

*Local Government Academy
Department of Interior and Local Government*

Course Book

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

Volume 1: Enabling LGU PPPs
Annotation and Commentary

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Introduction

Public-Private Partnerships (PPPs) is a development strategy at the national and local government levels. PPP should not be viewed as a piecemeal and palliative solution to the socio-economic-political woes of the country.

PPP must be seen as an integral part of a system, a vision, a culture, a learning ecology, an interdependent relationship between and among stakeholders, an innovation with a purpose, an ethical and democratic reform initiative, and promotive of the public good. Otherwise, PPP is just a contract and is project-driven. Such a traditional orientation renders PPP arrangement prone to cancellation, successor risk, and social or protester risk.

PPPs at the sub-national level integrate all the fundamental policies and basic tenets affecting local governments. PPPs are pursued by provinces, cities and municipalities because they enjoy local autonomy and fiscal autonomy, promote the general welfare, respond to the needs of the communities, seek to become self-reliant, operationalize private sector participation, act as agents of and serve the interest of the people, and exercise corporate and proprietary powers.

The Author therefore hopes that this Course Book on PPPs by Local Government Units can contribute to the realization of the public good and integrated development and bring all stakeholders into the “PPP Learning Ecology.”



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I. Philippine Local Government Bureaucracy

A. Overview of Philippine Local Government Bureaucracy

12 Features of Local Governments	12 Principles of Local Autonomy
<ol style="list-style-type: none"> 1. Local government units (LGUs) are political and territorial subdivisions. Under a unitary set-up, LGUs are intra-sovereign subdivisions of one sovereign nation. 2. There are five levels/ types of LGUs: namely, autonomous regions, provinces, cities, municipalities and barangays. 3. LGUs are public corporations and administrative agencies. An LGU is classified as a municipal corporation proper. 4. Creation of a particular LGU is a legislative act. 5. As a rule, powers of LGUs are intramural in nature. 6. Under a unitary set-up, integration is indispensable. 7. LGUs exist in a dual capacity and their functions and powers two-fold: public and private. 8. LGUs are agents of the State and the Community. 9. LGUs are institutions accountable to their principals (i.e., State and community). 10. LGUs derive their powers from three sources, i.e., the Constitution, statutes and their charters. They also possess residual powers. 11. The doctrine of uniformity of powers, in terms of actual exercise of powers, is not applicable. 12. The doctrine of governmental separation of powers does not apply to LGUs under the 1987 Constitution. 	<ol style="list-style-type: none"> 1. All LGUs enjoy local autonomy. 2. Local autonomy means a more responsive and accountable local government structure instituted through a system of decentralization. 3. Local autonomy vests on LGUs limited self-governing powers. 4. Under a unitary set-up, local autonomy is either decentralization of administration (administrative autonomy) or decentralization of power (political autonomy). 5. Decentralization is delegation, devolution, deconcentration and democratization. 6. The grant of local autonomy is exclusive to LGUs. 7. LGUs are accountable to the National Government in terms of executive supervision and legislative control. 8. Local autonomy is characterized by its active and passive natures. 9. Local autonomy means that local concerns are better addressed by LGUs (Principle of Subsidiarity). 10. Fiscal autonomy is an essential and indispensable component of local autonomy. 11. Local autonomy must be reconciled with other constitutional mandates. 12. Laws and policies must be interpreted in favor of local autonomy.

B. 12 Features of Local Governments

The 12 features and characteristics of LGUs are:

1. LGUs are *political and territorial subdivisions*¹ Under a unitary form of government (as distinguished from a federal set-up), an LGU is an intra-sovereign subdivision of one sovereign nation. It merely forms part of a whole and is considered a political subdivision or unit of a State. An LGU cannot be an *imperium in imperio* (empire within an empire).² The 1987 Constitution does not prescribe federalism or allow the creation of states.³
2. There are *five levels/ types of LGUs*; namely, autonomous regions, provinces, cities, municipalities and barangays.⁴ The levels/ types are identified by the 1987 Constitution. The right of these sub-national units to exist is a constitutional and fundamental right. They cannot go out of existence except by constitutional amendment.
3. LGUs are *public corporations*. An LGU is a public corporation and as such, is classified as a Municipal Corporation Proper.⁵ A municipal corporation is defined to be a body politic and corporate constituted by the incorporation of the inhabitants for the purpose of local government thereof. An LGU exercises corporate powers, possesses a distinct legal personality and enjoys the right of corporate succession.⁶

LGUs are also classified as public offices, administrative agencies and agencies of Government distinguished from the National Government which refers to the entire machinery of the central government.⁷

4. *Creation of a particular LGU is a legislative act*. Congress has the sole authority to create a province, city and municipality.⁸ The President has no authority to create an LGU.⁹ A province or city may create a barangay.¹⁰ The 1987 Constitution identifies only two autonomous regions (i.e., Muslim Mindanao and Cordillera) that Congress can establish through the passage of an organic act.¹¹ However, at present, there is only one autonomous region (i.e., Autonomous Region of Muslim Mindanao) that has been incorporated. Incorporation takes place after a majority of the voters of the areas directly affected agrees to form part of the LGU.¹²
5. As a rule, powers of LGUs may be exercised only within a fixed territorial jurisdiction. Powers of LGUs are therefore *intramural* in nature.¹³ Within their respective boundaries, they have substantial control over their local affairs. LGUs are established for the government of a portion of the State.¹⁴
6. Under a unitary set-up, *integration is indispensable*. National development can only be achieved with the development of LGUs, and *vice-versa*. Like spokes of a

wheel, national integration/ centralism and local autonomy/ decentralization must fundamentally and operationally co-exist. As a rule, absent an express provision of law, conflicts involving national concerns (or issues/ concerns which transcend boundaries of LGUs) between national government agencies (NGAs) and government-owned and -controlled corporations (GOCCs) performing integrative functions on one hand and LGUs on the other, must be resolved in favor of the former.

The *National Dimension Rule* means that a national concern cannot be subjected to fragmented concepts of management policies where LGUs exercise exclusive dominion over specific portions/ areas.¹⁵ If the concern is peculiarly local, the conflict must be resolved in favor of the latter unless there is a law which provides a different rule. This is the *Local Dimension Rule* or *Subsidiarity*.

7. LGUs exist in a *dual capacity* and their functions and powers two-fold: public, governmental or political, and corporate, private or proprietary.¹⁶ Governmental powers, which spring from sovereignty, are those exercised in administering the powers of the State and promoting the public welfare and they include those that are legislative, quasi-judicial, public and political. Proprietary powers, arising from their existence as legal persons and not as public agencies, are those exercised for the special benefit and advantage of the community and include those which are ministerial, private and corporate.
8. LGUs are therefore *agents of the State and the Community*. They perform a dual agency role. A municipal corporation proper has a public character as regards the State at large insofar since it is the agent of government, and private insofar as it promotes local necessities and convenience for its own community being an agent thereof.¹⁷
9. LGUs are *institutions accountable to their principals*, i.e., State and community. LGUs are not immune from suit¹⁸ and may be held liable for death or injury to persons and damage to property in the performance of their governmental and proprietary powers.¹⁹ Local officials, elective and appointive, are public servants accountable to the LGUs and their constituents. Public office is a public trust.²⁰ They must faithfully discharge their functions and duties as provided by law.²¹
10. LGUs *derive their powers from three sources*, i.e., the 1987 Constitution, statutes and their respective charters.²² The 1987 Constitution grants them local autonomy. Laws and charters of specific LGUs determine the powers and responsibilities of LGUs within the framework of local autonomy. LGUs have no inherent powers; however, they possess residual and broad powers. They can exercise those powers expressly given to them and those powers that are not prohibited by law and conferred on other governmental entities, provided, the general welfare is promoted.

11. The doctrine of *uniformity of powers, in terms of actual exercise of powers, is not applicable to LGUs*. While the grant of powers to LGUs under a general statute is the same to all, the actual exercise as well as the extent of the exercise of such powers may differ from one LGU to the other depending on local needs and policies. LGUs possess discretionary powers and cannot be straightjacketed to perform a uniform set of tasks and functions and nothing else. Powers and features of LGUs may also differ from other LGUs as defined under their respective charters.
12. The doctrine of *governmental separation of powers does not apply to LGUs under the 1987 Constitution*. The 1987 Constitution does not define the structure of LGUs and relationships amongst their branches. However, by legislative fiat, powers may be exclusively delegated to or shared between branches of LGUs.²³ Under Republic Act No. 7160 or the Local Government Code of 1991 (1991 LGC), the union of legislative and executive powers has been disbanded, so that either department now comprises different and non-intermingling personalities. The purpose of separation of powers is to ensure better delivery of public service and to provide a system of check and balance between the two branches.²⁴

C. 12 Principles of Local Autonomy

The 12 principles of local autonomy are:

1. *All LGUs enjoy local autonomy*. The 1987 Constitution mandates and guarantees that all political and territorial subdivisions enjoy local autonomy.²⁵ However, the totality of powers of each level/ type of LGU may vary and is largely dependent on the allocation of powers made by Congress.
2. Local autonomy means a *more responsive and accountable local government structure* instituted through a system of *decentralization*.²⁶ Thus, local autonomy mandates that LGUs must effectively respond and address the needs of the community, directs LGUs to perform their legal duties and responsibilities, and instructs the National Government to transfer and share governmental powers with LGUs.
3. *Local autonomy vests on LGUs limited self-governing powers*. Local autonomy is not total self-government, i.e., the powers of LGUs are not absolute or without limit.²⁷ LGUs cannot exercise powers that are prohibited by law. LGUs have no inherent powers but they possess residual powers.

Under the liberal view of autonomy, LGUs can exercise: (1) those powers expressly given to them; (2) those powers implied from the express powers; (3) those powers not given to the National Government or any governmental agency or instrumentality by law; (4) those powers not prohibited or forbidden

by the 1987 Constitution and statutes; (5) provided the powers are necessary for the carrying out of the mandates and duties entrusted to LGUs with the end in view of promoting the general welfare in response to local concerns where LGUs act as agents of the communities.

4. Under a unitary set-up, local autonomy is either *decentralization of administration (administrative autonomy) or decentralization of power (political autonomy)*.²⁸ Provinces, cities, municipalities and barangays enjoy administrative autonomy while autonomous regions enjoy a higher level of autonomy, i.e., political autonomy.

There is decentralization of administration when the central government delegates administrative powers to political subdivisions in order to broaden the base of government power and in the process, to make LGUs more responsive and accountable and ensure their fullest development as self-reliant communities and make them more effective partners in the pursuit of national development and social progress. Principally, administrative autonomy pertains to the power and responsibility to deliver basic services. Decentralization of power on the other hand, involves an abdication of political power in favor of LGUs declared to be autonomous. In that case, the autonomous government is free to chart its own destiny and shape its future with minimum intervention from central authorities. Decentralization of power amounts to self-immolation, since in that event, the autonomous government becomes accountable not to the central authorities but to its constituency.

5. *Decentralization is delegation, devolution, deconcentration and democratization.* Delegation refers to those governmental and proprietary powers which emanates from the State and are conferred on LGUs by law. There are two levels of decentralization, i.e., administrative decentralization or deconcentration, and political decentralization or devolution.²⁹ Devolution refers to the act by which the national government confers power and authority upon the various LGUs to perform specific functions and responsibilities.³⁰ What is not devolved cannot be arrogated by LGUs and that national power remains with the NGA. Devolution is power-specific and is a mandatory process.

Deconcentration, on the other hand, is the transfer of requisite authority and powers to the appropriate regional or field offices whose major functions are not devolved to LGUs.³¹ Democratization is an essential feature of local autonomy. The degree of local autonomy is measured by the degree of democracy the people enjoy. In this regard, the Code provides mandatory venues by which private citizens and popular, sectoral, non-governmental, peoples and private organizations can participate in local governance and administration.

6. *The grant of local autonomy is exclusive to LGUs.* The 1987 Constitution guarantees the local autonomy of all LGUs. Congress defines the extent of decentralization, i.e., the power, functions, duties and responsibilities of LGUs and their officials.³² Once delegated, absent any statutory prohibition, the actual performance and exercise of such powers is subject only to the constitutional guarantee of local autonomy and the general supervision of the President of the Republic or by the appropriate supervising authority. There is no similar grant to other public corporations.
7. *LGUs are accountable to the national government in terms of executive supervision and legislative control.* The Executive Branch exercises general supervision over LGUs.³³ The President exercises direct supervision over the autonomous regions, provinces outside autonomous regions, highly-urbanized and independent cities. The President exercises general supervision over provinces within autonomous regions, component cities, municipalities and barangays. The fundamental law permits the Chief Executive to wield no more authority than that of checking whether an LGU or the officers thereof perform their duties.³⁴ Hence, the President cannot interfere with LGUs so long as the same or its officers act within the scope of their authority.

Supervisory power, when contrasted with control, is the power of mere oversight over an inferior body. It does not include any restraining authority over such body. NGAs cannot impose limitations when there is no law which restricts a local government authority. The same limitation characterizes the relationship amongst levels of LGUs. The higher LGU (supervising unit) exercises direct supervision over the lower LGU (supervised unit). The supervisor in reviewing actions, policies and ordinances must only rule on questions of law, not questions of fact or any question that would deal with the wisdom and discretion of the supervised unit.³⁵ The supervising unit may only declare an order, policy or measure as legal or illegal, not whether it is good or bad, proper or improper, moral or immoral. It includes the power to discipline an erring local official but excludes the power to substitute one's own judgment or compel the supervised unit to take a particular course of action.

Congress, on the other hand, retains control over LGUs, although to a significantly reduced degree under the 1987 Constitution.³⁶ Congress may prescribe the local government structure, share of LGUs in national taxes and national wealth, powers of LGUs, qualifications of local officials, systems of accountability, among others.³⁷ The power of Congress is only limited by the 1987 Constitution. LGUs cannot enact laws which are inconsistent with statutes. Ordinances are subordinate to national laws.³⁸

8. *Local autonomy is characterized by its active and passive natures.* The passive nature of local autonomy is the actual grant of powers to LGUs under a general

statute. There is uniformity of powers in this respect. The active nature of local autonomy is the actual exercise of those powers in adopting local policies and programs that are responsive to local needs. There is diversity of powers in this regard.

9. *Local autonomy means that local concerns are better addressed by LGUs.* LGUs are in a better position than the Central Government and public quasi-corporations to assess local problems and to prescribe the appropriate solution. This is the principle of Subsidiarity. Being in the frontline, they are given substantial control over their local affairs. The degree or extent of control can only be shaped by valid legislation.
10. *Fiscal autonomy is an essential and indispensable component of local autonomy.* Fiscal autonomy means that LGUs have the power to create their own sources of revenue as well as the power to allocate their resources in accordance with their own priorities. It extends to the preparation of their budgets, and local officials in turn have to work within the constraints thereof.³⁹ The power to tax, power to raise revenue, just share in national taxes and equitable share in the proceeds in the utilization and development of national wealth of LGUs are guaranteed under the 1987 Constitution. There can be no genuine local autonomy without fiscal autonomy and vice-versa.
11. *Local autonomy must be reconciled with other constitutional mandates.* It is not only the grant of local autonomy that both the National and LGUs must respect and recognize. Government in adopting policies and programs must take into account other constitutional mandates such as due process, environmental protection, respect for human rights and family, free and open party system, strict public accountabilities, among others.
12. *Laws and policies must be interpreted in favor of local autonomy.*⁴⁰ Where a law is capable of two interpretations, one in favor of centralized power and the other beneficial to local autonomy, the scales must be weighed in favor the latter. Any provision on a power of an LGU shall be liberally interpreted in its favor, and in case of doubt, any question thereon shall be resolved in favor of devolution of powers and of the lower LGU. Any fair and reasonable doubt as to the existence of the power shall be interpreted in favor of the LGU concerned. This rule also applies to the exercise of fiscal powers of LGUs.⁴¹

II. Legal Bases for LGU Public-Private Partnerships

A. Broad Mandates of LGUs on PPPs

10 LGU Mandates Relevant to PPPs	
1. Local Autonomy	6. Indispensable Role of Private Sector
2. Fiscal Autonomy	7. Autonomy over Proprietary Functions

10 LGU Mandates Relevant to PPPs	
3. Liberal View of Local Autonomy	8. LGUs as Public Corporations
4. Dual Agency	9. Local Legislation
5. General Welfare	10. Self-Reliance and Responsiveness

Anchored on 10 of the features and principles listed above, LGUs can enter into partnership and collaborative arrangements with the private sector for the implementation of projects that will benefit the local communities. This strategy and scheme is popularly referred to as Public-Private Partnerships (PPPs). The relevant features and principles are:

1. LGUs enjoy *local autonomy*. They have the freedom to adopt their own PPP frameworks, and determine the requirements and procedures for the selection of the private sector proponent (PSP), provided, no law is violated. They can undertake projects based on their priorities. They cannot be compelled to pursue PPPs and undertake a particular PPP project.
2. LGUs have *fiscal autonomy*. They have the discretion to source additional revenues using the PPP approach, and to create fiscal space for other projects and activities. They have the power to allocate these revenues based on their priorities. Revenues generated from PPPs can be used for general or specific purposes.
3. Under the *liberal view of local autonomy*, LGUs can, for as long as no law is violated, pursue PPPs for the general welfare even if there is no express enabling law.
4. LGUs as *agents of the community and people* must adequately provide for local necessities and promote the convenience for their respective communities. Addressing the needs of the community can be done through PPPs, among other financing and implementation options.
5. Pursuant to the *general welfare clause*,⁴² LGUs can undertake infrastructure, development and social service-related projects via the PPP route for the preservation and enrichment of culture, promotion of health and safety, enhancement of the right of the people to a balanced ecology, encouragement and support the development of appropriate and self-reliant scientific and technological capabilities, improvement of public morals, enhancement of economic prosperity and social justice, promotion of full employment among their residents, maintenance of peace and order, and preservation of the comfort and convenience of their inhabitants.
6. Being subdivisions of the State, LGUs must operationalize the constitutional policy which “recognizes the *indispensable role of the private sector*, encourages

private enterprise, and provides incentives to needed investments.”⁴³ PPPs operationalize this mandate.

7. LGUs have full autonomy in the exercise of their *proprietary or private functions*. Thus, local projects which are proprietary in nature can be implemented through PPPs.
8. LGUs are *public corporations*. Having their own juridical personalities, LGUs can enter into contracts with PSPs for local projects.
9. LGUs, in the exercise of their legislative power through their respective local legislative councils or *sanggunians*, can enact ordinances and issue resolutions for the adoption of their PPP frameworks and execution of PPP contracts.
10. LGUs in order to be more responsive to the needs of the people, being their agents, may enter into PPPs. PPPs would enable LGUs to attain their fullest development as *self-reliant communities* and make them more effective partners in the attainment of national goals.⁴⁴ PPPs would also lessen the dependence of LGUs from the national government. PPPs entered into by LGUs also affirm the policy that local officials have superior competence in dealing with local matters with which they can be expected to be more knowledgeable than the national officials.⁴⁵

“LGUs” here refer to all territorial and political subdivisions identified in the 1987 Constitution. These sub-national institutions are the autonomous regions (ARs), provinces, cities, municipalities and barangays. As public corporations (i.e., municipal corporation proper, administrative agencies and public offices), they have governmental and proprietary, and corporate powers. LGUs can pursue PPPs within their respective territories. ARs can thus implement AR-wide PPP projects, provinces province-wide, cities city-wide, municipalities municipal-wide, and barangays barangay-wide PPP projects. LGUs, under the 1987 Constitution and the 1991 LGC,⁴⁶ may also cooperate and collaborate among themselves and enter into inter-LGU PPP projects.

