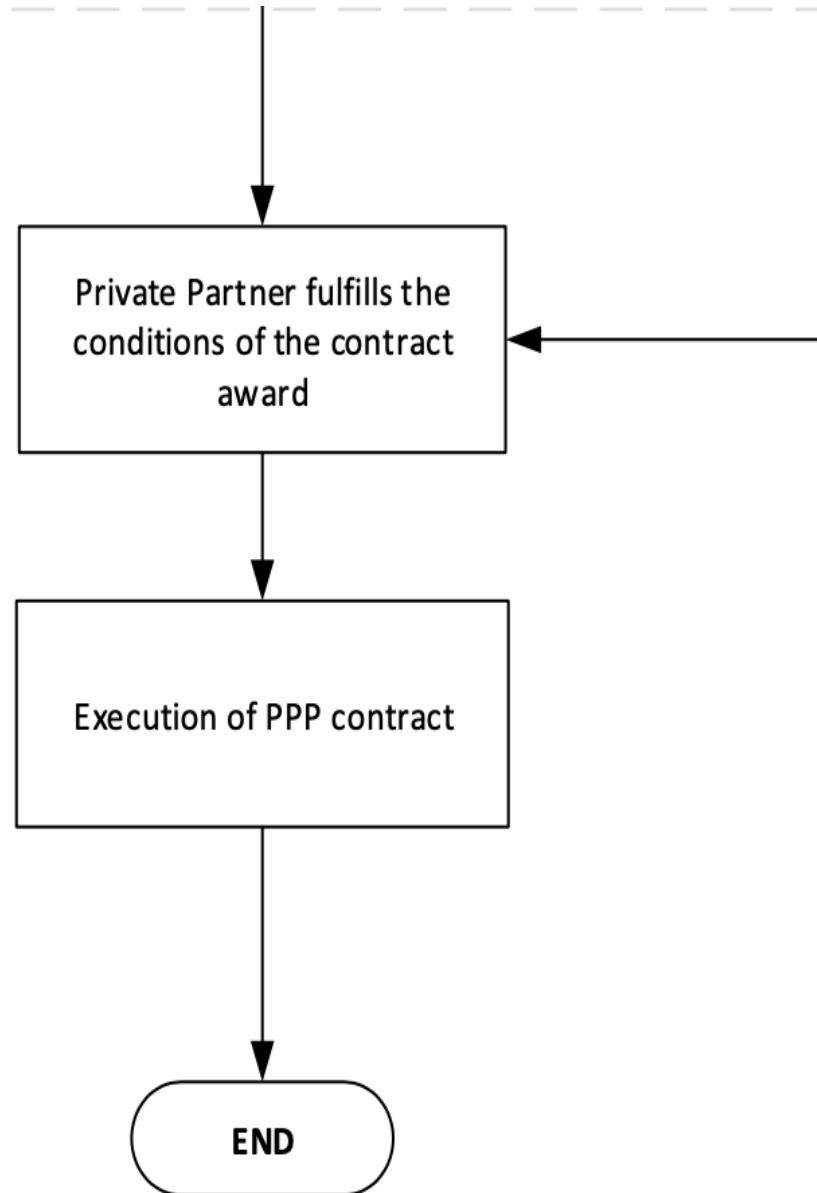


**(5) Comparative challenge process - Section 10 (e)**



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***(6) Contract award and signing***





## **(7) Pact and Provisions**

# Mandatory Provisions in a PPP Contract



- specific contractual arrangement, term, and scope of work
- minimum performance standards and specification
- KPIs, targets, and procedures for measuring and reporting results
- implementation milestones, including those for securing other approvals and the project completion date
- cost recovery scheme via proposed tolls, fares, fess, rentals, and other charges, as the case may be
- obligation of the Private Partner to disclose loan or financing documents



# Mandatory Provisions in a PPP Contract



- liquidated damages
- performance security requirements, including their validity and top-up mechanism procedures, contemplated under this IRR
- minimum insurance coverage as may be required for the project, such as Contractors' all risk, motor vehicle, workmen's compensation, third party liability, force majeure, or comprehensive general liability insurance, as may be applicable
- acceptance tests and procedures
- warranty period and procedures (after transfer) and warranty security
- lock-in periods, as applicable

# Mandatory Provisions in a PPP Contract



- grounds for and effects of contract termination, including formula for termination payment
- conditions and procedures for lender step-in rights
- conditions for acceptable permitted security interest
- procedures for resolving disputes as detailed in this IRR
- the manner and procedures for the resolution of warranty against corruption
- wind-up and transfer measures

# Mandatory Provisions in a PPP Contract



- period within which Financial Close shall be achieved by the Private Partner
- compliance with all other applicable laws, rules, and regulations
- total cost of the project, project specifications and features
- social and environment safeguards
- provisions on the use of dispute avoidance and ADR mechanisms
- ownership or retention of patents, technology and consultant