B. Specific Legal Authorities to Pursue PPPs

These are the specific legal authorities – the 1987 Constitution, statutes, case law, administrative opinions and rules – which empower or confirm the power of LGUs and Government Entities to enter into PPP arrangements and contracts with the PSPs:

1987 Constitution

1. LGUs can enter into PPPs in general. The 1987 Constitution provides that “[t]he State recognizes the *indispensable role of the private sector*, encourages private enterprise, and provides incentives to needed investments.”⁴⁷

Statutes

2. Under the 1991 LGC and its Implementing Rules and Regulations (1991 LGC IRR), LGUs can enter into *Joint Ventures (JVs)*. This landmark legislation and its rules state that:

- a) “[l]ocal government units may enter into joint ventures and such other cooperative arrangements with people's and non-governmental organizations (or the private sector) to engage in the delivery of certain basic services, capability-building and livelihood projects, and to develop local enterprises designed to improve productivity and income, diversity agriculture, spur rural industrialization, promote ecological balance, and enhance the economic and social well-being of the people”;⁴⁸
- b) “Local government units shall have the power and authority xxx to acquire, develop, lease, encumber, alienate, or otherwise dispose of real or personal property held by them in their proprietary capacity and to apply their resources and assets for productive, developmental, or welfare purposes, in the exercise or furtherance of their governmental or proprietary powers and functions and thereby ensure their development into self-reliant communities and active participants in the attainment of national goals”;⁴⁹
- c) “(a) Local government units shall endeavor to be self-reliant and shall continue exercising the powers and discharging the duties and functions currently vested upon them. They shall also discharge the functions and responsibilities of national agencies and offices devolved to them pursuant to this Code. Local government units shall likewise exercise such other powers and discharge such other functions and responsibilities as are necessary, appropriate, or incidental to efficient and effective provisions of the basic services and facilities enumerated herein xxx”;⁵⁰ and
- d) “(a) Every local government unit, as a corporation, shall have the following powers:
 - (1) To have continuous succession in its corporate name;
 - (2) To sue and be sued;
 - (3) To have and use a corporate seal;
 - (4) To acquire and convey real or personal property;
 - (5) To enter into contracts; and
 - (6) To exercise such other powers as are granted to corporations, subject to the limitations provided in this Code and other laws. xxx

(c) Unless otherwise provided in this Code, no contract may be entered into by the local chief executive in behalf of the local government unit without prior authorization by the sanggunian concerned. A legible copy of such contract shall be posted at a conspicuous place in the provincial capitol or the city, municipal or barangay hall.

(d) Local government units shall enjoy full autonomy in the exercise of their proprietary functions and in the limitations provided in this Code and other applicable laws.”⁵¹

3. LGUs can also use any of the variants under Republic Act (R.A.) No. 6957 as amended by R.A 7718, more popularly known as the *Build-Operate-Transfer* Law. Under said law,⁵² “[a]ll concerned government agencies, including government-owned and-controlled corporations and local government units, shall include in their development programs those priority projects that may be financed, constructed, operated and maintained by the private sector under the provisions of” the BOT Law.

Under the 2012 BOT Law Implementing Rules and Regulations (BOT Law IRR), “[f]or LGU projects, concerned LGUs may formulate additional guidelines/procedures not in conflict with this Act and these Implementing Rules and Regulations and pertinent provisions of R.A. No. 7160 (Local Government Code of 1991) and its IRR.”⁵³

4. LGUs can *procure or acquire*⁵⁴ consulting services (i.e., services for Infrastructure Projects and other types of projects or activities of the Government requiring adequate external technical and professional expertise that are beyond the capability and/or capacity of the government to undertake such as, but not limited to: (i) advisory and review services; (ii) pre-investment or feasibility studies; (iii) design; (iv) construction supervision; (v) management and related services; and (vi) other technical services or special studies)⁵⁵ and contract infrastructure projects (which includes the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, communication facilities, civil works components of information technology projects, irrigation, flood control and drainage, water supply, sanitation, sewerage and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings, hospital buildings and other related construction projects of the government).⁵⁶

Case Law/ Jurisprudence

1. *Privatization/ Franchise/ Police Power.* Cities, according to the Supreme Court,⁵⁷ can privatize the administration of parking for environmental and peace and

safety reasons, both of which are within its powers under Section 458(A)(5)(v) and (vi) of the LGC. By delegating governmental functions in terms of regulating the designation and use of parking spaces, as well as the collection of fees for such use, the privatization contract takes the essential character of a franchise because what is being privatized is a government-monopolized function.

2. *BOT Law Impetus.* One main impetus for the enactment of the BOT Law is the lack of government funds to construct the infrastructure and development projects necessary for economic growth and development. This is why private sector resources are being tapped in order to finance these projects. The BOT law allows the private sector to participate, and is in fact encouraged to do so by way of incentives, such as minimizing the unstable flow of returns, provided that the government would not have to unnecessarily expend scarcely available funds for the project itself.⁵⁸
3. *BOT Law Variants are Multi-Component.* Under the BOT Law, a person who offers to pay, or pays, on behalf of the government the amounts due to a project proponent does not thereafter obtain the status of project proponent. A project proponent is required to undertake the construction of the project, including financing. Financing is but a component of the construction of the structures and not the entirety thereof.⁵⁹

A BOT arrangement is *sui generis* and is different from the usual financing arrangements. Under this concept, it is the project proponent who constructs the project at its own cost and subsequently operates and manages it. The proponent secures the return on its investments from those using the project's facilities through appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated. At the end of the fixed term agreed upon, the project proponent transfers the ownership of the facility to the government agency.⁶⁰

4. *Unsolicited Proposal.* The rights or privileges of an original proponent of an unsolicited proposal for an infrastructure project are never meant to be absolute. Otherwise, the original proponent can hold the Government hostage and secure the award of the infrastructure project based solely on the fact that it was the first to submit a proposal. The absurdity of such a situation becomes even more apparent when considering that the proposal is unsolicited by the Government. The rights or privileges of an original proponent depends on compliance with the procedure and conditions explicitly provided by the statutes and their IRR. An unsolicited proposal is subject to evaluation, after which, the government agency or LGU concerned may accept or reject the proposal outright.⁶¹
5. *JV/ Consortium.* Joint venture as "an association of persons or companies jointly undertaking some commercial enterprise; generally, all contribute assets and share risks. It requires a community of interest in the performance of the subject

matter, a right to direct and govern the policy in connection therewith, and a duty, which may be altered by agreement to share both in profit and losses.⁶²

Administrative Issuances and Opinions

Summary of Administrative Affirmation of LGU PPPs	
<i>On PPPs</i>	<i>On JVs</i>
1. No PPP Statute	1. 1991 LGC is law on LGU JVs
2. LGU freedom to enact own PPP Code	2. LGU can set own JV rules, provided, no law is violated
3. LGUs may use Proposed PPP Code of Agra	3. LGUs may adopt Proposed PPP Code of Agra for JVs
4. PPP is not Procurement under GPRA	4. NEDA JV Guidelines excludes LGU JVs, but LGUs may use the Guidelines

PPP

1. LGUs may enact their *own PPP Code or omnibus ordinance* outlining, among others, all applicable modalities according to the Secretary of Justice.⁶³ Thus, LGUs, through legislation, can allow unsolicited proposals in the selection of a PSP. An LGU, through an enabling ordinance, is free to act to address local concerns, even without an enabling ordinance, provided no statute will be infringed.
2. There is no specific statute on PPPs as opined by the Department of Interior and Local Government (DILG).⁶⁴ An LGU PPP Code, being a duly enacted local legislation, must be complied with in undertaking PPP projects. Whenever applicable, the JV Guidelines issued by the National Economic and Development Authority (NEDA) and the BOT law and its IRR, may be referred to. PPP infrastructure or development projects are excluded from the application of the IRR of R.A. 9184 or the Government Procurement Reform Act (GPRA), save for the portions financed by the Government of the Philippines.

JVs

3. LGUs may enter into *JV contracts* “in accordance with their own JV rules, guidelines or procedures” according to Presidential Executive Order No. 78.⁶⁵
4. There are no legal impediments for a province to pursue development projects through *JV programs* with the private sector consonant with the 1991 LGC and its IRR according to the Executive Secretary.⁶⁶ The provincial legislative body may

provide the additional guidelines subject to the usual government accounting, auditing and procurement rules and regulations.

5. Local laws or ordinances being subordinate legislation must not be inconsistent with the 1987 Constitution, the 1991 LGC, and other statutes. Thus, LGUs are free to prescribe the requirements, procedures and conditions for *local joint ventures* provided no law is violated. At the moment, there is no law on Joint Ventures pertaining to LGUs according to the Department of Justice.⁶⁷
6. According to the DILG:⁶⁸
 - a) The power of LGUs to enter into JVs is provided under Section 35 of the 1991 LGC in relation to Sections 17, 22 (a) (5), (c) and (d) thereof. The LGUs' full autonomy exercise of their proprietary functions is underscored therein subject to certain limitations that are imposed by the Code itself or by other applicable laws. The Supreme Court En Banc in *Leopoldo T. Bacani, et al., vs. National Coconut Authority, Inc. et. al.*, (G.R. No. L-9657. 29 November 1956) defined proprietary/ministrant as those that are undertaken only by way of advancing the general interests society, and are merely optional. Hence, LGUs may enter into JV agreements/contracts in pursuit of their proprietary functions subject to the prior authorization of the sanggunian and the limitations imposed by applicable laws.
 - b) In the absence of a statute and explicit guidelines on LGU JVs with the private sector, LGUs may, at their option, enter into JV arrangements with the private sector using the guidelines issued by the NEDA although LGUs are excluded from the coverage thereof. They may likewise adopt the rules and procedures set forth in the "Proposed PPP Code for Local Governments: Annotated" by Certified PPP Specialist Atty. Alberto C. Agra (Agra) through the enactment of an ordinance.
 - c) As to LGUs with no existing PPP Ordinance, their discretionary adoption of the 2008 NEDA JV Guidelines, which excludes LGUs from its coverage, does not operate as an automatic acquiescence in the adoption of the 2013 NEDA JV Guidelines which also excludes LGUs from its coverage.
7. In another issuance,⁶⁹ the DILG said that there are no specific guidelines on JVs for LGUs. The 2013/ Revised Guidelines on JV issued by NEDA excludes LGUs from the coverage.
8. Per the Legal Service of the DILG,⁷⁰ an LGU is not precluded from entering into JV agreements (JVAs) with the private sector and using as guidelines issued by the NEDA. An LGU may likewise adopt the rules and procedures set forth in the "Proposed PPP Code for Local Governments: Annotated" by Agra.

The 1991 LGC does not define what a JV is and does not spell out the particular requirements and conditions, and procedures for choosing the private JV partner. To operationalize the 1991 LGC mandate on JVs, LGUs are free to adopt their own definition of a JV undertaking and prescribe the requirements, procedures and conditions for local JVs. A supplementary rule issued by the Oversight Committee of the 1991 LGC or the DILG can also supply the details. To date, there is no such overarching rule or guideline issued by the Oversight Committee or DILG. Assuming such a rule is subsequently adopted, its application is prospective. Further, such a rule cannot impose limitations when there are no limitations imposed by law.

C. Inclusive List of PPP Modalities

1. *Inclusive, Not Exclusive List.* Consistent with and in furtherance of local autonomy and fiscal autonomy which empowers LGUs to adopt alternative sources of revenues, the general welfare clause, full autonomy in the exercise of proprietary powers, and residual powers of LGUs, the list of PPP modalities that LGUs can undertake is not exclusive. For as long as no law is violated and the general welfare will be served, and competitive, transparent and accountable procedures will be adopted, LGUs may pursue “innovative” ways of partnering with the private sector.
2. *The 20++ Modalities.* The 20++ PPP modalities, each supported by a national law, local ordinances, regulation or administrative issuance, are:
 - 1) Build-and-Transfer (BT);
 - 2) Build-Lease-and-Transfer (BLT);
 - 3) Build-Operate-and-Transfer (BOT);
 - 4) Build-Own-and-Operate (BOO);
 - 5) Build-Transfer-and-Operate (BTO);
 - 6) Contract-Add-and-Operate (CAO);
 - 7) Develop-Operate-and-Transfer (DOT);
 - 8) Rehabilitate-Operate-and-Transfer (ROT);
 - 9) Rehabilitate-Own-and-Operate (ROO);
 - 10) Rehabilitate-Lease-and-Transfer (RLT);
 - 11) Rehabilitate-and-Transfer (RT);
 - 12) Rehabilitate-Transfer-and-Operate (RTO);
 - 13) Concession Arrangement;
 - 14) Joint Venture (JV);
 - 15) Lease or Affermage;
 - 16) Management Contract;
 - 17) Service Contract;
 - 18) Divestment or Disposition;
 - 19) Corporatization; and

20) Any other modality akin to any of the above or features thereof which falls under the alternative definition of a PPP.

All these will be discussed in detail below.

III. Concept and Definition of PPPs

PPP Definitional Realities	
1. No 1-Size-Fits-All PPP Definition	6. Necessity for LGU Framework
2. No Single PPP Philippine Law	7. LGU Ordinances presumed Valid
3. Different Governing Laws per Modality	8. 8 Framework Options for LGUs
4. BOT Law as a, not the only, PPP Law	9. PPP Center's Definition presumably lifted from BOT Law
5. Administration Dependent Popular Terminologies	10. Alternative/ Broad Definition of PPP by Agra

A. No Single PPP Law or Framework

1. *No One-Size-Fits-All Definition.* There is no universal definition of a PPP arrangement where all countries are bound to follow. Each country's definition of a PPP is determined by its own laws. There is therefore no one-size-fits-all definition of a PPP. Below are some definitions of PPPs in other countries:⁷¹

South African law defines a PPP as a contract between a public sector institution/municipality and a private party, in which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project. Two types of PPPs are specifically defined:

- 1) where the private party performs an institutional/municipal function; or
- 2) where the private party acquires the use of state/municipal property for its own commercial purposes. A PPP may also be a hybrid of these types.

In *Botswana*, PPP is defined as a contractual relationship between a public institution and a private entity where the private party performs a function (normally infrastructure provision) or uses Government property, in accordance with agreed output specifications for a significant period of time in return for a benefit.

The *Government of Mauritius* defines PPPs as an agreement between government and a private party in which the private party undertakes to perform a contracting authority's function for a specified period; the private party receives a benefit for performing the function by way of: (i) compensation from a

revenue fund, (ii) charges or fees collected by the private party from users or customers, or (iii) a combination of compensation and charges or fees; the private party is liable for the risks arising from the performance of its function; and state facilities, equipment or other state resources may be transferred or made available to the private party.

The *Institute for Public-Private Partnerships (IP3)* defines a PPP as:

1. A legally enforceable contract between a government or public sector entity and a private sector firm;
2. Transfers some meaningful risks onto the private partner, such as for financing, designing, constructing, operating, maintaining a project to deliver services;
3. The private partner receives its payments in accordance with its actual performance;
4. For the provision of some service that has traditionally been provided by the public sector.

According to the Public-Private Infrastructure Advisory Facility,⁷² PPP is “[a] long-term contract between a private party and a government agency, for providing a public asset or service, in which the private party bears significant risk and management responsibility.”

There are broader definitions of PPPs as compiled by IP3:⁷³

Citing the World Economic Forum, a PPP is a voluntary alliance/ agreement between actors from different sectors (Public, Private and Civil Society) whereby they agree to work together to reach a common goal or fulfill a specific need and share risks, responsibilities, means and competencies.

Citing the United Kingdom, PPPs bring public and private sector together in long-term partnership for mutual benefit.

2. *BOT Law as a, not the only, PPP Law.* Since the passage of BOT Law, PPP has been a centerpiece program of every Philippine administration. The BOT Law operationalized Section 20, Article II of the 1987 Constitution recognizing the indispensable role of the private sector in governance. Several projects were undertaken by NGAs, LGUs, and public corporations under said law. These projects still exist today since projects under the BOT Law are long-term in nature.

Because of its origin, popular acceptance and preponderant utilization, the BOT Law has been touted as *the* PPP Law by some. However, a survey of laws, policies and rules reveals that the Build-Operate-Transfer (BOT) scheme and eight other

specified variants under the BOT Law are only nine of the possible 18 PPP modalities. There are laws, guidelines and regulations on PPP modalities other than those spelled out in said law.

- a) Concession laws such as the National Water Crisis Act and the Electric Power Industry Reform Act of 2001 are PPPs which do not fall under the BOT Law.
 - b) For GOCCs, government instrumentalities with corporate powers (GICPs), government financial institutions (GFIs), state universities and colleges (SUCs), the 2013 JV Guidelines issued by the NEDA is the governing regulation. For some LGUs, they have their own PPP or JV ordinances.
 - c) For service and management contracts using public funds, the GPRA is the controlling legislation. For corporatization, the Corporation Code is the enabling law. The Civil Code covers donations and leases. Commission on Audit (COA) Circulars regulate the disposition and divestment of government assets.
 - d) All these are PPP modalities are outside the ambit of the BOT Law. All are, broadly, arrangements and contracts entered into between the public sector (i.e., implementing agency) and the PSP. These are PPPs, or forms of private sector participation or PSP, or loosely, “privatization” initiatives.
3. *Administration-Dependent Popular Terminologies.* PPP is the more popular terminology used by the second Aquino Administration. Under the previous Administration, private sector participation or PSP was predominantly used. Earlier on, privatization was the popular term.

The confusion in nomenclature and the breadth of PPP can be attributed to the fact that the country has no PPP Law. While the Philippines can boast of having one of the earliest BOT or Design-Build-Finance-Operate law in the world, the country, to date, still does not have a single law or comprehensive framework that encapsulates all possible PPP modalities.

B. Current PPP Administrative Definition

1. *PPP Center’s Definition.* A PPP, according to the PPP Center,⁷⁴ is defined as:

A contractual agreement between government and a private firm targeted towards financing, designing, implementing and operating infrastructure facilities and services that were traditionally provided by the public sector. It embodies optimal risk allocation between the parties – minimizing cost while realizing project developmental

objectives. Thus, the project is to be structured in such a way that the private sector gets a reasonable rate of return on its investment.

The foregoing definition of PPPs adopted by the PPP Center is presumably lifted from the BOT Law. If PPP is confined to the BOT Law, other modalities will be excluded such as JVs, service and management contracts, leases, and straight concessions. Further, projects will be limited to those traditionally provided by the public sector, tariff mechanism will be restricted to rate of return or RoR (and will therefore exclude cash needs, revenue cap, or price cap mechanisms), and pure public financing will not be allowed.

2. *Proposed Broad Definition.* The Authro suggests a broad definition of PPPs at the project level. This definition is stated in his template PPP Code.

PPP is a form of legally enforceable contract between the LGU and a PSP, requiring new investments from the PSP and transferring key risks to the PSP in which payments are made in exchange for performance, for the purpose of delivering a service provided or intended to be provided by the LGU. PPP shall also include dispositions of an asset, facility, project owned, or entity created by the LGU to a PSP; procurement of a service; assumption by a PSP of a proprietary function of the LGU; grant of a concession or franchise to a PSP by the LGU; or usage by the PSP of public property owned or possessed by the LGU.

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

C. LGU Framework Options

1. *Need for a Framework.* The relevance and importance of having a comprehensive PPP framework for an LGU cannot be overemphasized. Having a framework will ensure and facilitate consistency, stability, integrity, reliability, sustainability, accountability and transparency, and if embodied in a law (an ordinance in the case of a specific LGU), greater enforceability. Everyone must follow. Surely, the ordinance, being subordinate in nature, cannot be inconsistent with the 1987 Constitution and relevant statutes.
2. *Presumptions.* PPP ordinances or codes enjoy the presumptions of constitutionality and validity. To overthrow this presumption, there must be a clear and unequivocal breach of the 1987 Constitution, not merely a doubtful or argumentative contradiction. In short, the conflict with the 1987 Constitution

must be shown beyond reasonable doubt. When doubt exists, even if well-founded, there can be no finding of unconstitutionality. Much should be left thus to the discretion of municipal authorities. Courts will go slow in writing off an ordinance as unreasonable.⁷⁵

3. *Liberal Interpretation.* The provisions of the ordinance-framework must be liberally interpreted to accomplish the policy and objectives set forth therein. Any fair and reasonable doubt as to the existence of the power shall be interpreted in favor of the LGU concerned.⁷⁶ Further, in interpreting statutory provisions on municipal fiscal powers, such as pursuing PPPs, doubts will have to be resolved in favor of municipal corporations.⁷⁷
4. *Applicable Laws and Regulations.* The governing laws and regulations for every available PPP modality are:
 - a) In pursuing BOT Law variants, LGUs shall comply with the BOT Law and its IRR;
 - b) In entering into Management and Service Contracts using public funds, LGUs shall comply with the GPRA and its IRR; while, for Management and Service Contracts not using public funds, local laws will be followed;
 - c) For Dispositions, COA Circular No. 89-296 (January 27, 1989) and relevant issuances shall be the applicable regulations;
 - d) For Corporatization, the incorporation of the corporation must be done in accordance with the Corporation Code of the Philippines and the selection of the PSP shall be in accordance with the procedure under a relevant ordinance;
 - e) For JVs, appropriate ordinances of LGUs must be followed;
 - f) For Rehabilitate-and-Transfer (RT), Rehabilitate-Lease-and-Transfer (RLT), and Rehabilitate-Transfer-and-Operate (RTO), local ordinances must be complied with;
 - g) For Leases and Affermages, relevant ordinances of LGUs shall be followed subject to the Law on Leases of the Civil Code of Philippines; and
 - h) For Local Concessions, ordinances of LGUs shall govern.

Governing Laws on PPPs	
BOT and 8 Variants	BOT Law
JV	Local Ordinance
Local Concessions	Local Ordinance
Leases or Affermage	Civil Code; Local Ordinance

Governing Laws on PPPs	
Service Contracts using public funds	GPRA
Service Contracts not using public funds	Local Ordinance
Management Contracts using public funds	GPRA
Management Contracts not using public funds	Local Ordinance
RT, RLT and RTO	Local Ordinance
Corporatization	Corporation Code; Local Ordinance
Divestment/ Disposition	COA Circular No. 89-296

5. *Application of Ordinances.* In sum, considering the absence of a national law on the matter, JVs, leases and concessions shall be governed by local ordinances. The power of LGUs to provide the details and mechanics is broad since no law will be violated. This is consistent with local autonomy and fiscal autonomy.
6. *Framework Options.* In terms of adopting their own comprehensive PPP or JV frameworks, LGUs have eight (8) options, namely, adopting:
- a) Its own framework, provided the core requirements of government contracts (i.e., competition, accountability and transparency) are present;
 - b) The Proposed PPP Code developed by Agra;
 - c) The Proposed JV Ordinance drafted by Agra;
 - d) The Proposed PPP Code formulated by the PPP Center which basically adheres to the BOT Law;
 - e) The 2008 NEDA JV Guidelines for government-owned and -controlled corporations, etc.;
 - f) The 2013 NEDA JV Guidelines for government-owned and -controlled corporations, etc.;
 - g) The procedures and requirements under the BOT Law; or
 - h) The procedures and requirements specified under the GPRA.

8 Framework Options for LGUs	
1. Own PPP Code with CAT	5. 2008 NEDA JV Guidelines
2. Agra Proposed PPP Code	6. 2013 NEDA JV Guidelines
3. Agra Proposed JV Ordinance	7. BOT Law
4. PPP Center Proposed PPP Code	8. GPRA

7. In the absence of a statute and explicit guidelines on LGU JVs with the private sector, LGUs may, at their option, enter into JV arrangements with the private sector using the guidelines issued by the NEDA although LGUs are excluded from the coverage thereof. They may likewise adopt the rules and procedures set forth in the "Proposed PPP Code for Local Governments: Annotated" by Agra through the enactment of an ordinance. As to LGUs with no existing PPP Ordinance, their discretionary adoption of the 2008 NEDA JV Guidelines, which excludes LGUs from its coverage, does not operate as an automatic acquiescence in the adoption of the 2013 NEDA JV Guidelines which also excludes LGUs from its coverage.⁷⁸
8. To date, 37 LGUs have referred to the Proposed PPP Code and JV Ordinance developed by Agra:

Provinces

PPP Code	JV Ordinance
1. Cavite 2. Camarines Sur 3. Northern Samar 4. Pangasinan 5. Nueva Ecija 6. Bataan 7. Bohol 8. Agusan del Norte 9. Southern Leyte 10. Pampanga 11. Zambales 12. Tarlac 13. Davao del Norte 14. Quezon	1. Camarines Sur

Cities

PPP Code	JV Ordinance
1. Butuan 2. Olongapo 3. Batangas 4. Cauayan 5. Paranaque 6. Pasay 7. San Juan 8. Quezon 9. Imus 10. General Santos* 11. Passi	1. Manila 2. Valenzuela 3. Caloocan

PPP Code	JV Ordinance
12. Catbalogan 13. Navotas	

* - PPP Center's Version with aspects of Proposed PPP Code of Agra

Municipalities

PPP Code	JV Ordinance
1. General Tinio, Nueva Ecija 2. Cordova, Cebu 3. Cainta, Rizal 4. Tiwi, Albay	1. Opol, Misamis Oriental 2. Mendez, Cavite 3. Tuburan, Cebu

There are some LGUs which have adopted by reference the 2008 Guidelines on JV issued by the NEDA. These are the Provinces of Laguna and Cebu, the Cities of Cebu, Lapu-Lapu, Mandaue, Iloilo, Pasay, Tacloban and Calamba City, and the Municipality of Argao, Cebu.

D. 12 P's of PPPs

12 P's of PPPs		
1. Parties	5. Purpose – Public Good	9. Period
2. Pact (Agreement)	6. Parts	10. Proprietary Power
3. Partnership	7. Peril (Risk) Sharing	11. Payment Schemes
4. Project	8. Performance-Based	12. Procedures

PPPs can be described and explained using the 12 P's. These are:

1. *Parties*. The Parties to a PPP arrangement are the Public Sector or Public Entity (PE), and the PSP. The very name of this approach to development – “Public-Private” – spells out the parties to the arrangement. Government-to-Government (G-to-G) or Private-Private arrangements are not contemplated under the PPP scheme. These types of schemes, however, are also critical for development and may be pursued by the LGU. The discretion lies with the implementing LGU.

The PE can be an NGA, a GOCC, a GICP, a GFI, a SUC, and an LGU. They can enter into PPP projects pursuant to their respective mandates.

On the other hand, a PSP can be any individual, corporation, partnership, firm or organization declared qualified and eligible to undertake a particular PPP project, it must have the legal, technical (track record) and financial capabilities to implement the project.

2. *Pact*. A PPP arrangement is embodied in a legally enforceable contract. The parties to the contract, definition of the project, duration of the contract, the PPP modality, authorities, obligations, functions, responsibilities, representations and warranties of each party, the corresponding risks each party assumes, the supervision and governance of the project, performance targets, milestones, termination and step-in provisions, resolution mechanisms, among other provisions, are incorporated in the PPP contract.

A duly executed PPP contract cannot be impaired or unilaterally rescinded or cancelled by one party. In one case,⁷⁹ cited by the DILG⁸⁰ regarding the validity of the terms of a JVA entered into between an LGU and a PSP, the Supreme Court held that:

Where there is a perfected contract executed by the former Governor, the succeeding Governor cannot revoke or renounce the same without the consent of the other party. The contract has the force of law between the parties and they are expected to abide in good faith by their respective contractual commitments. Just as nobody can be forced to enter into a contract, in the same manner, once a contract is entered into, no party can renounce it unilaterally or without the consent of the other. It is a general principle of law that no one may be permitted to change his/her own acts or to proceed contrary thereto, to the prejudice of the other party.

However, even with the consent of both parties, revisions and amendments to a government contract with the private party must be sparingly made. Not every revision or amendment of the terms of the PPP Contract can be made by the Parties thereof. No material and substantive amendments that would add risks and burden to the government, and provide more benefits to the PSP can be made even by agreement of the parties.

In a decided case,⁸¹ the Supreme Court held that if material deviations are allowed post-signing and post-bidding, public bidding will cease to be competitive and worse, government would not be favored with the best bid. Bidders will no longer bid on the basis of the prescribed terms and conditions in the bid documents but will formulate their bid in anticipation of the execution of a future contract containing new and better terms and conditions that were not previously available at the time of the bidding. Such a public bidding will not inure to the public good. The resulting contracts cannot be given half a life but must be struck down as totally lawless. If there were changes and the contracts end up unfavorable to government, the public bidding becomes a mockery and the modified contracts must be struck down.

There are certain instances when contracts may give way to the greater good. In a recent case⁸² the “freedom to contract is not absolute” and “all contracts and all rights are subject to the police power of the State and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity.”

3. *Partnership*. The name of this development strategy – “Partnership” – denotes the relationship between the PE and the PSP. It is a collaborative arrangement between two consenting parties aimed towards the attainment of a desired goal or outcome. The PPP contract or pact defines the relationship between them, the project that will be implemented, and the resources they will invest.

One party cannot dominate or have control over the other save what is provided and agreed upon in the PPP contract. Resource exchange⁸³ is critical in a PPP but its effects are moderated by the PPP contract. The magnitude of the exchange between the parties and the criticality of the resource of each party are managed by the PPP contract. Further, under a PPP contract resource discretion and use are governed by the agreement between the parties. Possession, ownership, allocation and actual use of the resource are contractually defined.

One partner will not have control over more important resources and thereby exercise strategic control over the other. Conceptually, one partner will not accumulate key resources from the other that would make the venture less stable.⁸⁴

4. *Project*. A PPP contract identifies a project that is envisioned to address and respond to the needs of the local community. Under the principle of Subsidiarity, LGUs are in a better position to assess the needs of the people and prescribe the appropriate remedy or solution.

Under the BOT Law, the project is for the construction, financing, operations and maintenance of an infrastructure or development project which is normally financed and operated by the public sector. Under the 2013 NEDA JV Guidelines, the project must be for an investment activity which need not be traditionally provided by the public sector. Under the proposed PPP Code or JV ordinance of Agra, the contract may be for any infrastructure, development or social service-related project.

In the BOT Law and template of Agra, the list is not exclusive. LGUs can undertake PPP projects even for those not mentioned in the list. Under the list of enumeration of Agra, the project need not be normally or traditionally financed

by the public sector, a requirement for BOT Law variants. Thus, the list is more expansive for JVs, leases, service and management contracts, and concessions.

Developmental Projects per the definition in the Proposed PPP Code of Agra consist of those:

- a. normally financed and operated by the Province/ City/ Municipality, but which will now be wholly or partly financed, constructed and/ or operated by the PSP;
- b. that will advance and promote the general welfare and public good;
- c. that will be responsive to the needs of the communities;
- d. that will raise revenues for the Province/ City/ Municipality;
- e. projects in furtherance of devolution, deconcentration and decentralization; and other infrastructure, social-related and developmental projects as may be authorized by the Province/ City/ Municipality.

Below is the list of projects that LGUs can implement:

2012 BOT IRR	Proposed Code by Agra
Highways, including expressway, roads, bridges, interchanges, tunnels, and related facilities;	Energy and power Renewable energy Waste-to-energy
Railways or rail-based projects that may or may not be packaged with commercial development opportunities;	Roads Highways Bridges Causeways
Non-rail based mass transit facilities, navigable inland waterways and related facilities;	Waterways Ports Wharfs
Port infrastructures like piers, wharves, quays, storage, handling, ferry services and related facilities;	Terminals Airports Community airports
Airports, air navigation, and related facilities;	Canals Dams
Power generation, transmission, sub-transmission, distribution, and related facilities;	Desilting Dredging
Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities;	Mining and exploration Hydropower projects Water supply and distribution Sewerage

2012 BOT IRR	Proposed Code by Agra
<p>Information technology (IT) and data base infrastructure, including modernization of IT, geo-spatial resource mapping and cadastral survey for resource accounting and planning;</p> <p>Irrigation and related facilities;</p> <p>Water supply, sewerage, drainage, and related facilities;</p> <p>Education and health infrastructure;</p> <p>Land reclamation, dredging and other related development facilities;</p> <p>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;</p> <p>Government buildings, housing projects;</p> <p>Markets, slaughterhouses, and related facilities;</p> <p>Warehouses and post-harvest facilities;</p> <p>Public fish ports and fishponds, including storage and processing facilities;</p> <p>Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others; and</p> <p>Climate change mitigation and adaptation infrastructure projects and related facilities.</p>	<p>Irrigation</p> <p>Drainage</p> <p>Water conservation such as impoundment areas and rainwater harvesting</p> <p>Telecommunications</p> <p>Railroad and railways</p> <p>Short-haul transit services such as monorail, guided bus, bus services and trams, intermodal and multi-modal transit systems</p> <p>Transport systems</p> <p>Traffic control and management</p> <p>Parking facilities</p> <p>Reclamation projects</p> <p>Platform settlements</p> <p>Industrial estates or townships</p> <p>Central business and industrial park development</p> <p>Hotels and resorts</p> <p>Socialized housing</p> <p>Non-conventional low-cost housing</p> <p>Settlement/ resettlement and relocation facilities</p> <p>Residential subdivisions</p> <p>Parks and open space development/ redevelopment</p> <p>Pocket parks</p> <p>Public art</p> <p>Libraries</p> <p>Heritage conservation</p> <p>Government buildings</p> <p>Sustainable/ green public buildings</p> <p>Sports facilities</p> <p>Wellness establishments</p> <p>Tourism such eco-tourism, wellness tourism and agri/agro-tourism</p> <p>Public markets</p> <p>Commercial buildings</p> <p>Slaughterhouses</p> <p>Storage buildings, warehouses, and cold storage</p> <p>Solid waste management and sanitary landfills</p> <p>Meeting and convention centers</p>

2012 BOT IRR	Proposed Code by Agra
	Information technology networks and database infrastructure Education-related and classrooms Health facilities and hospitals Social services-related Prisons Agriculture-related Post-harvest facilities Environmental management and protection Climate change adaption Disaster risk reduction

The projects must in the local development plan of the LGU. Considerations for PPP prioritization are potential economic impact, market timing, urgency of need for asset or service, development cost and funding availability and political support. It must also be determined if the Project is:

- a) Effective in meeting the LGU objectives;
- b) Technically feasible;
- c) Legally acceptable;
- d) Environmentally compliant;
- e) Socially sustainable; and
- f) Economically viable.⁸⁵

Check if Present	Checklist: Viable PPP Project
[]	Consistency with LGU Plans
[]	Technically Feasible
[]	Legally Acceptable
[]	Environmentally Compliant
[]	Socially Sustainable
[]	Economically Viable

The LGU must also determine if the project will be:

- a) for a single component or activity (e.g., public 1-storey market);
- b) bundled with other components or the “plus-plus,” multi-use or integrated mode (e.g., 5-storey building with public market, bus terminal, parking spaces, commercial spaces and academic institution); or

- c) unbundled from other activities (e.g. service contract for the pharmaceutical unit of a provincial hospital).

PPP Projects may be further classified into two (2):

- a) *Infrastructure or Development Projects (Hard)*. Roads, Bridges, Water, Power, Ports, Solid Waste, Reclamation, Land Development, Sports Complex, Markets, Slaughterhouses, Transport Systems, Mining, Tourism, Government Buildings, Parks, Information Technology, among others, and
- b) *Social Assets and Social Service-Related Projects (Soft)*. Education (classrooms), Health (hospitals and clinics), Agriculture, Accommodation (Socialized Housing), Rehabilitation, Reconstruction, Prisons, among others.

Types of PPP Projects	
<i>Infrastructure or Development Projects</i>	<i>Social Assets and Social Service-Related Projects</i>
Roads, Bridges, Water, Power, Ports, Solid Waste, Reclamation, Land Development, Sports Complex, Markets, Slaughterhouses, Transport Systems, Mining, Tourism, Government Buildings, Parks, Information Technology	Education (classrooms), Health (hospitals and clinics), Agriculture, Accommodation (Socialized Housing), Rehabilitation, Reconstruction, Prisons

- 5. *Purpose – Public Good*. While the object of a PPP contract is the implementation of a specific project, the ultimate purpose of a PPP project or the outcome of a PPP strategy is the public good and the general welfare. PPPs must promote the public good and must serve the public interest. Public good, as the end goal and as a value, is not solely pursued by or is in the exclusive domain of public servants who deliver public service. Public good is a collective responsibility shared with PSPs and civil society in general.

Focusing on public good for PPPs translates into the realization of the avowed objective of providing more, better, affordable and timely services. All PPP projects should translate into immediately realizable public service, and must necessarily be responsive to the public and where local officials and their PSP counterpart are responsible for.

PPP laws, regulations, policies, and projects must also adhere to the principle of sustainable and integrative development, and ensure that the needs of the present generation are met without compromising the ability of future generations to meet their own needs. PPP proponents from the public and private sectors must act as stewards and be responsible for and accountable to

the environment. Integrated development shall ensure that all communities develop, and that national development will co-exist with the development of local governments, and vice-versa.

Under the general welfare clause (2nd clause; police power proper) enshrined in the 1991 LGC,⁸⁶ LGUs can undertake infrastructure, development and social service-related projects via the PPP route for the preservation and enrichment of culture, promotion of health and safety, enhancement of the right of the people to a balanced ecology, encouragement and support the development of appropriate and self-reliant scientific and technological capabilities, improvement of public morals, enhancement of economic prosperity and social justice, promotion of full employment among their residents, maintenance of peace and order, and preservation of the comfort and convenience of their inhabitants.

6. *Parts.* A PPP project has several parts corresponding to the functions and responsibilities of the parties to a PPP arrangement. The parts or components are: design, construction, finance, operations and maintenance, lease, and governance. A PPP contract must also provide for the ownership of the facility or asset (whether government or private at the start or at the expiry of the PPP contract, in perpetuity or temporary or time-bound). The PPP contract and terms of reference of the competitive process may provide for disposition or divestment to the PSP or to the public.

Under the BOT Law,⁸⁷ construction refers to new construction, rehabilitation, improvement, expansion, alteration and related works and activities including the necessary supply of equipment, materials, labor and services and related items.

7. *Peril or Risk-Sharing.* Aside from sharing in the resources, the parties to a PPP arrangement share in the risks. Either the PE retains the risk (risk retention), transfers the risk to the PSP (risk transfer) or shares the risk with the PSP (risk-sharing). Ordinarily, the party who assumes the part or function bears the corresponding risk. For example, the party who constructs the facility will bear the construction risk.