# PTCs and PPP Contracts

- In no case shall the Head of the IA sign the contract if it contains provisions that are **inconsistent or in conflict** with the final PTCs approved by the Approving Body
- If the executed PPP contract contains provisions which are **contrary with the final PTCs approved by the Approving Body** and are **grossly disadvantageous** to the government, the contract shall be null and void, without prejudice to the liability which the erring or negligent officials may incur
- **Changes to the PTCs** of the draft PPP contract may be allowed **prior to submission of bids** for Solicited Projects: *Provided*, That the prior approval for such changes of the appropriate Approving Body and the Head of the IA shall be secured
- Changes to the PTCs of the draft PPP contract **after bid submission** and prior to contract execution shall not be allowed except for changes to contract terms affected or decided by the winning bidder's bid



# PPP Contract Review

## National PPP Projects

- PPP Center, for compliance with the approved PTCs
- Statutory counsel/s, for compliance with all other applicable laws, rules, and regulations
- DOF, for national Government Undertakings or Availability Payments

## Local PPP Projects

- Statutory counsel/s, for compliance with all other applicable laws, rules, and regulations
- DOF, for national Government Undertakings or Availability Payments



# 20 Important PPP Code Provisions

1. Risk Allocation
2. Sources of Financing
3. Financial Close
4. Investment Recovery Schemes
5. Tolls, Fares, Fees, Rentals and Other Charges
6. Availability Payments
7. Reasonable Rate of Return
8. Land Value Capture Strategies
9. Contingent Liability
10. Viability Gap Funding
11. Guarantees
12. Subsidy
13. Government Undertakings
14. Divestment
15. Wind-Up and Transfer Measures
16. Alternative Dispute Resolution
17. Material Adverse Government Action
18. Variation, Expansion or Extension
19. Termination
20. Accountability/ Liability



# Risk Allocation

- **Equitable and optimal risk allocation** between/ among the PPP Parties
- **Each party** shares in the associated risks
- NEDA-ICC shall publish the **Generic Preferred Risk Allocation Matrix (GPRAM)**
- **All PPP contracts** to be entered into by the IA shall adhere to the principles stipulated under the GPRAM, to the extent applicable
- Any **deviations** to the preferred risk allocation shall be justified by the IA and approved by the appropriate Approving Body
- Adoption of **contract management and risk mitigation plans** (*execution plan, all risks assumed by the government under the PPP contract, risks assumed by the IA, risk mitigating measures, estimated costs to be incurred, target timeline to have each measure in place, and the appropriate action plan by the IA to manage each type of risk*)



# Sources of Financing

## *Private*

- Debt and Equity
- Project Finance

## *Government*

- Direct government appropriations
- Official Development Assistance

## *Blended Financing*

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





# Alternative Financing

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



# Financial Close

- Specific milestone in a PPP contract where the PP successfully secures all necessary project and **financing agreements**
- The achievement of such milestone confirms that all prior **conditions have been met**, allowing the PP to **draw down** the financing to commence work on the PPP Project
- Period stated in **PPP contracts**
- **Failure** to achieve Financial Close within such period, without the fault of the government, shall subject the PP to **penalties** under the signed PPP contract



# Investment Recovery Schemes

Private Partner shall be allowed to recover its investments and earn reasonable profit

1. Revenue-based - refers to a scheme where the PP is authorized to charge and collect, in whole or in part, from the users **reasonable tolls, fares, fees, rentals, and other charges** subject to appropriate regulation; Where applicable, the PP may likewise be repaid in the form of a share in the revenue of the PPP Project, **and/or**
2. Availability-based - refers to a scheme where the IA commits to make **predetermined payments**, which do not take the form of charges paid by the users of the works or of the service, but of regular payments by the IA in **exchange of delivering an asset or service** in accordance with the PPP contract.
3. Supplementary/ Other investment recovery schemes:
  - a) Commercial **development rights**
  - b) Grant of a portion or **percentage of a reclaimed land**, subject to the constitutional requirements on land ownership and fair valuation