Without the PSP as partner to a project, all risks will be borne by the PE. Transferring all or most of the risk to the PSP will have an effect on the cost of the project and the tariff the end-users will pay for using the facility or availing of the service. Thus, the more government contributes to a project and the more government shares in the cost, the resultant end-user fee will be lower. The rule is, the more functions are performed by the PSP, the more risks the PSP will bear, which will result in higher costs for the PSP which in turn will result in higher

tariffs and rewards for the PSP. Surely, a proper risk allocation for PPP projects is imperative.

8. *Performance-Based*. PPP contracts are performance-based agreements. Key performance indicators (KPIs) are incorporated in agreements. Each party must perform its contractually assigned function based on a given timeline or period. Therefore, the award of the PPP contract to a PSP is not the be-all of a PPP transaction. The delivery of the service or the use of the facility for the full duration of the contract based on a timeline is the object of the PPP project. Construction milestones (e.g., construction of phase 1 of bulk water project on the 2nd year) or delivery milestones (e.g., reduction of non-revenue water by 10% on the 2nd year) must be incorporated in the PPP contract.
9. *Period*. Depending on the PPP modality, the project or contract life will either be short, medium or long-term. Service or management contracts are short-term contracts which may span two to three years. Lease contracts can be medium term arrangements lasting for seven to 15 years. BOT Law variants and JVs may extend to a period of 50 years. All the terms and provisions of the contract as a rule, are operative up to contract termination. Contract extensions or renewals are permitted provided, these are part of the terms of competitive process and that the PPP contract allow the same.
10. *Proprietary Power*. When a PE enters into a contract with a PSP for a PPP project, like a public market, transport system, water supply facility, it does so in its proprietary or private capacity. It must be remembered that the character of LGUs is two-fold, i.e., governmental or public, and proprietary or private.⁸⁸ This is the dual capacity of LGUs.

Governmental powers are those exercised in administering the powers of the state and promoting the public welfare and they include the legislative, judicial, public and political. Examples are: delivery of sand for a municipal road,⁸⁹ local legislation, control over police and abatement of nuisance. Proprietary powers, on the other hand, are exercised for the special benefit and advantage of the community and include those which are ministerial, private and corporate. In the implementation of a PPP project or as part of the contributions of the LGU, the LGU may exercise police power, issue franchises, permits or concessions, expropriate private property, grant tax amnesties, and/ or reclassify agricultural land.

11. *Payment Schemes*. The revenues that will pay for the operating and capital expenditures, taxes, amortization costs and interests and profit can be sourced from either government through the national or local budgets (which ultimately, the taxpayers shoulder) or the end-users or consumers of the PPP facility or asset.

There are six (6) basic forms of payments for PPPs applicable to PPP modalities. These are:⁹⁰

6 Forms of Payment	
Payment Schemes	PPP Modalities
User, Usage and Availability Payments	BOT Law variants, JV, Concessions or Rehabilitation Variants
Service Performance Payments	Service or Management Contracts
Purchase Price Payments	Procurement, Divestment, Corporatization with Divestment, BOO, ROO, or JV with Divestment
Rental Payments	Lease or Affermage

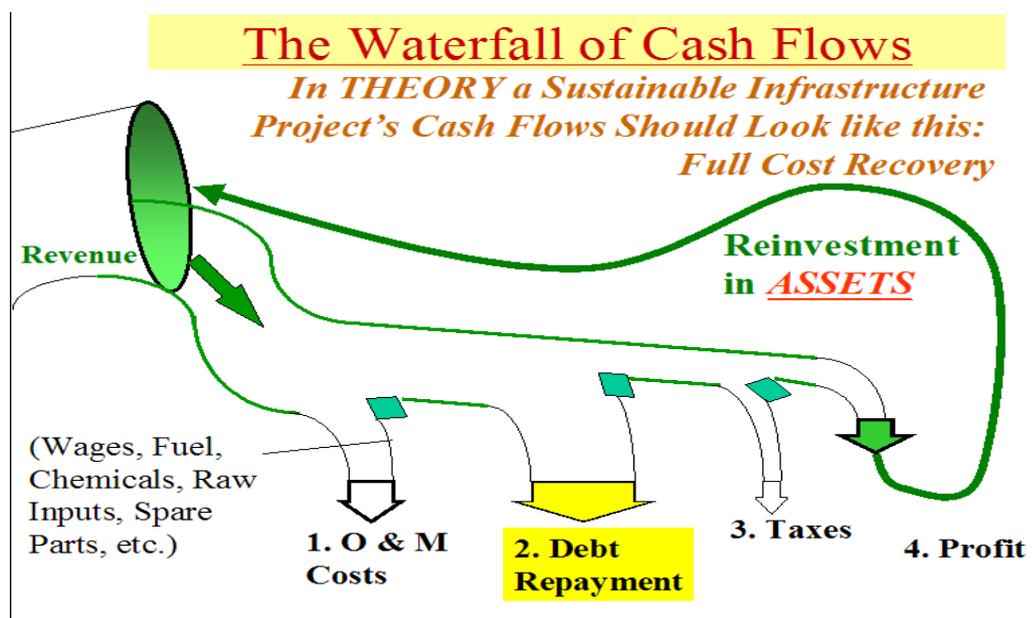
- a) *User charges*. Payments made by the end users of the service provided. Payments can vary based on the category of the user and the timing of the usage. The applicability of these charges depends on government policy, availability of alternatives, elasticity of demand, practicality of applying, ability to forecast demand and the legality of introducing such charges. An example is the toll road project referred to above, where drivers pay the user charges as toll.
- b) *Usage payments*. These are charges paid by the government based on actual volumes used of the contracted service. Typically, usage is banded by volume, and penalties or reductions are made for unsatisfactory levels of performance.
- c) *Availability payments*. These payments are paid by government based on the available capacity provided by the project. Payments may vary based on timing. This is also referred to as take-or-pay schemes.
- d) *Service performance payments*. These payments are based on the ability to meet specified performance standards. Key is the ability to accurately measure and monitor discrete, individual performance levels.

In addition:

- e) *Purchase Price payments*. These payments are anchored on market value of property, goods, infrastructure or services when there is transfer of ownership from the private sector or LGU.
- f) *Rental Payments*. This form of payment is appropriate when a property is leased is allowed to be used by another party.

The PSP shall be entitled to reasonable returns on investments in a BOT Law arrangement. In a JV arrangement, the PSP shall be entitled to a proportionate share of its investments and contributions which can be half or more than 50% of the outstanding capital stock of the JV Company or overall share.

PSP recovers the expenditures for the operations and maintenance, debt payment, interests and amortization costs and taxes, and makes reasonable profits. This is the “waterfall of cash flows.” For a PPP project to be bankable and sustainable, PPP projects must pay for operations and maintenance costs, repay interest and principal to private commercial lenders, answer for taxes as well as produce acceptable dividends to owners. The illustration below prepared by the IP3 shows the “waterfall”:



Private sector financing can come from either private investors in the form of equity or from banks in the form of commercial debt.

Project financing or limited recourse project financing is applied to specific new projects as opposed to just individual assets used in an existing business activity (asset-based lending) or the total operations of a corporation providing many different products and services (corporate lending). Lenders in project financing rely almost completely on the future cash flow that the project generates to service the project's own debts obligations. The underlying assets of the project provide only limited collateral support because the assets are usually single-purpose and immobile, and have no alternative use other than the original use.

The right to use these assets provides the only for PSPs to receive a revenue stream to recover the costs of developing, constructing and operating the

project. Lenders pay particular attention to the amount of free flow cash (revenues minus operating costs) that is available to pay debt service obligations (debt service coverage ratio = EBITDA [earnings before interest, taxes, depreciation and amortization] divided by debt service).⁹¹

12. *Procedures*. There are three core and legal requirements for government contracts with the private sector, i.e. competition, accountability and transparency (CAT). Thus, no PPP arrangement, as a rule, can be entered into through straight negotiations without CAT. Competition must be legitimate, fair and honest. The selection of the PSP or co-venturer must be done in compliance with CAT.

The three principles in public bidding are: the offer to the public; an opportunity for competition; and a basis for exact comparison of bids.⁹² However, bidding rules may specify other conditions or require that the bidding process be subjected to certain reservations or qualifications. Since a bid is in the nature of an offer to contract with the Government, the government agency involved may or may not accept it.⁹³

A restrictive and conservative application of the rules and procedures of public bidding is necessary not only to protect the impartiality and regularity of the proceedings but also to ensure the financial and technical reliability of the project. The basic rule in public bidding is that bids should be evaluated based on the required documents submitted before and not after the opening of bids. Otherwise, the foundation of a fair and competitive public bidding would be defeated. Strict observance of the rules, regulations, and guidelines of the bidding process is the only safeguard to a fair, honest and competitive public bidding.⁹⁴

The BOT Law, the 2008 and 2013 NEDA JV Guidelines, the PPP Code of the PPP Center and template PPP Code and JV ordinance of Agra all have CAT. Under the Agra template, the four (4) procedures, patterned after the BOT Law and 2008 NEDA JV Guidelines, are defined as follows:

- a) *Competitive Selection or Bidding or Open Competition* - A method of selection or procurement initiated and solicited by the LGU, based on a transparent criteria, which is open to participation by any interested party.
- b) *Competitive Challenge or Swiss Challenge* - An alternative selection process wherein third parties or challengers shall be invited to submit comparative proposals to an unsolicited proposal. Accordingly, the PSP that submitted the unsolicited proposal, or the original proponent, is accorded the right to match any superior offers given by a comparative PSP/ challenger.

- c) *Limited Negotiations* - A process whereby the LGU negotiates with the PSP in instances when there is only one eligible and qualified PSP in a competitive selection process, under Stage 2 of the competitive challenge process, or when there is a prior completed competitive process.
- d) *Competitive Negotiations* - A process where the LGU negotiates with eligible and qualified PSPs and awards the project to that PSP which offers the best combination of quality and price.

PSPs have a vested right over the procedure. Government entities are precluded from stopping the process already commenced. The Supreme Court⁹⁵ ruled that government entities cannot abort an unsolicited proposal/ challenge process commenced under existing regulations. Rules must therefore be followed. “Allowing government agencies to retract their commitments to the project proponents will essentially render inutile the incentives offered to and have accrued in favor the private sector entity.” Further, City officials have to obey the Ordinance. Failure to do would subject the officials to disciplinary action for dereliction of duty and abuse of authority, among other offenses.

E. PPP Value Drivers and Benefits

7 Project Implementation and Funding Options	
1. Own LGU Funds	5. Loans and Grants
2. NGA Funding or Support	6. PPPs
3. Procurement under GPRA	7. Some or All of the Above
4. Project by Administration	

1. *PPP not a Panacea*. It must be underscored that PPP is not a panacea. PPP is not the only solution to respond to all the concerns and problems confronting LGUs. While PPP is not the only solution, PPPs must be part of an overall strategy towards reform and change. LGUs have options other than collaborating with the private sector for its projects. LGUs can:
 - a) Use their own funds like its regular and special funds, internal revenue allotment, development fund, special education fund, share in the utilization and development of the national wealth, calamity fund, among other funds to finance its projects;
 - b) Obtain national government support or funding;
 - c) Procure consulting services and infrastructure from the PSP under the GPRA;
 - d) Implement projects on its own or by administration;

- e) Contract a loan from GFIs and secure grants from donor agencies to fund its local projects; and
- f) Combine any or all of the foregoing together with or independent of PPPs.

All these options are grounded on law. The choice rests with the LGU. This is a matter of wisdom outside the control of Government. This is anchored on local autonomy and fiscal autonomy. The LGU may choose from any of the funding and implementation options mentioned above. It may select the appropriate PPP modality if the PPP route is chosen.

- 2. *Overall Impact.* PPP, as a local development strategy, promotes the general welfare, operationalizes the constitutional mandate of encouraging private sector participation, strengthens decentralization, encourages democratization, enhances self-reliance, builds sustainability and capability, realizes local autonomy and fiscal autonomy, creates additional sources of revenues, lessens dependence on external support and the Internal Revenue Allotment, among other impacts.
- 3. *Benefits and Value Drivers.* The value drivers, benefits and rationale of PPPs are:⁹⁶

PPP Benefits and Value Drivers	
6 Value Drivers	6 Benefits
1. PPP as Reform Strategy	1. Creating Fiscal Space
2. Acceleration of Delivery of Public Service (Additionality)	2. Incentives
3. Scarcity of Funds	3. Quality of Service
4. Better Value-for-Money	4. Public Good and General Welfare
5. Better Risk-Allocation	5. Additional Revenues
6. Efficiencies and Innovation	6. Strengthened Accountabilities
	7. Enhanced Public Management

- a) PPP is part of a reform strategy of government;
- b) Public good and general welfare;
- c) Acceleration of infrastructure provision through mobilization of private sector capital. More public services can be provided when using PPPs than without using PPPs (Additionality);
- d) Faster implementation, because government doesn't have to wait until later when it could finance and implement the given project;

- e) Reduced whole-life costs, because of PSP efficiencies and innovation;
 - f) Better allocation of risk, because the PSP has experience and incentives in handling commercial risks well, while government typically does not;
 - g) Better incentives to perform, because a failure to perform means that payment is not issued;
 - h) Improved quality of service, again because quality of service is a measurable KPI upon which payments are based;
 - i) Generation of additional revenues as the result of the technical expertise and commercial incentives possessed by the private sector and the efficiencies that result;
 - j) Strengthened accountability, due to explicit, written contractual provisions that link the private operator's remuneration with performance; and
 - k) Enhanced public management, because government now has the time to plan sector development and reach development goals, rather than be distracted by daily emergencies and operational and service provision requirements.
4. *Problems with Public Provision.* PPPs are recognized solutions to low coverage low quality, low reliability, insufficient funds, poor planning and project selection, inefficient management and inadequate maintenance.⁹⁷

A PPP is a form of innovation from traditional procurement. In procurement, the private sector provides basic supplies, equipment, construction services and consulting services. In PPPs, there is increased scope of private sector participation in the provision of financing and operation services, innovative solutions to public sector problems and ownership of assets.⁹⁸

One of the main differences between traditional procurement and PPP is that the requirements to be met by the PSP in procurement are stipulated as output specifications (e.g. 2 240 volts per wall), while in PPPs, the requirements are set forth as inputs (e.g. adequate power supply to meet operational requirements).⁹⁹

PPP and public provision may be contrasted as follows:

Aspects	PPP	Public Provision
<i>Funding</i>	Mobilization of Private Capital; Utilization of previously untapped resources from the local, regional, or international	General appropriations from taxes, regulatory fees, tariffs, customs, official development assistance, and exactions

Aspects	PPP	Public Provision
	private sector seeking investment opportunities	
<i>Spending</i>	Expenditures are made pursuant to contractual obligations; Regulatory agencies ensure prudent and efficient spending; Payments made on actual performance	Infrastructure services are often provided at an operating deficit; Deficit-spending
<i>Expertise</i>	PPP allows introduction and transfer of new technologies, management techniques	Set of skills and technologies may be inadequate or outmoded
<i>Specifications</i>	Output-based; The “ends” will allow for innovation and lower whole-life project costs; Makes PPP contract robust; Focused on service outcomes and strategic needs; Allows new ideas for design, construction and operation; Optimizes whole-life value for money benefits	Input-based; Detailed specifications on design, construction and operation; Focused on means rather than strategic needs; Requirement for procurement
<i>Risk-Transfer</i>	Better allocation of risks; Risks (typically commercial, investments, and financial) are transferred to or shared with the Private Sector on the premise that whoever assumes the risk can best control, manage and mitigate them	All commercial, funding, design, investments-related are risks borne by the Public Sector
<i>Greater Efficiency</i>	If the PPP is structured to let the private sector pursue the goal of making profits (subject to appropriate return on investment), the efficiency of the infrastructure services will likely be enhanced; Better incentives to perform, because a failure to perform means that payment is not issued; Improved quality of service, again because quality of service is a measurable key performance indicators upon which payments are based.	Difficulty in efficient use of scarce public resources; Public sector typically has few or no incentives for efficiency structured into its organization and processes
<i>Value for</i>	Better “value for money” (over	Government has scarce

Aspects	PPP	Public Provision
<i>Money</i>	the whole-life of the PPP project, government's total expenditures adjusted for the risks that have been transferred to the private sector, will be less, on a Net Present Value basis, than if the government had performed the services itself; Government can use its scarce resources for social services and other priority projects.)	resources to spend on all infrastructure and development projects
<i>Project Completion</i>	Accelerated infrastructure provision and faster implementation of projects; There is data showing that under a PPP arrangement, there is improved project delivery in terms of meeting target expenditures and completion dates	Cost overruns and delay; Actual costs exceed contract price necessitating variations and projects delivered late to the private sector

5. *Criticisms Against PPP.* PPPs all over the globe have been criticized. The common criticisms and the responses to these are shown below:

Arguments Against PPP	Counter-Arguments in Favor of PPP
Government abdicates its responsibilities to the private sector which makes the former beholden to the latter.	There is no abdication. Government sets policies, regulates and ensures compliance with standards and obligations. The private sector simply undertakes the PPP project on behalf of government. The private sector "rows" while the government "steers." In most PPP modes, the asset remains with the public sector. Government continues to exercise acts of ownership.
PPPs will result in higher prices/ tariffs and will thus unduly burden the people/ consumers.	The primary and bottomline objective of any PPP undertaking is improved services to the people by providing economic and social benefits and empowering Filipinos and local

Arguments Against PPP	Counter-Arguments in Favor of PPP
	<p>investors.</p> <p>The PPP must provide more/ better services at affordable prices taking into account value for money. Optimal value for money must be achieved through the proper allocation of risks and adoption of risk-mitigation measures. Lower prices/ tariffs may be ensured if the PPP contract is long(er), interest rates are low(er), government provides moderate support and assumes certain risks, and subsidies are extended.</p> <p>If the PPP project is not bankable, affordable and feasible, then PPP should not have been adopted. PPP should only pursued if the project is apt for PPP because it is bankable, affordable and feasible.</p>
<p>Private profit at the expense of the public.</p>	<p>The private sector in a PPP arrangement should not be allowed earn unconscionable or limitless profits. The rate of return or other rate measurements are pre-determined in the PPP contract or fixed by law. In the Request for Proposals or bid documents, the government sector may impose caps or ceilings on the project rate or return. The private sector must be able to recover its investment applying a prescribed or regulated return on its investments. In exchange for this, the private sector must meet performance standards and must comply with regulatory policies and standards.</p> <p>The public, whether the project is undertaken via PPP or public provisions, “pays” for the project either through tariffs or taxes. Under a PPP, the public, being the beneficiary of any</p>

Arguments Against PPP	Counter-Arguments in Favor of PPP
	<p>PPP, will enjoy the PPP service now rather than later (“additionality”)</p> <p>Even in a procurement/ input-based arrangement, the private sector also makes profits. In instances when government lacks the resources, and this is the principal driver for PPP, the premise of the opposition to PPPs becomes false.</p> <p>Public interest is protected if the selection of the Private Sector Partner is done in a competitive manner.</p>
<p>PPP is a complex contract and arrangement only understood by lawyers and government officials.</p>	<p>Complexity is not an evil. Long-term contracts with various components are not simple arrangements. While PPP has several components, each component has a purpose and can be explained in simple/ non-legalese terms.</p> <p>In strategic communications where stakeholders must be consulted, these components can be explained using contemporary or popular tools and media. At the end, what should be explained would be the features of the PPP mode, the risk allocation and mitigation, the pricing/ rate-setting scheme, the performance standards, the obligations of each parties, the regulatory regime. Charts, matrices and video presentations can be utilized.</p> <p>The private sector cannot sacrifice safety for profit because the contract must be drafted to list all performance standards. The regulatory authority in turn must ensure compliance with these.</p>
<p>PPP is a long-term commitment and the public sector cannot renegotiate. The Private Sector can do whatever it</p>	<p>Project-Finance Initiatives are typically long-term arrangements since the private sector which incurs debt to</p>

Arguments Against PPP	Counter-Arguments in Favor of PPP
pleases.	<p>finance its project must be able to repay the loan. During the life of the PPP contract, the responsibilities, obligations and functions of each party are defined and any material breach thereof could result in rescission, cancellation or re-negotiations.</p> <p>Long-term contracts are often referred to as incomplete contracts since not all events and circumstances can be foreseen.</p> <p>Regulation at the LGU level is a function not shared with the Private Sector. This power cannot be privatized since this is a governmental or public power. Only the project, not the regulation thereof, can be the subject of a PPP.</p>

6. *Project Study.* Choosing the PPP route must be justified and carefully studied. The choice must be weighed with other options. The bases for the choice must be embodied in the feasibility study (FS), pre-feasibility study (pre-FS) or business case, or a project study defined under the Agra templates. A Project Study, under the Proposed Code of Agra, is defined as:

A study prepared by the LGU in a competitive selection or a PSP when submitting an unsolicited proposal, which indicates the following: needs analysis, affordability assessment, value for money assessment, preliminary risk assessment, stakeholder assessment, human resource assessment, bankability assessment, legal viability assessment, market testing if relevant, indicative transaction implementation plan, and draft PPP contract.

Under the 2013 NEDA JV Guidelines, the GOCC, etc. or the PSP in an unsolicited proposal can either prepare or submit an FS, pre-FS or project study.

7. *Public Sector Comparator.* The LGU when comparing with other options may use a Public Sector Comparator (PSC). A PSC model estimates the cost of undertaking the same tasks envisioned for the PPP (on the basis of the outputs specified) using a traditional public sector procurement, in terms of the net present value (NPV) of the project and on a risk-adjusted basis. The results of the PSC will help

government determine whether a particular project should be undertaken as a PPP or should remain an entirely public responsibility.¹⁰⁰

8. *Value-for-Money*. PPPs are also chosen if it is a more attractive and viable option and if it creates better value-for-money (VfM). VfM looks at the risk-adjusted long-term costs of adopting the PPP option versus the costs of using traditional procurement (i.e., PSC), taking into account the higher costs of private capital and the associated transaction costs, but adjusting for the value of the risk transfer between the public and private sectors.¹⁰¹

So if PPP would be a least expensive option than public provision based on the VfM and PSC analyses, the LGU would be justified to choose the PPP route. If public provision would be less costly, then this should be the choice. However, even if projected costs may be initially higher for a PPP, this may be balanced out by significant advantages of PPPs – public funds are stretched further (i.e. creating fiscal space), projects are implemented faster, risks and liabilities are reduced for LGUs, more services can be provided (doing more with limited funds), better services can be provided, and accountability is enhanced.¹⁰² If on paper public provision would be a “cheaper” option, the PPP route is also chosen if the PE has no money to spend for the project.

F. Project Study

1. *Necessity*. Choosing the PPP option is a purposive exercise and not a knee-jerk reaction or faddishly undertaken. Whether the process is solicited or unsolicited, there must be a project study.
2. *Contents*. The IP3 enumerates the parts/ contents of a feasibility study. These are:¹⁰³

12 Parts of a FS	
1. Needs Analysis	7. Bankability Assessment
2. Affordability Assessment	8. Legal Viability Assessment
3. Value-for-Money Assessment	9. Market Testing
4. Preliminary Risk Assessment	10. PPP Option Recommendation
5. Stakeholder Assessment	11. Indicative Transaction Implementation Plan
6. Institutional and Human Resource Assessment	12. Draft PPP Contract

- 1) *Needs Analysis*, defining the government’s goal relative to the priority projects, outputs of the service, and standards to be met;

- 2) *Affordability Assessment*, identifying the current cost to government of providing the service, capacity of the government to run the service, and impact of proposed project on user fees or tariffs;

Affordability examines the level and structure of the project's overall revenue requirements in relation to the capacity of users, the public authority, or both to pay for the infrastructure service. This requires building up a picture of the expected operating and maintenance costs of the project, together with the levels of cash flow required to repay the loans and provide a return to investors.

In the case of user-fee PPPs, once the expected revenue requirements for the project have been established, the capacity and willingness of users to pay for the infrastructure service needs to be assessed. For availability-based PPPs, where the public authority, not the user, makes the payments, assessment of affordability is one of the most important aspects in considering the deliverability of the project.¹⁰⁴ A willingness-and-ability-to-pay (WAP) survey must be undertaken.

- 3) *Value-for-Money Assessment*, justifying PPP over public sector initiative based on cost estimates using net present value approach if undertaken via PPP or public provision on risk-adjusted basis;
- 4) *Preliminary Risk Assessment*, determining the risks that will transferred, shared or retained by the public section, the value of each risk, and the capacity of the private stakeholders to manage and control the risks that will be shared or transferred to them;
- 5) *Stakeholder Assessment*, recognizing the stakeholders, supporters and oppositors to each of the PPP project and securing their feedback on the project;
- 6) *Institutional and Human Resources Assessment*, providing a plan to absorb employees of the public sector if needed, and creation of SPCs or asset holding companies;
- 7) *Bankability Assessment*, requiring long-term investments, private financing, guarantees, subsidies, incentives, and security for cash flows;
- 8) *Legal Viability Assessment*, listing all legal and governmental requirements, PPP options and authorities of public units involved;
- 9) *Market Testing*, assessing the potential field of qualified bidders, domestic and international, their interests and appetite;

10) *PPP Option Recommendation*, recommending the best or appropriate PPP option --- whether Build-Operate-Transfer or any of its variants, joint venture, concession, lease, service contract, management contract or disposition, among others; and

11) *Indicative Transaction Implementation Plan*, spelling out the procurement process, and detailed implementation plan; and

Other than these 11 components:

12) *Draft PPP contract* must be prepared spelling out the description and term of the project, components, functions, responsibilities and warranties of the parties, among other provisions.

G. PPP Risks

1. *Definition of Risk*. A host of risks can attend any governmental or PPP project implemented by an LGU. Risk is defined as the chance of something happening that will have an impact upon the achievement of the objectives.¹⁰⁵ Risk is the chance of an event occurring that would cause actual project circumstances to differ from those actually assumed when forecasting project benefits and costs.¹⁰⁶
2. *Effects*. If and when there is material deviation from the projections and assumptions, then the PPP project will either fail, the service or facility will not be delivered, services will be hampered, partnership may be strained or prejudiced, or higher costs will be incurred resulting in higher tariffs and end-user fees, or call on guarantees.

From the PSP's perspective, any risk would likely mean that not enough cash will be available to repay lenders on time and in full. Ultimately, any completion delay, technology failure, non-payment of tariffs, decreased demand, foreign exchange depreciation, operations and maintenance cost inflation will increase the credit risk of the PPP project. It is the objective of a PPP to lower or minimize credit risk¹⁰⁷ by efficiently and sustainably allocating risks.¹⁰⁸ Otherwise, the calculated or expected VfM will not come about.

3. *Types of Risks*. Risks can be classified depending on the influencing environment. Risks may be "external risks" or those matters that arise outside of the confines of a project like change of government, change of law, or change in public desire, and "internal risks" which pertains to the project like the way it is constructed and operated. External risks are outside the control of the parties while Internal risks are the opposite.¹⁰⁹

Risks can be categorized based on the likelihood of it occurring (i.e., high, medium, low) and the consequence or impact when it occurs (i.e., major, medium, minor) which in turn will determine the level of prioritization the risk should have (i.e., high, medium, low). For example, high likelihood of a risk occurring which would result in a major consequence must be given high priority.¹¹⁰

Risks can also be divided into political and commercial risks. Political risks are those risks that are the result of government actions, policies, and which governments have the greatest ability to control and to determine. Commercial risks are those events that business managers typically have the greatest ability to control and determine.¹¹¹

4. *50 Risks*. These are 50 possible risks that could have effect on a PPP project. These are:¹¹²

50 PPP Project Risks	
1. Acquiring planning approval	26. Legal
2. Asset quality	27. Legislative
3. Availability	28. Life cycle costs
4. Bid process	29. Local partners
5. Commissioning or start-up	30. Market competition
6. Consortium structure	31. Market familiarity
7. Construction	32. Operational
8. Corruption	33. Payment mechanism
9. Cost	34. Project management ability
10. Counterparty	35. Project performance
11. Credit	36. Raw material
12. Demand	37. Regulatory
13. Demographic	38. Residual value
14. Design	39. Revenue tariffs
15. Economic	40. Risk mismatch
16. Environmental	41. Site acquisition
17. Feasibility studies	42. Social or protester
18. Force majeure	43. Sponsor
19. Foreign exchange	44. Succession
20. Gearing	45. Taxation
21. Ground conditions	46. Technology
22. Inflation	47. Time
23. Installation	48. Usage
24. Insurance	49. Volume
25. Interest rates	50. Weather

- 1) *Acquiring planning approval risk* where delays could arise or failure to secure the necessary permissions;
- 2) *Asset quality risk* where quality of assets is unacceptable;
- 3) *Availability risk* which relates to facilities and equipment being on hand for use by the parties;
- 4) *Bid process risk* due to unwieldy, lengthy and costly process;
- 5) *Commissioning or start-up risk* due to delay in meeting targets;
- 6) *Consortium structure risk* where there is a mismatch of consortium partners;
- 7) *Construction risk* which arises from cost or time overruns, and poorly constructed solutions;
- 8) *Corruption risk* which arises from officials getting bribes and favors;
- 9) *Cost risk* where the private party fails to deliver on its outputs within the cost assumptions;
- 10) *Counterparty risk* which concerns the trading process when one of the trading parties do not perform its obligations;
- 11) *Credit risk* which arises from the possible default of the debtor whether government or the private sector proponent or when the lenders or sponsors are not credit-worthy;
- 12) *Demand risk* which could render the facility or project underutilized;
- 13) *Demographic risk* where changes in population and density could affect the project;
- 14) *Design risk* where the proposed technical solution is unworkable or inefficient;
- 15) *Economic risk* which results in fall in revenues or financiers pulling out;
- 16) *Environmental risk* which involves the impact of the project on the environment, or vice-versa;
- 17) *Feasibility studies risk* for failure to conduct a complete one or not identifying the key downsides of the project;
- 18) *Force majeure risk* arising from circumstances beyond the parties' control;
- 19) *Foreign exchange risk* brought about by foreign currency fluctuations;
- 20) *Gearing risk* which arises from an inappropriate funding structure (ratio of debt to equity) and its impact on profitability;
- 21) *Ground conditions risk* pertaining to undesirable ground conditions;
- 22) *Inflation risk* brought about by inflation;
- 23) *Installation risk* which arises from incorrect installation to ensure no risks are left behind and passed on to operator;
- 24) *Insurance risk* which involves the efficacy of the insuring the project;
- 25) *Interest rates risk* where interest rates for debts affect the project life cycle;
- 26) *Legal risk* relating to the capacity of the party to sign the contract;
- 27) *Legislative risk* brought about by changes in law affecting the project;
- 28) *Life cycle costs risk* on the inaccuracy with which life cycle costs can be projected for longer duration;
- 29) *Local partners risk* posing interface problems or in the use of different systems and procedures;
- 30) *Market competition risk* eroding the potential gains of the project;

- 31) *Market familiarity risk* where private proponents assume projects they are not familiar with;
- 32) *Operational risk* arises in the course of the processing, confirming and reconciling transactions, and maintenance, malfunctions and delays, and operating beyond the cost projections;
- 33) *Payment mechanism risk* pertaining to the scheme by which payments are apportioned among the parties;
- 34) *Project management ability risk* pertaining to inadequacy to accomplish task;
- 35) *Project performance risk* where parties fail to meet standards set;
- 36) *Raw material risk* on supply, availability and cost;
- 37) *Regulatory risk* where future actions of government will adversely affect the project;
- 38) *Residual value risk* where high standard of facilities at the end of the project life or concession period will not be achieved;
- 39) *Revenue tariffs risk* where actual tariffs set are lower than projected;
- 40) *Risk mismatch risk* where the allocation of risk is not appropriate or when risk is assigned to a party incapable of managing or controlling it;
- 41) *Site Acquisition risk* that may be brought about by choosing the wrong land or the right land for the wrong price;
- 42) *Social or protester risk* where some communities may oppose the project;
- 43) *Sponsor risk* which arises from the level of commitment of the sponsors or equity-providers to the project;
- 44) *Succession risk* brought about by change of policies by the successor administration;
- 45) *Taxation risk* due to change in taxation laws and rules;
- 46) *Technology risk* could result in an unfruitful scheme due to obsolescent technology;
- 47) *Time risk* involving delays in the project;
- 48) *Usage risk* where use of facility overtime could overstretch the capability limits of resources;
- 49) *Volume risk* on the capacity of the facility; and
- 50) *Weather risk* causing project disruptions attributable to the weather.

5. *Steps and Measures*. There are four steps in risk allocation, all of which are part of an iterative process whereby government needs to allocate the risk and decide whether the allocation produces optimal result in terms of impact. The steps are:¹¹³

4 Steps in Risk Allocation	
Step 1	Identify and Prioritize Project Risks
Step 2	Allocate Project Risks
Step 3	Assess Risk and Financial Impact
Step 4	Develop Risk Management Plan

- 1) *Identification and Prioritization of Project Risks.* Identify all risk by developing a “risk list” (see 50 risks) complemented with brainstorming on project-specific risks.
- 2) *Allocation of Project Risks.* For each risk, decide whether the risk will be borne by the PE, PSP or both parties.
 - a. Each risk should be allocated to the party best able to control the likelihood of the risk event occurring.
 - b. If the risk cannot be controlled, the party that can best manage the impact of the risk event on the project outcomes should bear the risk.
 - c. If the foregoing is not possible, the risk should be given to the party that is able to absorb the risk at lowest cost, i.e., party with the ability to pass on the risk (user fees or insurance) or cost to ultimate risk bears (tax payers or shareholders).
- 3) *Assessment of Risks and Financial Impact.* There must be a qualitatively assessment of the likelihood of occurrence and severity of loss of the risk events. This will be the basis for prioritizing the actions to mitigate the risks (see matrix).
- 4) *Development of Risk Management Plan.* Key to this plan is mapping risk mitigation strategies. This involves any measure that will assist the affected party or parties in managing the risk. Risk monitoring and review are part of the plan.

Parties are advised to draw up a risk matrix identifying the risk, the impact, the likelihood of occurrence, the bearing party and risk mitigation strategy. Here is a sample matrix.

Risk Category	Possible Impact	Probability of Occurrence	Risk Mitigation	Bearing Party

6. *PPP Structuring Options.* Risk allocation is a key ingredient in structuring PPP options. Transferring all or most of the risk to the PSP will have an effect on the cost of the project and the tariff the end-users will pay for using the facility or availing of the service. The more government contributes to a project and the more government shares in the cost, the resultant end-user fee will be lower. The rule is, the more functions are performed by the PSP, the more risks the PSP

will bear, which will result in higher costs for the PSP which in turn will result in higher tariffs and rewards for the PSP.

Thus, the tariffs and PSP rewards are higher for divestment, concession and BOT Law variants than in service and management contracts and leases. JVs would fall somewhere in between depending on the sharing scheme.¹¹⁴

IV. PPP Modalities

A. Inclusive List of PPP Modalities

1. *Inclusive List.* Under the Proposed PPP Code by Agra, there is an inclusive, not an exclusive, list of PPP modalities. This means that LGUs can pursue modalities other than those explicitly enumerated. An LGU may undertake any other modality akin to any of the listed modalities which falls under the alternative definition of a PPP, i.e., a PPP is a legally enforceable contract where each party assumes specified functions, bears certain risks, provides contribution or renders some obligation, and earns benefits and revenues from the PPP arrangement.

The objective of having an inclusive list is to encourage LGUs to be innovative and not be restricted to traditionally accepted and commonly recognized modalities. Further, not every type of PPP can be anticipated nor can be readily labeled. This is consistent and in furtherance of local autonomy and fiscal autonomy. LGUs cannot be straightjacketed to only statutory options.

2. *20++ Specific Modalities.* LGUs have a host of options to choose from. The specific modalities enumerated under the Proposed PPP Code of Agra are:

20++ PPP Modalities	
Under the BOT Law:	10. Rehabilitate-Lease-and-Transfer
1. Build-and-Transfer	11. Rehabilitate-and-Transfer
2. Build-Lease-and-Transfer	12. Rehabilitate-Transfer-and-Operate
3. Build-Operate-and-Transfer	13. Concession Arrangement
4. Build-Own-and-Operate	14. Joint Venture
5. Build-Transfer-and-Operate	15. Lease or Affermage
6. Contract-Add-and-Operate	16. Management Contract
7. Develop-Operate-and-Transfer	17. Service Contract
8. Rehabilitate-Operate-and-Transfer	18. Divestment or Disposition
9. Rehabilitate-Own-and-Operate	19. Corporatization
	20. Other PPP Modalities

21) Build-and-Transfer (BT);

22) Build-Lease-and-Transfer (BLT);

- 23) Build-Operate-and-Transfer (BOT);
- 24) Build-Own-and-Operate (BOO);
- 25) Build-Transfer-and-Operate (BTO);
- 26) Contract-Add-and-Operate (CAO);
- 27) Develop-Operate-and-Transfer (DOT);
- 28) Rehabilitate-Operate-and-Transfer (ROT);
- 29) Rehabilitate-Own-and-Operate (ROO);
- 30) Rehabilitate-Lease-and-Transfer (RLT);
- 31) Rehabilitate-and-Transfer (RT);
- 32) Rehabilitate-Transfer-and-Operate (RTO);
- 33) Concession Arrangement;
- 34) Joint Venture (JV);
- 35) Lease or Affermage;
- 36) Management Contract;
- 37) Service Contract;
- 38) Divestment or Disposition;
- 39) Corporatization; and
- 40) Any other modality akin to any of the above or features thereof which falls under the alternative definition of a PPP.

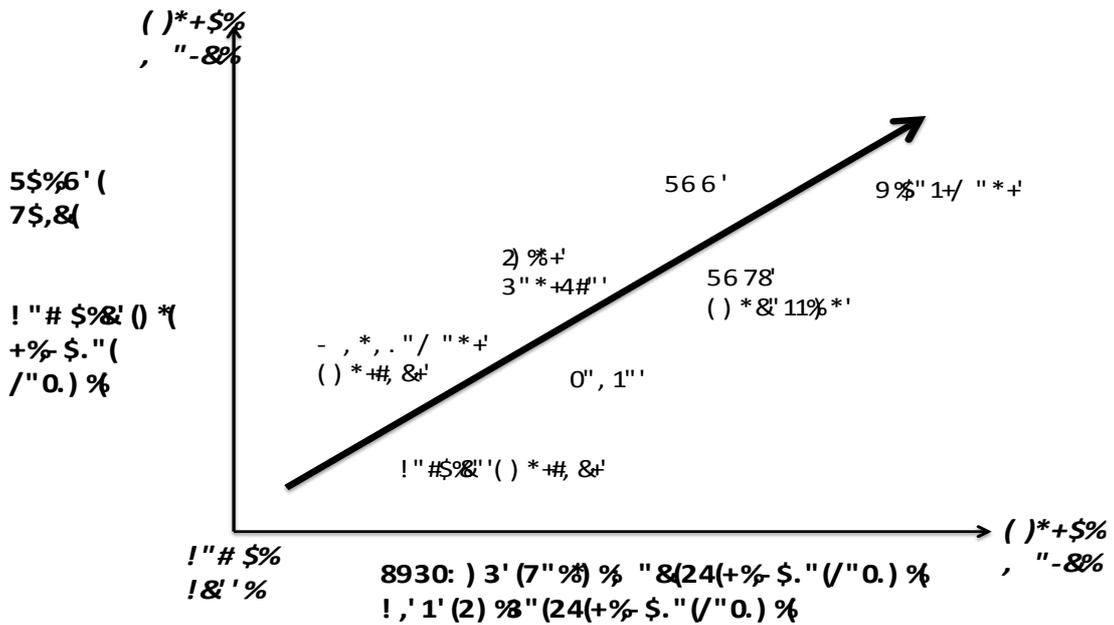
The first nine (9) in the list are the variants listed under the BOT Law.