# Tolls, Fares, Fees, Rentals and Other Charges



- **Initial** tolls, fares, fees, rentals, and other charges and adjustments thereof shall be as stipulated in the PPP contract (for revenue-based investment recovery scheme)
- **Regulatory Agencies** to issue **guidelines, frameworks, or mechanisms** for consultation, review, and approval of said initial tolls, fares, fees, rentals, and other charges and adjustments thereof
  - Approve the initial tolls, fares, fees, rentals, and other charges and adjustments thereof, on the basis of service quality, key performance indicators, the principles of fairness, transparency, predictability, and protection of public interest while providing for a Reasonable Rate of Return on capital or investment by the Private Partner
  - Uphold the approved initial tolls, fares, fees, rentals, and other charges and adjustments thereof during the implementation of the PPP Project
  - Where the IA fails to implement the initial tolls, fares, fees, rentals, and other charges and adjustments thereof as stipulated in the PPP contract, the Private Partner shall be allowed to recover the difference through measures consistent with the PPP contract and applicable laws, rules, and regulations
- In the case of Local PPP Projects, the IA may also opt to create and establish a **local rate setting body**
- **Changes** in tolls, etc. must be approved by Approving Body



# Availability Payments

- Predetermined payments by the IA to the PP in exchange of delivering an asset or service in accordance with the PPP contract.
- Not construed as a Government Undertaking, Guarantee on Demand, Subsidy, or government contribution
- Approval by NEDA-ICC needed (even if < P15B)



# Reasonable Rate of Return (RRoR)

- **Net gain of an investment** over a specified time period, expressed as an annualized percentage as prescribed by the appropriate Approving Body and reflected in the PPP contract
- **Cumulative annualized percentage** that shall in **no case exceed 15%**, taking into account among others the prevailing costs of capital (debt and equity) in the domestic and international markets, risks being assumed by the Private Proponent, and appropriate risk premia
- Where the realized rate of return exceeds the prescribed RRoR, the **excess** shall be remitted to the National Treasury (“Clawback”)
- Prescribed by **Approving Body**
- Considered by Regulatory Agency in assessment of **public interest**

# Reasonable Rate of Return (RRoR)

## Trust Account



Purpose of retaining excess cash when the realized rate of return exceeds the RROR

- When the realized RoR exceeds the prescribed RROR by more than 5%, the Private Partner will deposit excess cash into the trust account in such amount as to cause the realized RoR to equal RROR plus 5%
- When the realized RoR falls below RROR by 5%, the Private Partner may draw from the trust account in such amount as to cause the realized rate of return to equal RROR
- An independent financial consultant may be engaged and paid from the trust account to evaluate the RROR  
At the end of the PPP Contract, the Private Partner shall deposit excess cash into the trust account in such amount as to cause the realized rate of return to equal RROR
- After which, the trust account balance will be remitted to the National Treasury



# Land Value Capture Strategies

- A set of mechanisms used to **recover and re-invest land-based value increases** that arise in the catchment area of public infrastructure investments
- **Purpose:** Optimize the financial and economic efficacy of a PPP Project
- **Examples:** Betterment contributions, grant or sale of commercial development rights, and strategic land management





# Contingent Liability

- An obligation that may arise from events specified in a PPP contract, the occurrence, timing, and amount of which are **uncertain**
  - Regulatory action
  - Force majeure
  - Breach of government warranties
  - Material Adverse Government Action (MAGA)
  - Others
- Payment of CL from PPP Risk Management Fund



# Viability Gap Funding (VGF)

- Extended by the government to make an **economically viable** revenue-based PPP Project financially viable
- ROW and resettlement shall not be considered as VGF



# Guarantees

- ***On Demand*** - an agreement where the IA undertakes to assume the **market demand risks** associated with the PPP Project
- ***On Loan Repayment*** - an agreement where the IA guarantees to assume responsibility for the **repayment** of debt directly incurred by the PP in implementing the PPP Project in case of a loan default
- ***On Private Sector Return*** - an agreement where the IA guarantees to provide a **predetermined rate of return** on the investment of the PP



# Subsidy

An agreement where the IA will:

1. Defray, pay for, or shoulder a portion of the **Project Cost** or the expenses and costs in operating or maintaining the project
  - ≠ 50% of Project Cost
  - Not a subsidy if Gov't receives payment or remunerated by PP
2. Bear a portion of **capital expenditures** associated with the establishment of an infrastructure or development project and services
  - ≠ 50% of Project Cost
3. Contribute any **property or assets** to the project
  - Allowed for JVs
4. Waive charges or fees relative to **business permits or licenses** that are to be obtained for the Construction of the project
  - Not a subsidy if Gov't receives payment

Includes **VGF** which may be extended by the government to make an economically viable revenue-based PPP Project financially viable



# Divestment

## By IA

- Divest ownership, rights or interest in a PPP Project (*full or partial*)
- Approval of Approving Body

## By PP

- Divest ownership, rights or interests in a PPP Project
- Approval of IA
- After a holding or lock-in period as indicated in the PPP contract
- New PP must have equal or better qualifications as previous PP



# Government Takeover

## Temporary

- During a temporary takeover, the Implementing Agency shall retain the tolls, fares, fees, rentals, and other charges from the PPP Project and shall be responsible for the corresponding costs to rectify, operate and maintain the PPP Project
- Contract term shall be suspended until the PPP Project or operations thereof is returned to the Private Partner
- When returned to Private Partner
  - Compensation due to the Private Partner
  - Adjustment of KPIs to the extent that defects in the PPP Project cannot be rectified
  - Warranty in favor of the Private Partner that the PPP Project is capable of meeting the KPIs as adjusted

## Permanent

- Private Partner shall be entitled to claim Termination Payments
- Minimum period to be defined in the PPP Contract from the date of receipt by the Private Partner of a written takeover notice shall be deemed to be a permanent takeover



# Wind-Up and Transfer Measures

- Mechanisms and procedures for the **transfer of assets** to the IA
- **Transfer of technology** required for the operation of the PPP Project
- **Training of the personnel** of the IA or of a successor in the O&M of the PPP Project
- The provision, by the PP, of a **warranty** that the PPP Project meets the project technical specifications, agreed system features, and performance standards and services for a certain period after the transfer of the PPP Project to the IA
- In case of JVs, the **compensation** to which the PP may be entitled in case of buy-out and transfer of assets to the IA



# Alternative Dispute Resolution

- Include provisions on the use of dispute avoidance and ADR mechanisms (*Republic Act No. 9285 otherwise known as the “Alternative Dispute Resolution Act of 2004”*)
- Contracting parties shall be given complete freedom to choose which ADR mechanisms



# Material Adverse Government Action (MAGA)



- Any act of the government which the PP had no **knowledge** of, or could not be reasonably expected to have had knowledge of, prior to the effectivity of the PPP contract, and that **occurs after the effectivity** of the PPP contract, other than an act which is authorized or permitted under the PPP contract, which:
  - specifically **discriminates** against the sector, industry, or project, and
  - has a **significant negative effect** on the ability of the PP to comply with any of its obligations under the approved PPP contract
- MAGA may include **unanticipated regulatory risks**
- CL covered by National/ LGU Risk Management Fund



# Termination

## PPP contract shall:

- Define **all events** that may lead to its termination, including but not limited to, either party event of default, force majeure and other no-fault termination events, and other termination events, as may be agreed upon by the parties to the PPP contract.
- Provide for **remedies**, curing periods, lender step-in rights, remittance procedures, default interest rates, and written notice requirements agreed upon by both parties
- Indicate the **Termination Payment** (amount payable by the government or the PP on the occurrence of an event or series of events)

## Restrictions

- No termination without **exhausting** the corresponding remedy or curing period
- **Termination** shall take place only upon failure to remedy or cure the default in accordance with the PPP contract



# “Amendments”

## *PPP Contract Variation, Expansion or Extension*

- 1.Changes in the agreed **schedule** or **parametric formula** to calculate tolls, fares, fees, rentals, and other charges and adjustments thereof, as stipulated in the PPP contract
- 2.Decrease in the **IA’s revenue or profit share** derived from the project, except as may be allowed under a formula approved by the relevant regulatory or Approving Body
- 3.Change in the approved **scope of works**, decrease in the performance standards, deferment of committed service levels or change in the contractual arrangement
- 4.Extension in the **contract term**
- 5.Increase in the **financial liabilities** of the government under the PPP Project
- 6.Others which have **same effect as above**



# “Amendments”

## Approving Body

- Must approve the “amendments”
- May impose limitations on amendments during approval process of project

## IA Head

- Approve other forms of “amendments”

## Requirements

- No Approval = Void Amendment
- Approval before implementation of amendment
- Splitting of Amendments not allowed



# Accountability

- All **PPP contracts** - clearly **define the scope** of each party's accountability under the PPP contract
- **IA Head** shall at all times be accountable to PPP Projects
- **PP** shall likewise be held accountable for the works it has delivered and services it has rendered for a PPP Project
- PPP Projects shall be subject to the **Government Auditing Code of the Philippines** and the 2009 COA Revised Rules of Procedures



# Liability

- Imprisonment (3 – 6 years) and fine (P1M – P5M)
  - **Downgrading** the category of the Project Cost for purposes of evading the required approvals
  - Submitting of any **false information** or falsified documents
  - Neglecting or refusing to act upon an UP within the **prescribed period**
  - Performing any act which restricts **transparency** or tend to restrain the natural rivalry of parties or operates to stifle or suppress competition in the PPP process
  - **Withdrawing a bid**, after it shall have been declared the winner, or refusing award, without just cause for the purpose of forcing the IA to award the PPP contract to another bidder
  - **Violating provisions** on Approval of Projects, Solicited and Unsolicited Proposals, JVs, Amendments, Divestment, Conflict of Interest, Confidentiality of Information
- Anti-Graft and Corrupt Practices Act



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Together, let us learn-unlearn-relearn.

*Thank you.*