3. *Appropriateness of Modality.* The choice of the appropriate modality involves the exercise of wisdom and political discretion. An LGU cannot be forced to utilize a particular modality, or even enter into PPPs. Not all PPPs can fit into one modality. While all the 19 specific modalities are governed by their respective laws or regulations, the Project Study will provide the justification, appropriateness, bankability and feasibility of the project.

Comparative Analysis of PPP Modalities					
Modality	Objective	Period	Revenue Source	Financing	Risks
BOT	Innovation, Build, O&M and Financing by PSP	25-50 years	Capital + Revenue + O&M – finance costs – license fee	Private	Mostly private
JV	Joint undertaking	25-50 years	Shared	Shared	Shared
Concession	Rehabilitation, O&M and Financing by PSP	25-50 years	Revenue – O&M costs – finance costs – concession fee	Private	Mostly private
Service Contract	Improve efficiency	2-3 years	Paid per unit of service	Public	Mostly public
Management Contract	Install new management systems	2-3 years	Fixed fee + bonus + salaries	Public	Mostly public
Lease	Efficient use of assets	7-15	Rental Payments	Public or	Shared

Comparative Analysis of PPP Modalities					
Modality	Objective	Period	Revenue Source	Financing	Risks
		years		Private	
Divestment	Innovation, Build, O&M and Financing by PSP	In perpetuity	Revenue – O&M costs – finance costs – license fee	Private	Mostly private
Corporatization	Transform into private enterprise	50 years	Initial Public Offering	Private	

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B. Joint Ventures

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1. *Lack of Definition.* The 1991 LGC (Section 35), the enabling law for LGU JVs, does not contain a definition of a JV, prescribe the requirements and procedures for selecting the PSP or co-venturer. LGUs are therefore free to define this type of modality, prescribe the requirements and conditions of the arrangement, and set the procedures for selecting the PSP, provided, that CAT is present and no law is violated.

In one case, the Supreme Court defined a JV as a form of partnership and should thus be governed by the general law on partnership.¹¹⁵

2. *Proposed Definition.* Under the Proposed JV Ordinance of Agra, a JV is defined as:

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

The definition under the NEDA JV Guidelines may also be adopted by LGUs. Under the 2013/ revised Guidelines, JV is defined as:

An arrangement whereby a private sector entity or a group of private sector entities on one hand, and a Government Entity or a group of Government Entities on the other hand, contribute money/capital, services, assets (including equipment, land, intellectual property or anything of value), or a combination of any or all of the foregoing to undertake an investment activity. The investment activity shall be for

the purpose of accomplishing a specific goal with the end view of facilitating private sector initiative in a particular industry or sector, and eventually transfer the activity to either the private sector under competitive market conditions or to the government. The JV involves a community or pooling of interests in the performance of the investment activity, and each party shall have the right to direct and govern the policies in connection therewith with the intention to share both profits and, risks and losses subject to agreement by the parties. A JV may be a Contractual JV or a Corporate JV (JV Company).

In the 2008 NEDA JV Guidelines, a JV is:

A contractual arrangement whereby a private sector entity or a group of private sector entities on one hand, and a Government Entity or a group of Government Entities on the other hand, contribute money/capital, services, assets (including equipment, land or intellectual property), or a combination of any or all of the foregoing. Parties to a JV share risks to jointly undertake an investment activity in order to accomplish a specific, limited or special goal or purpose with the end view of facilitating private sector initiative in a particular industry or sector, and eventually transferring ownership of the investment activity to the private sector under competitive market conditions. It involves a community or pooling of interests in the performance of the service, function, business or activity, with each party having a right to direct and govern the policy in connection therewith, and with a view of sharing both profits and losses, subject to agreement by the parties. A JV may be a contractual JV, or a corporate JV.

The foregoing definitions are almost identical. One marked difference is that, under the Proposed JV Ordinance of Agra, the JV activity is not limited to an investment activity. JV may be undertaken for social service-related projects.

Nature of JV	
<i>Joint, Community Pooling of Resources</i>	Components – Functions – Accountability – Contributions – Revenues – Profits – Dividends – Risks – Losses – Governance

Specific assignment of functions to the JV Parties, rather than an across-the-board assumption, may also be made provided, the contributions and the sharing schemes are clear, and joint governance is established.

3. *Distinguished from BOT Law Variants.* A fair reading of the BOT Law will reveal that a JV is not listed as one of the variants. By executive fiat, JVs cannot be

considered a variant of said law since this would be violative of the rule on undue delegation of legislative powers vested in Congress. The fact that a JV is As Law variant is manifested in the issuance of the 2013 NEDA JV Guidelines. If JV is considered a variant under the BOT Law, then there is no reason for NEDA to issue separate guidelines on JVs where JVs are governed not by the BOT Law and its IRR.

<i>JV is Not a BOT Law Variant</i>	
<i>Differences</i>	<i>Inapplicable BOT Law Provisions to LGU JVs</i>
<ol style="list-style-type: none"> 1. <i>Functions</i>: Delineated (BOT Law) vs. Shared (JV) 2. <i>Governance</i>: Policy by LGU and O&M by PSP (BOT Law) vs. Policy and O&M Shared (JV) 3. <i>Risk Allocation</i>: Risk-Retention, Risk-Transfer and Risk-Sharing (BOT Law) vs. Risk-Sharing (JV) 4. <i>Contributions and Expenditures</i>: As a rule, LGU does not contribute (BOT) vs. LGU contributes (JV) 5. <i>Accountability</i>: Separate Accountabilities between LGU and PSP (BOT Law) vs. Mutual Accountability (JV) 6. <i>Single-Purpose Project Company</i>: Incorporated only by PSP, as a rule (BOT) vs. Both LGU and PSP (JV) 7. <i>Revenues and Losses</i>: Fixed percentage or share (BOT Law) vs. Proportionate Sharing (JV) 	<ol style="list-style-type: none"> 1. <i>Project</i>: traditionally provided by the LGU 2. <i>Approvals</i>: Based on Thresholds (P20M; 50M; 200M for Local Development Councils or NEDA-ICC) 3. <i>Unsolicited Proposal</i>: <ol style="list-style-type: none"> a) Not allowed for priority project unless with new technology b) Ban on direct government guarantee, subsidy and equity c) First-in-time approach 4. <i>Debt-Equity Ratio</i>: 75-25% 5. <i>RoR</i>: 12% cap on negotiated projects for public utilities which are monopolies

An examination of the nature of a BOT Law variant and a JV would show that they are fundamentally different. There are five (5) basic differences between BOT Law variants on one hand, and JVs on the other. These are:

- a) *Functions*. The main difference between the two is the manner by which functions are performed by the parties. The “community or pooling of resources” makes JVs fundamentally different from the variants under the BOT Law. While the components of a BOT Law variant and a JV may be the same – building, financing, designing, operating and maintaining, rehabilitating or improving, using or leasing a property – under the BOT Law, all these are performed by the private sector. Under a BOT Law, the responsibilities of the LGU and PSP are distinct and separately undertaken by the parties. There is no community or pooling of resources. Under a JV

arrangement, these components and functions are collectively performed by the Parties based on their proportionate share in the JV. Functions are jointly performed.

- b) *Governance*. Another distinguishing feature is governance. In a JV, by definition, governance is proportionately shared not just in the policy-making but in operations and maintenance as well. In a BOT Law arrangement, government sets the policy while the PSP is responsible for the day-to-day operations. In a JV, the LGU is represented in the Board of Directors, if incorporated, and in the Governing Board or Joint Committee, if not incorporated, and in the management structure of the JV project.
- c) *Risk Allocation*. As a general rule, a BOT Law arrangement involves a transfer of certain risks to the PSP. In a JV, the parties share in the risk based on their equity or participation. However, contractually, government may bear less risk than its participation.
- d) *Contributions and Expenditures*. Under a JV and unlike in a BOT arrangement, the LGU, as a rule, shares in the contributions and expenditures on a proportional basis. In a JV, the public sector must contribute to the project either by way of capital, services, property, or anything of value. This is not the case for BOTs, as a rule.
- e) *Single-Purpose Project Company (SPPC)*. The corporate expression of a JV could be a JV corporation formed by the JV parties. Whether incorporated or not, the LGU has participation in the governance of JVs. There is no such mutual corporate expression for BOTs. The private sector in a BOT Law arrangement forms a special purpose vehicle or special/ single-purpose company (SPC) without, as a rule, equity and participation from the LGU.
- f) *Mutual Accountability*. In JVs, both the LGU and the PSP are accountable for the Project and to the public. Accountability is shared.
- g) *Revenues and Losses*. In a JV, the LGU and the PSP are entitled to dividends and income based on their respective equity contributions or share; while in a BOT, government is entitled to a fixed fee or percentage of gross revenues, and the PSP a reasonable RoR which need not necessarily translate into a fixed percentage. The share of the JV parties can be based on gross or net revenues/ income. In a JV, the LGU shares in the losses of the JV in proportion to its participation. This is not contemplated in BOTs.

Under a JV arrangement, the co-venturers shall proportionately share in the profits, income, revenues as well as in the losses and risks. This can be done in two ways, i.e., (1) fixed percentages are specified where for example, the LGU will assume 15% of the contributions, gains, risks and losses and the PSP

the balance, or (2) specific allocation of the functions, profits, rights, losses and risks, which if valued, would determine a percentage or share.

LGU, conceptually and if contractually provided, can enjoy a greater share in the profits and revenues beyond what it actually contributed, and bear a lower risk or share in the losses than what it puts in. Thus, the share or equity of government translates to a minimum share in the revenues (i.e., floor), and the maximum share in losses and risks (i.e., ceiling). In such situation, there is no disadvantage to Government. In fact, this is manifestly advantageous.

Because a JV is not a variant under the BOT Law and considering the foregoing differences, JVs should not be governed, unless voluntarily adopted by the LGU, by the BOT Law and *vice-versa*. The provisions and requirements under the BOT Law and even the NEDA JV Guidelines, are not applicable in JVs. Thus, the following provisions in BOT Law are not applicable in LGU JVs:

- a) *Type of Project*. A JV project need not be a project or activity which is normally or traditionally provided by an LGU which is a requirement under the BOT law. A JV can be for a non-traditional, new or innovative project.
 - b) *Approvals*. For JVs by LGUs, external approvals are not required regardless of the project cost. Only the prior authorization of the local legislative council and approval of the local chief executive are required. No approvals from the NEDA and local development councils are required. The confirmation by the Departments of Finance (DOF), and Budget and Management confirmation are not needed save in instances where national government support is made. Under the BOT Law, there are thresholds for governmental approvals.
 - c) *Unsolicited Proposals*. Under the BOT Law, unsolicited proposals cannot be for priority projects unless new technology is introduced. Further, unsolicited proposals cannot contain direct government guarantee, subsidy and equity. Also, in the evaluation of multiple unsolicited proposals, the first-in-time approach is adopted. For LGU JVs, there are no such restrictions and provisions.
 - d) *Debt-Equity Ratio*. Under the BOT Law, there is a fixed gearing/ debt-equity ratio of 75-25%. This is not applicable in JVs.
 - e) *12% RoR*. Under the BOT Law, there is a cap of 12% RoR for negotiated contracts for public utilities that are monopolies. There is no cap in LGU JVs.
4. *Parties*. There are two parties to a JV arrangement, i.e., the LGU and the PSP. As earlier explained, LGUs can enter into JVs being juridical persons, i.e., public

corporations, municipal corporation proper acting in their proprietary capacities. Thus, a province, city, municipal, or barangay can pursue JVs for provincial-, city-, municipal-, barangay-wide projects respectively. Being territorial subdivisions, their projects must be located in within their respective areas.

However, an LGU, by mutual agreement in a G-to-G arrangement can collaborate with other LGUs, NGAs, GOCCs, GIs and GCEs, and implement JV Projects for projects located within the LGU's territory or those projects that will benefit the LGU and its community even if the project site is outside the LGU's territory; provided, that the collaborating or partner government entity jointly undertakes with the LGU the selection of the PSP. In this case, all the participating government institutions are partners or co-venturers of a project on the public side.

For example, an LGU can partner with another LGU and a GOCC like a water district for a bulk water project. In which case, the two (2) LGUs must follow their respective ordinances on PPP or JV, while the GOCC must comply with the 2013 NEDA JV Guidelines. The other option is, there is only one LGU as proponent or co-venturer, and the other government agencies shall be beneficiaries of the Project either as consumers, end-users or recipient of benefits and revenues. For example, the other LGU and the GOCC can enter into a supply or distribution agreement with the LGU-PSP JV which is supplying water.

Not all private entities can partner with an LGU for any project. The PSP must be eligible and qualified, and must be declared as such by the JV-Selection Committee (JV-SC). Under the Proposed JV Ordinance by Agra, the PSP is a:

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

The technical and financial requirements shall be determined by the JV-SC with the approval of the Local Chief Executive. The requirements may differ depending on the nature and costs of the project.

A PSP may also be a consortium or a private JV. A PSP may be composed of the project manager, financing institution, operator, construction company, equipment provider and insurer. Each may provide equity or be responsible, compensated and contracted for a specific component or function. Borrowing from the 2013 NEDA Guidelines,¹¹⁶ "in case of consortia, all member-entities of

the prospective JV Partner shall also submit the above legal, technical and financial eligibility requirements to determine the overall capability of the consortia for the JV undertaking.”

5. *Projects.* LGUs can pursue JVs for projects which are proprietary or private in nature, but not for activities which are governmental or public. Thus, no JV can be undertaken for taxation, tax collection, police power, and eminent domain.

An LGU, regardless of the cost, may undertake infrastructure, development, revenue-raising and/ or social service-related projects which are traditionally or not traditionally provided or supplied by the LGU. The restriction under the BOT Law does not apply to LGU JVs.

The LGU must identify specific priority projects in its comprehensive multi-sectoral development plan, and development and physical framework plan. The list of possible JV projects is not exclusive. General welfare and public good are key determinants for local JV projects. JVs may be undertaken for the delivery of certain basic services, capability-building and livelihood projects, to develop local enterprises designed to improve productivity and income, diversify agriculture, spur rural industrialization, promote ecological balance, and enhance the economic and social well-being of the people.

LGUs may enter into JV arrangements may enter into JV arrangements for developmental projects such as but not limited to energy and power, renewable energy, waste-to-energy, roads, bridges, causeways, waterways, highways, ports, wharfs, terminals, airports, community airports, canals, dams, desilting, dredging, mining and exploration, hydropower projects, water supply and distribution, sewerage, irrigation, drainage, water conservation such as impoundment areas and rainwater harvesting, telecommunications, railroad and railways, short-haul transit services such as monorail, guided bus, bus services and trams, intermodal and multi-modal transit systems, transport systems, traffic control and management, parking facilities, reclamation projects, platform settlements, industrial estates or townships, central business and industrial park development, hotels and resorts, socialized housing, non-conventional low-cost housing, settlement/ resettlement and relocation facilities, residential subdivisions, parks and open space development/ redevelopment, pocket parks, public art, libraries, heritage conservation, government buildings, sustainable/ green public buildings, sports facilities, wellness establishments, tourism such as eco-tourism, wellness tourism and agri/agro-tourism, public markets, commercial buildings, slaughterhouses, storage buildings, warehouses, cold storage, solid waste management, sanitary landfills, meeting and convention centers, information technology networks and database infrastructure, education-related, classrooms, health facilities, hospitals, social services-related, prisons, agriculture-related, post-harvest facilities, environmental management

and protection, climate change adaption, disaster risk reduction, among other developmental projects.

Aside from implementing specific projects (e.g. public market), LGUs may bundle or integrate projects and components into one project, provided, the components are interrelated. Thus, an LGU can implement a mixed use commercial venture – commercial spaces, restaurants, bus terminal, public market, slaughterhouse, and sports complex on land(s) owned by the LGU. This is the multi-use or “plus-plus” concept.

6. *Contributions.* Contributions of LGUs in a JV can be cash or non-cash. The following are the policies and rules on contributions by LGUs and PSPs under the Proposed PPP Code and JV Ordinance of Agra:

LGU Contributions	
Money or Cash	Non-Cash or In Kind
<p><i>Current or Future (Monetized); Advanced by PSP</i></p> <p>IRA, RPT, Development Fund, Regular Funds, National Wealth Tax, SEF, Calamity Fund, Loan or ODA Proceeds, Grants, Bonds, Securities, Cost-Sharing</p> <p>Cost avoidance and share in the national wealth shall be factored in</p>	<p><i>Anything of pecuniary/ monetary value</i></p> <p>Goodwill, franchise, concession, usufruct, right-of-way, equity, subsidy or guarantee, credit enhancement mechanisms, services, personnel, intellectual property</p> <p>Police power, tax incentives, tax holidays, devolved powers, expropriation and reclassification of land</p>

- a) The co-venturers or parties to a JV shall contribute money, capital, services, personnel, assets including equipment, land, intellectual property or anything of value, or a combination of any or all of the foregoing to the JV arrangement. The contribution of the LGU shall be subject to third party independent valuation.

GFIs like the Development Bank of the Philippines and the Land Bank of the Philippines can do the valuation. This would be a G-to-G arrangement which involves negotiations and does not require bidding.

- b) The LGU may allocate a portion of its Internal Revenue Allotment, real property tax, development fund, regular funds, proceeds from the utilization and development of its national wealth, Special Education Fund when the JV project is education-related, Calamity Fund when the JV project is calamity- or reconstruction-related, and special funds, if appropriate, as its

contribution or share in the JV activity. These may be the actual or current funds, or future or monetized value of these funds of the LGU.

- c) The LGU may contract a loan, avail of Official Development Assistance, secure grants, issue bonds, debentures, securities, collaterals, and notes the proceeds of which can be earmarked for the JV activity.
- d) The LGU may extend goodwill, grant a franchise, concession, usufruct, right-of-way, equity, subsidy or guarantee, provide cost-sharing and credit enhancement mechanisms, exercise police power, give tax incentives or tax holidays, perform devolved powers, expropriate and reclassify and enact or integrate zoning ordinances.

Under the Proposed PPP Code of Agra, upon the signing of the JV Agreement by the Governor/ Mayor pursuant to the authority given by the Sangguniang Panlalawigan/ Panlungsod/ Bayan, the franchise, concession or license is deemed awarded to the winning PSP, in case of a contractual JV, or the JV company.

- e) The share or equity of the LGU in the JV arrangement may be advanced, in full or in part, by the PSP where the PSP shall be paid from the future revenues due the LGU either by set-off or actual payment.
- f) Any subsidy, guarantee, equity or contingent liability assumed or given by the LGU must be reflected, disclosed and recognized in the annual appropriations of the LGU.
- g) The revenues, funds, expenditures and contributions of the LGU shall be subject to the audit examination by the COA. Revenues, funds, expenditures and contributions of the PSP shall be subject to audit by a private auditing firm.

Private funds are outside the jurisdiction of COA since they are not public funds. They were not contributed by an LGU nor sourced from local budgets. However, there are some who are of the view that all PPP funds, regardless of the source, fall under the audit jurisdiction of COA. They posit that all PPP funds are imbued with public interest and therefore partake of a public character.

7. *Sharing and Participation.* Below are the rules on sharing and participation embodied in the Proposed PPP Code and JV Ordinance of Agra:

- a) The LGU shall be a minority equity or shareholder while the PSP shall be majority equity or shareholder, except in the case where fifty percent (50%)

of the outstanding capital stock or contribution is owned or made by the LGU.

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

In this case, the LGU despite only having minority participation, may exercise rights of a majority shareholder under the PPP Contract.

- c) A reasonable percentage of the equity to be provided by the PSP should come from its own resources and not borrowed. There is no fixed or preferred debt-equity ratio required unlike in the BOT Law and 2013 NEDA JV Guidelines.
- d) Any cost avoidance or substantial savings that will be made by the LGU because of and directly attributable to the JV activity may be factored in the computation of the respective shares of the LGU and the PSP.
- e) For the utilization and development of natural resources located within its jurisdiction, the Province/ City/ Municipality shall be entitled to an equitable share which may come in the form of a portion of the benefits, revenues and profits thereof.
- f) The share of each JV party shall be set as fixed or determinable percentages or values either based on an overall or across-the-board assignment of contributions, revenues, profits, losses, risks and functions; or on specific assignment of contributions and functions to each JV party, provided that, the agreed percentage share is maintained and that joint governance is ensured where the LGU shall have representation in the governing structure based on in proportionate share at the minimum.
- g) Subject to the terms of the competitive selection process and agreement of the parties, the LGU may be entitled to a share greater than its contribution or equity.
- h) Each party shall be entitled to dividends, profits, income and revenues and will bear the corresponding risks, losses and obligations in proportion to its share, either based on gross or net revenues or income, unless the parties agree that the LGU will have a greater share in the dividends, profits, income and revenues and/ or bear lower risk and percentage loss than what it contributes to the JV arrangement.

- i) For as long as the LGU is involved in the JV undertaking, the PSP shall not sell/transfer its interest in the JV Company without the express written consent of the LGU.
8. *Award Parameter.* Typically, the PSP which offers the highest revenues or percentage to an LGU, which would be higher than the actual contribution of the LGU in the JV Project, shall be awarded the JV contract.
 9. *Period.* The JVA can be for a period of a maximum of 50 years under the Proposed PPP Code and JV Ordinance of Agra. This is same rule under the BOT Law and 2013 NEDA JV Guidelines.
 10. *JV Vehicle.* Under the Proposed JV Ordinance by Agra, the LGU and the PSP have the option to implement the JV activity through a Contractual or Unincorporated JV, or establish a JV or Incorporated Company. A contractual JV is a legal and binding agreement under which the JV Partners shall perform the primary functions and obligations under the JVA without forming a JV Company. A JV Company is a stock corporation, formed by the LGU and the PSP, fifty percent (50%) or less of the outstanding capital stock of which is owned by the LGU.

The JV Company shall be formed by the LGU and the PSP under the following parameters:

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

Since a JV Company is not owned or controlled by the Government, it does not fall under the Civil Service and should be regarded as an ordinary commercial corporation.¹¹⁷

If parties chose to pursue the contractual JV route, and not incorporate a JV company, and considering that there will be no comingling of public and private funds in a separate corporate entity:

- a) *Audit.* Private funds shall be subject to audit by a private Audit Firm (not by COA);
- b) *Procurement.* The PSP shall use its own procurement rules, not GPRA;
- c) *Labor.* Those hired by the PSP shall comply with Labor Code, not Civil Service Laws; and
- d) *Compensation Scheme.* Salaries of managers, officers and employees of the PSP shall be based on the Labor Code and internal policies, not the Salary Standardization Law.

11. *Divestment.* The JV activity may, subject to the terms of the competitive selection process, include divestment, disposition or transfer of ownership of the JV activity, asset or project to the PSP or JV partner. Divestment or disposition is the manner or scheme of taking away, depriving, withdrawing of title to a property owned by the LGU and vesting ownership thereof to a PSP. The divestment or disposition may take place at the end of the JV period or before the term ends.

Divestment is optional, not mandatory. Parties to a JV must agree to this. Divestment must be subjected to a competitive process and stated in the terms of reference of the competitive selection/ bidding or competitive challenge/ unsolicited proposal, if pre-determined. If not pre-determined, divestment can take place under either a competitive process initial public offering (IPO), or any other means that promote competition, fairness and transparency is undertaken.

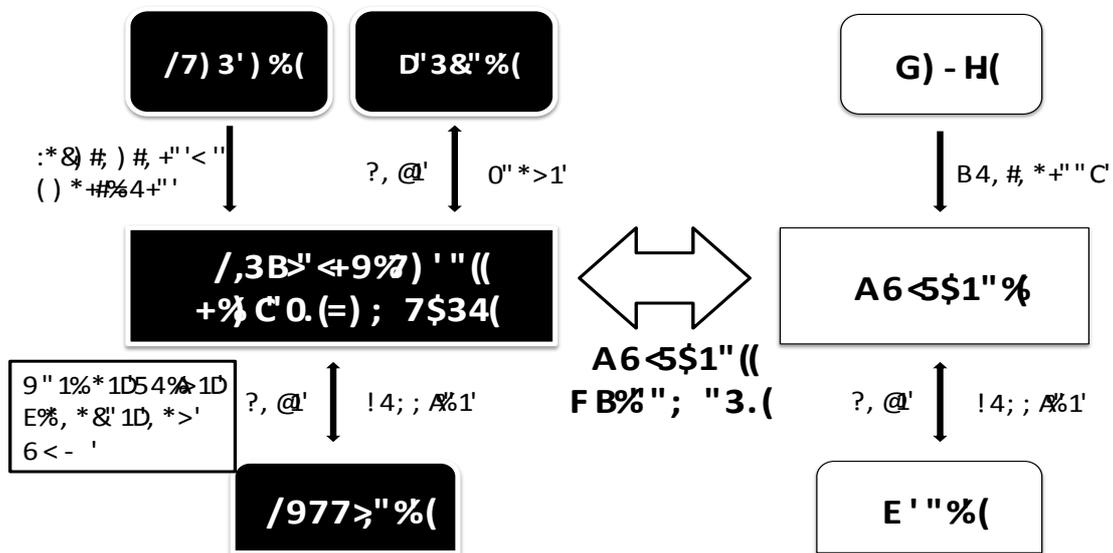
12. *Conflict of Interest.* Conflict of interest is seen as one of the negative dimensions of JVs. When an LGU is both a project implementor interested in raising revenues, and a regulator watching out for the interest of the public, there is potential conflict. There are ways of curbing or mitigation this. These are:

- a) Having a clear delineation of the functions and roles of the LGU;
- b) Institutionalizing constructive engagement with civil society;

- c) Creating a collegial regulatory authority on the part of the LGU (as against having one person in charge with contract management and project execution);
- d) Implementing accountability mechanism; and
- e) Designing periodic review of the JVA and LGU performance.

All these are spelled out in the Proposed PPP Code and JV Ordinance of Agra.

C. BOT Law Variants



1. *Policy.* It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government. Such incentives, aside from financial incentives as provided by law, shall include providing a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector.¹¹⁸ It must be noted that private sector is not just an important or essential partner in development. The private sector is indispensable in development. Thus, there is no development without the private sector.
2. *Governing Law.* R.A. 6957 amended by R.A. 7718 is the governing law for BOT Law variants. Being a statute, this must be followed by LGUs when implementing

any of the variants mentioned therein. For LGU projects, LGUs may formulate additional guidelines/procedures not in conflict with the BOT Law and its IRR.¹¹⁹

3. *Variants*. There are nine (9) specified variants under the BOT Law. The President however, may authorize other variants.¹²⁰ However, presidential authority is not absolute. The additional variants must be of the same kind as the enumerated modes following *ejusdem generis*, a rule on statutory construction. The nine (9) variants under the BOT Law are:

- 1) *Build-and-Transfer (BT)* - A contractual arrangement whereby the PSP undertakes the financing and construction of a given infrastructure or development facility, and after its completion, turns it over to the LGU, which shall pay the PSP, on an agreed schedule, its total investment expended on the project, plus a reasonable RoR thereon.
- 2) *Build-Lease-and-Transfer (BLT)* - A contractual arrangement whereby a PSP is authorized to finance and construct an infrastructure or development facility and upon its completion, turns it over to the LGU on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to the LGU.
- 3) *Build-Operate-and-Transfer (BOT)* - A contractual arrangement whereby the PSP undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The PSP operates the facility over a fixed term, during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid, or as negotiated and incorporated in the contract, to enable the PSP to recover its investment, and its operating and maintenance expenses in the project. The PSP transfers the facility to the LGU at the end of the fixed term which shall not exceed fifty (50) years. This build, operate and transfer contractual arrangement shall include a supply-and-operate scheme, which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the LGU so requires, operates the facility, providing, in the process, technology transfer and training to Filipino nationals.
- 4) *Build-Own-and-Operate (BOO)* - A contractual arrangement whereby a PSP is authorized to finance, construct, own, operate and maintain an infrastructure or development facility from which the PSP is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users. Under this project, the proponent who owns the assets of the facility may assign its operation and maintenance to a facility operator. The divestiture or disposition of the asset or facility shall be subject to relevant rules of the COA.

- 5) *Build-Transfer-and-Operate (BTO)* - A contractual arrangement whereby the LGU contracts out the construction of an infrastructure facility to a PSP such that the contractor builds the facility on a turnkey basis, assuming cost overruns, delays, and specified performance risks. Once the facility is commissioned satisfactorily, title is transferred to the LGU. The PSP, however, operates the facility on behalf of the LGU under an agreement.
- 6) *Contract-Add-and-Operate (CAO)* - A contractual arrangement whereby the PSP adds to an existing infrastructure facility which it is renting from the LGU and operates the expanded project over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the PSP.
- 7) *Develop-Operate-and-Transfer (DOT)* - A contractual arrangement whereby favorable conditions external to a new infrastructure project to be built by a PSP are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates, such as higher property or rent values.
- 8) *Rehabilitate-Operate-and-Transfer (ROT)* - A contractual arrangement whereby an existing facility is turned over to the PSP to refurbish, operate and maintain for a franchise period, at the expiry of which the legal title to the facility is turned over to the LGU.
- 9) *Rehabilitate-Own-and-Operate (ROO)* - A contractual arrangement whereby an existing facility is turned over to the PSP to refurbish and operate, with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity.

Comparative Analysis of BOT Law Variants			
Variant	Undertaking	Payment of Fees	Legal Title to Facilities
BT	Financing, designing and construction of the facility	Paid, on an agreed schedule, the total investments expended on the project plus reasonable RoR	Turned over the LGU after completion
BLT	Financing, designing and construction of the facility	Lease payments	Ownership transferred to the LGU after lease period
BOT (with SO)	Financing, designing, construction and O&M of the facility Includes supply of	Collection of tolls, fees, rentals or other charges from facility users	During operation, the facility belongs to the PSP; at the end of period,

Comparative Analysis of BOT Law Variants			
Variant	Undertaking	Payment of Fees	Legal Title to Facilities
	equipment and machinery for the facility with technology transfer to Filipino nationals		ownership transferred to LGU
BOO	Financing, designing, construction, O&M and ownership of the facility	Collection of tolls, fees, rentals or other charges from facility users	Ownership is retained by the PSP (in perpetuity)
BTO	Financing, designing and construction of the facility, and its O&M after transfer of ownership to the LGU	Provided in agreement	Once the facility is commissioned satisfactorily, title is transferred to the LGU; PSP operates facility for the LGU
CAO	Addition to an existing facility which the PSP is renting from the LGU	Provided in agreement	There may or may not be a transfer; PSP operates the expanded project over franchise period
DOT	Development of adjoining property is integrated into the agreement for new facility to be built by PSP	Enjoyment of benefits that the investment creates such as higher property or rent values	
ROT	Financing, designing, refurbishing and O&M of an existing facility	Provided in agreement	Legal title transferred to LGU at the end of franchise period
ROO	Financing, designing refurbishing, O&M and ownership of an existing facility	Provided in agreement	As long as operator is not in violation of the franchise, the PSP can continue to operate the facility in perpetuity

4. *PSP*. Any individual, partnership, corporation or firm, whether local or foreign, including consortia of local, foreign or local and foreign firms may participate or apply for pre- or simultaneous qualification for projects.¹²¹ The PSP shall have contractual responsibility for the project and which shall have an adequate track

record in the concerned industry as well as technical capability and financial base consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project to implement the said project. A PSP must be eligible and declared as such by the LGU.

To pre-qualify, a prospective PSP must comply with the following requirements:¹²²

a. *Legal Requirements*

- i. For projects to be implemented under a contractual arrangement which requires a public utility Franchise for its operation, and where the project proponent and Facility Operator are one and the same entity, the prospective PSP must be Filipinos or, if corporations, must be duly registered with the SEC and owned up to at least sixty percent (60%) by Filipinos, or, if a consortium of local, foreign, or local and foreign firms, Filipinos must have at least sixty percent (60%) interest in said consortium.
- ii. For projects to be implemented through a contractual arrangement requiring a public utility Franchise for its operation but where the PSP and Facility Operator may be two separate and independent entities, the Facility Operator must be a Filipino or, if a corporation, must be duly registered with the SEC and owned up to at least sixty percent (60%) by Filipinos.
- iii. For projects that do not require a public utility Franchise for its operation, the prospective PSP or the Facility Operator may be Filipino or foreign-owned.
- iv. In case the prospective PSP is a consortium, the members or participants thereof shall be disclosed during the pre-qualification stage and shall undergo pre-qualification. Further, the members or participants thereof shall execute an undertaking in favor of the LGU that if awarded the contract, they shall bind themselves to be jointly and severally liable for the obligations of the PSP under the contract.

However, if members of the consortium organize themselves as a corporation registered under Philippine laws, such corporation shall execute such an undertaking binding itself to be liable for the obligations of the PSP under the contract, which shall substitute or be in lieu of the undertaking submitted by the members or participants of the consortium.

- v. For purposes of pre-qualification, the Contractor proposed to be engaged by the Project Proponent to undertake the Construction of the project must be duly licensed and accredited by the Philippine Contractors Accreditation Board (PCAB), in the case of a Filipino Contractor, or by an equivalent accreditation institution in the Contractor's country of origin, in the case of a foreign Contractor. Once the Project Proponent is awarded the project, such foreign Contractor must secure a license and accreditation from the PCAB.
- b. *Experience or Track Record* - The prospective PSP must possess adequate experience in terms of the following:
- i. Firm Experience - By itself or through the member-firms in case of a consortium or through a Contractor(s) which the prospective PSP may engage for the project, the prospective PSP and/or its Contractor(s) must have successfully undertaken a project(s) similar or related to the subject infrastructure/development project to be bid. The individual firms and/or their Contractor(s) may individually specialize on any or several phases of the project(s). A consortium proponent shall be evaluated based on the individual or collective experience of the member-firms of the consortium and of the Contractor(s) that it has engaged for the project.

For purposes of the above, consortia shall submit as part of their pre-qualification statement a business plan which shall, among others, identify their members, the equity interest/contribution of each member to the consortium, their prospective Contractor(s), if the experience of their Contractor(s) are necessary for the determination of the capacity of the consortium to undertake the project, and the description of the respective roles said members and Contractors, if necessary, shall play or undertake in the project, including as to which member(s) is(are) the prospective facility operator(s), if applicable. If undecided on a specific Contractor, the prospective PSP may submit a short list of Contractors from among which it will select the final Contractor. Short listed Contractors are required to submit a statement indicating willingness to participate in the project and capacity to undertake the requirements of the project.

- ii. Key Personnel Experience - The key personnel of the prospective PSP and/or its Contractor(s) must have sufficient experience in the relevant aspect of schemes similar or related to the subject project, as specified by the LGU.

- c. *Financial Capability* - The prospective PSP must have adequate capability to sustain the financing requirements for the detailed engineering design, Construction and/or operation and maintenance phases of the project, as the case may be. The LGU concerned shall determine on a project-to-project basis, and before pre-qualification, the minimum amount of equity needed. For purposes of pre-qualification, this capability shall be measured in terms of proof of the ability of the prospective PSP and/or the consortium to provide:
- i. Equity
 - (a) a minimum amount of equity to the project measured in terms of the net worth of the company, or in the case of consortia, the net worth of the lead member or the combined net worth of members, or
 - (b) a set-aside deposit equivalent to the minimum equity required ii.
 - ii. Debt

A letter testimonial from a domestic universal/commercial bank or an international bank with a subsidiary/branch in the Philippines or any international bank recognized by the Bangko Sentral ng Pilipinas (BSP) attesting that the prospective PSP and/or members of the consortium are banking with them, and that they are in good financial standing and/or are qualified to obtain credit accommodations from such banks to finance the project.
5. *Projects*. Under the BOT Law, an LGU with the PSP can implement infrastructure or development projects normally financed and operated by the LGU but which will now be wholly or partly implemented by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be authorized by the appropriate agency pursuant to the BOT Law.¹²³ The list therefore is not exclusive.

Under the BOT Law IRR,¹²⁴ LGUs are tasked to prepare their infrastructure or development programs and to identify specific priority projects that may be financed, constructed, operated and maintained by the private sector through

the Contractual Arrangements or schemes authorized under the IRR and to submit for the approval by the Approving Body. The List of Priority Projects shall be consistent with the Philippine Development Plan (PDP), and Provincial Development and Physical Framework Plan (PDPFP). The Provincial Development Investment Programs (PDIPs)/Local Development Investment Programs (LDIPs) shall be deemed as the List of Local Priority Projects. Any updates to the lists of Priority Projects, local and national, shall be submitted to the PPP Center within five (5) days from approval of the Approving Body for information and for posting in the PPP Center website.

6. *Government Support.* Under the BOT Law, an LGU may extend the following support:

Government Support	
1. Direct Government Guarantee	5. Credit Enhancement
2. Direct Government Subsidy	6. Performance Undertaking
3. Direct Government Equity	7. Legal Assistance
4. Cost-Sharing	8. Security Assistance

- a) *Direct Government Guarantee* – An agreement whereby the LGUs assume responsibility for the repayment of debt directly incurred by the project proponent in implementing the project in case of a loan default.
- b) *Direct Government Subsidy* – An agreement whereby the LGUs will: (a) defray, pay for or shoulder a portion of the Project Cost or the expenses and costs in operating or maintaining the project; (b) contribute any property or assets to the project; (c) waive or grant special rates on real property taxes on the project during the term of the contractual arrangement; and/or (d) waive charges or fees relative to business permits or licenses that are to be obtained for the Construction of the project, all without receiving payment or value from the PSP and/or Facility operator for such payment, contribution or support.
- c) *Direct Government Equity* – Subscription by the LGUs of shares of stock or other securities convertible to shares of stock of the project company, whether such subscription will be paid by the money or assets.
- d) *Cost-Sharing* – Refers to the LGU concerned bearing a portion of capital expenses associated with the establishment of an infrastructure development facility, such as, the provision of access infrastructure, right-of-way, transfer of ownership over, or usufruct, or possession of land, building or any other real or personal property for direct use in the project and/or any partial financing of the project, or components thereof, Provided, that such shall not exceed fifty percent (50%) of the Project Cost, and the balance to be

provided by the PSP. Such government share may be financed from direct government appropriations and/or from Official Development Assistance (ODA) of foreign government or institutions.

- e) *Credit Enhancement* – Support to a development facility by the PSP and/or LGU concerned, the provision of which is contingent upon the occurrence of certain events and/or risks, as stipulated in the contract. Credit enhancements are allocated to the party that is best able to manage and assume the consequences of the risk involved. Credit enhancements may include, but are not limited to, government guarantees on the performance, or the obligation of the LGU under its contract with the PSP.
- f) *Performance Undertaking* – Undertaking of an LGU in assuming responsibility for the performance of the LGU's obligations under the contractual arrangement including the payment of monetary obligations, in case of default. These undertakings may be subject to payment of risk premium to the LGU.
- g) *Legal Assistance* – Extension of representation by government lawyers to a PSP but only in cases, hearings, or inquiries where the LGU and PSP are party-defendants/respondents therein including the adoption by such government lawyers of positions and strategies consistent with upholding the validity of the approved contractual arrangement.
- h) *Security Assistance* – Deployment of government security forces from the Philippine National Police (PNP) in the vicinity of the project site to provide security during the implementation of the project up to completion.

The more an LGU provides support to a BOT Law project, the greater the LGU exposure and stake of an LGU in a project. This will effectively lower the tariff.

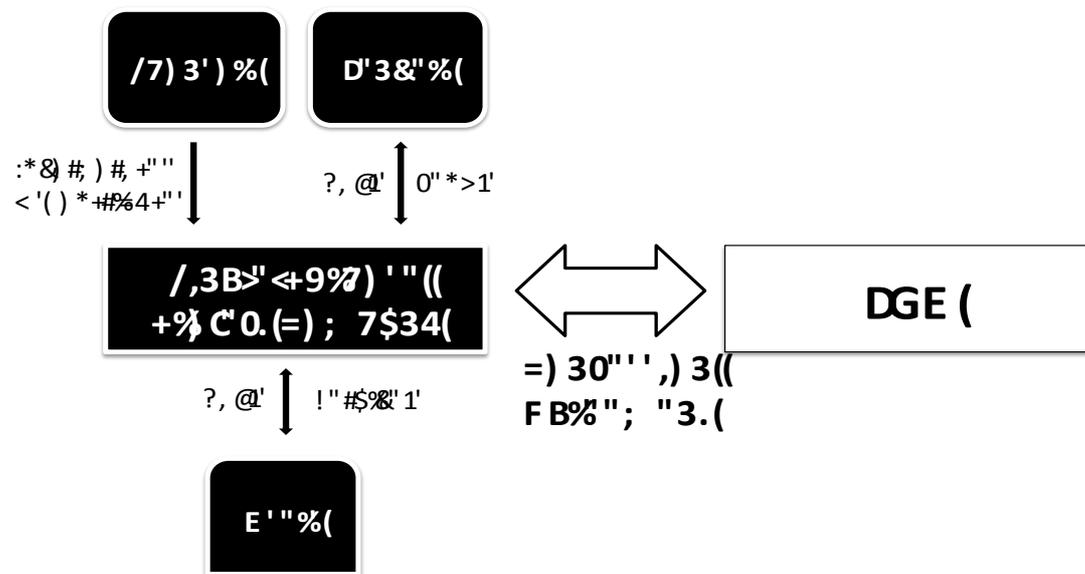
7. *Procedures*. There are three (3) procedures under the BOT Law in the selection of the PSP, i.e., competitive public bidding, unsolicited proposals, and direct negotiations.

- 1) *Competitive Public Bidding* – Refers to open public bidding when an LGU solicits for projects identified by an LGU as part of the list of priority projects.¹²⁵
- 2) *Unsolicited Proposals* – Refer to project proposals submitted by the PSP, not in response to a formal solicitation or request issued by an LGU and not part of the list of priority projects as identified by LGU, to undertake Infrastructure or Development Projects.¹²⁶

- 3) *Direct Negotiation of Contracts.* – Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder:
- a) If, after advertisement, only one contractor applied for prequalification and it meets the prequalification requirements, after which it is required to submit a bid/proposal which is subsequently found by the LGU to be complying.
 - b) If, after advertisement, more than one contractor applied for prequalification but only one meets the prequalification requirements, after which it submits bid/proposal which is found by the LGU to be complying.
 - c) If, after prequalification of more than one contractor, only one submits a bid which is found by the LGU to be complying.
 - d) If, after prequalification, more than one contractor submit bids but only one is found by the LGU to be complying: Provided, That, any of the disqualified prospective bidder may appeal the decision of the LGUs Prequalification Bids and Awards Committee within fifteen [15] working days to the Department of the Interior and Local Government, and from the date the disqualification was made known to the disqualified bidder. Provided, furthermore, that the LGUs concerned should act on the appeal within 45 working days from receipt thereof.¹²⁷
8. *Award Financial Parameters.* Any one or more of the following criteria may be used in the evaluation of the financial component of the bid for determining the most advantageous bid for the LGU:¹²⁸
- a) Lowest proposed toll, fee, rental or charge at the start of project operation, if a pre-agreed parametric tariff adjustment formula is prescribed in the bid document;
 - b) Lowest present value of LGU subsidy to be provided for the period covered by the contract;
 - c) Highest present value of proposed payments to the LGU, such as: concession fees, lease/rental payments, fixed/guaranteed payments, and/or variable payments/percentage shares of revenue for the period covered by the contract; or
 - d) Any other appropriate financial bid parameter as may be approved by the LGU.

9. *Franchise.* In case of a project requiring a utility franchise, the winning PSP shall automatically be granted by the LGU the franchise to operate and maintain the facility, including the collection of tolls, fees, rentals, and other charges in accordance with the schedules stipulated in the approved contract. The original franchise period as stipulated in the contract agreement may be extended, as may be authorized by the concerned authority, provided that the total franchise period shall not exceed 50 years.¹²⁹

D. Local Concessions



1. *Definition.* Concession as defined, under the Proposed PPP Code of Agra, as:

A contractual arrangement whereby the financing and construction of a new facility and/ or rehabilitation of an existing facility is undertaken by the PSP after turnover thereof to it, and includes the operation, maintenance, management and improvement, if any, of the facility for a fixed term during which the PSP generally provides service directly to facility users and is allowed to charge and collect the approved tolls, fees, tariffs, rentals or charges from them. The LGU may receive a concession or franchise fee during the term of the contract and/ or other consideration for the transfer, operation or use of any facility. There may be a transfer of ownership of the asset or facility after the concession period has ended subject to rules of the COA.

Concession broadly refers to any arrangement in which a firm obtains from the government the right to provide a particular service under conditions of significant market power. A concession is thus a device that can be used to create competition for a market, when competition in the market is not operating. Concessions in general may involve public or private enterprises.¹³⁰ To be a PPP, the concessionaire must be a PSP.

2. *Separate Modality.* A concession arrangement is a stand-alone or a distinct modality from other modalities under the Proposed PPP Code of Agra. BOT Law variants and JVs may also incorporate concession or franchise provisions. A grant of concession or franchise is needed in order for a PSP to undertake a PPP modality for a project which is traditionally provided by the LGU or government.

As distinguished from a BOT which is greenfield project (i.e., stand-alone new from-the-ground-up facility), a concession is a brownfield project (i.e., there exists an existing facility which needs to be rehabilitated or improved). Contrasted with JVs, concessions, like BOT Law variants, require that the components or functions – construction, rehabilitation, design, financing, operations and maintenance – are performed by the PSP, not jointly undertaken by the parties.

3. *Components.* In a Concession, in addition to financing, designing, rehabilitating, operating and maintaining the facilities by which the services are rendered, the PSP is further required to perform a range of services that support the realization of the revenues that are the source of compensation by also undertaking the billing, collection and customer relations management activities that are normally undertaken by the LGU. For example, in a water services concession, the PSP becomes the Water Department, with all of the responsibilities that entails, including taking over the government employees that previously worked for government.¹³¹
4. *Local Concession Laws and Projects.* Existing projects of LGUs can be the subject of this PPP modality. There could be concessions on water, public markets, transport terminals, cockpits, among others. For existing facilities, the LGU may also implement an ROT or ROO arrangement under the BOT Law, or a JV or other PPP modalities. The PSP must be given the right through a concession, franchise or license to undertake the projects on behalf of the LGU. That particular concession, franchise or license must be embodied in a resolution which is predicated on the 1991 LGC or a local ordinance.

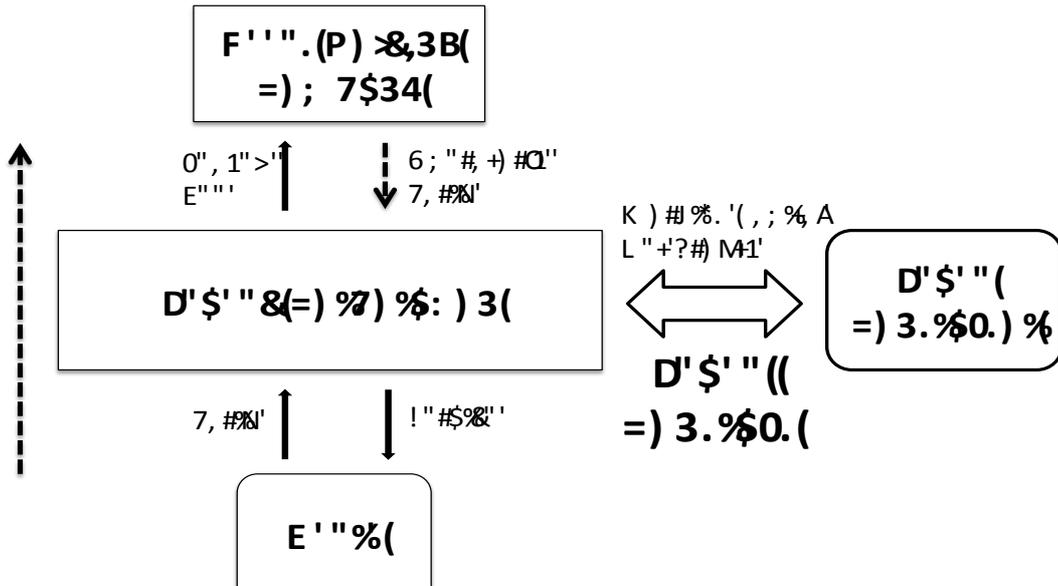
Concessions may be classified into two: Distribution concessions like electricity, water, telecommunications, and gas; wholesale concessions are arrangements where the concessionaire sells to another entity (often a government agency or state-owned enterprise), which in turn sells to the public. Natural monopolies

like water distribution, power transmission and distribution, gas transmission and distribution, railway infrastructure and roads are most suitable candidates for concessions. Other infrastructure businesses, which are potentially competitive, like power generation, gas production, retail of power and gas, mobile telecommunications and rail services may not be suited for concessions.

Concessions for natural monopolies usually confer the winning PSP exclusive right to provide the service. Exclusivity rights make concessions more attractive to potential PSPs. Exclusivity can also prevent other PSPs from inefficiently entering businesses that are naturally monopolistic.¹³²

5. *Period.* The concession period may be for a maximum of 50 years.
6. *Consideration.* A PSP-concessionaire is remunerated entirely through the collection of tariffs or user fees. For being awarded the concession, the PSP shall pay the conceding authority-LGU a concession fee. Like BOT Law variants, the level of the PSP's remuneration is explicitly linked with the level of the average tariff, and thus concessions commonly require that the tariff be set at a level that allows the recovery of the full cost of operations, maintenance and depreciation.¹³³
7. *Risk Allocation.* The allocation of risks shall be similar to BOT Law variants. The PSP or concessionaire typically bears the rehabilitation, construction, financing, and operations and maintenance risks since it is the party responsible for these functions.
8. *Procedures.* The proposed procedures are the same as the procedures for selecting a PSP in a JV arrangement, i.e., competitive selection or bidding, limited negotiations when only one PSP is eligible and submitted a compliant bid, or competitive challenge/ unsolicited proposal. CAT cannot be dispensed with.

E. Leases or Affermage



1. *Definition.* Under the Proposed PPP Code of Agra, a lease or affermage is defined as:

A contractual arrangement providing for operation, maintenance, and management services by the PSP, including working capital and/or improvements to an existing infrastructure or development facility leased by the PSP from the LGU for a fixed term. Under a lease, the PSP retains revenue collected from customers and makes a specified lease payment to the LGU. Under an affermage, the parties share revenue from customers wherein the PSP pays the contracting authority an affermage fee, which varies according to demand and customer tariffs, and retains the remaining revenue. The LGU may provide a purchase option at the end of the lease period subject to rules of the COA.

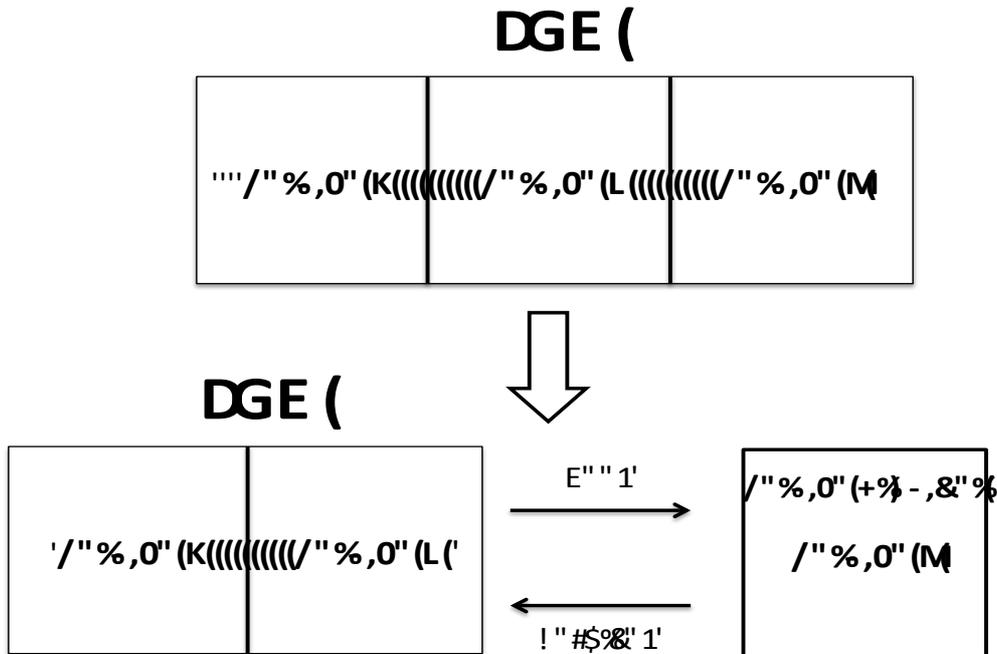
2. *Goal.* The goal of a lease is usually to improve the overall commercial performance and quality of service of an existing public enterprise. Under a lease, the PSP-lessee assumes responsibility for funding the regular operations and maintenance of the leased facilities. In addition to operating and maintaining the facilities, the PSP is also responsible for providing working capital and funding the replacement of short-term assets and of spare parts, etc..¹³⁴

3. *Period.* The duration of a lease is generally between five and ten years, depending upon the payback period for the private operator.¹³⁵ A lease may be for a longer period.

4. *Consideration.* Leases do not explicitly link the PSP's remuneration with the level of the tariff or user fee. Instead, the lessee is paid a "lessee fee" (also known as the "operator's tariff") that is commonly linked with its performance under the contract. In addition, the PSP (lessee) pays a lease fee to the LGU, which uses these revenues to finance capital investments.¹³⁶
5. *Vehicle.* In most cases, the PSP that is awarded the lease will form a SPC that is created specifically to carry out the services under the lease. The PSP maybe staffed with employees that were formerly associated with the LGU. The resulting smaller public enterprise thus takes on the role of an "asset holding company" (AHC) and focuses on the LGU's obligations under the lease agreement.¹³⁷
6. *Lease Agreement.* The lease agreement may contain the following provisions:¹³⁸
 - a) Establishment of a lease period that is sufficient to allow the amortization of any expenditure for new assets by the PSP;
 - b) Determining an annual lease amount to be paid by the PSP that reflects a market value, as determined by reference to similar undertakings;
 - c) Determining the key performance indicators for the activities to be performed upon the leased premises by the PSP, including maintenance and throughput requirements;
 - d) Assessing the regulatory mechanisms by which the PSP imposes fees on third parties that are the customers or beneficiaries of the activities carried on in the leased premises;
 - e) Providing for the taking over of any LGU employees previously involved in performing services on the leased premises, including any residual responsibilities on LGU in that regard upon the termination of the lease;
 - f) Providing for the extension of the lease agreement within a certain period of the date when the lease would otherwise terminate; and
 - g) Providing for the refurbishment/ refreshment of the premises that must be undertaken by the PSP prior to the termination of the lease.
7. *Procedures.* The proposed procedures under the Proposed PPP Code of Agra are the same as the procedures for selecting a PSP in a JV arrangement, i.e., competitive selection or bidding, limited negotiations when only one PSP is eligible and submitted a compliant bid, or competitive challenge/ unsolicited proposal.

While it can be argued that there is no need for competitive selection/ bidding for leases where the LGU is the lessor/ owner of the property since this is not a procurement activity (since LGU funds are disbursed), it would be advisable to comply with CAT.

F. Service Contract



1. *Definition.* A service contract is defined in the Proposed PPP Code of Agra as:

A contractual arrangement whereby the PSP shall provide a particular service to the LGU involving the LGU’s proprietary authority or to entities or corporation created by the LGU. The PSP shall be entitled to be paid a fee per unit of work done during the term of the contract.

2. *Legal Basis.* The legal basis for service contracting is the GPRA. Selecting the PSP or service provider is a procurement activity by an LGU as a procuring entity. Service contracting can either be contractual services or general support services which falls under “goods,”¹³⁹ or consulting services.¹⁴⁰ If the Service Contract does not involve the use or disbursement of local funds, then this would not be considered a procurement contract. Local ordinances, not the GPRA, will be the governing law.

General support services can be trucking, hauling, janitorial, security, and related or analogous services. Contractual services are advisory and review services, pre-investment or feasibility studies; design; construction supervision; management and related services; and other technical services or special studies.

3. *Nature.* In a Service Contract, the LGU pays a fee to a PSP-service provider to provide specific operational services. Service contracting is commonly referred to as “contracting out” and has been increasingly used by public and private sector organizations as a means of reducing operating costs as well as accessing new technologies it could not provide on its own. Such cost reductions are realized through competitive tendering, which awards the contract to the bidder offering to provide the service for the least cost.

It is important that prior to tendering for a service contract, the LGU must determine how much it currently costs (direct and indirect/ overhead costs) to provide the given service itself. This benchmark must be used to compare against outside private bids. If this is not done, it is impossible to tell if a PSP is providing any savings to the LGU.¹⁴¹

4. *Period.* Because the primary benefits of service contracting – the cost reductions – come through more efficient operations, rather than through any new investments in long-term capital assets, these contracts are typically short in duration, commonly lasting between one and two years. Therefore every two years the competitive bidding process helps keep the costs of service low. Service contracts may be renewed.
5. *Projects.* Typically, service contracting has been used to reduce the cost of non-core functions of the LGU, enabling it to focus more on its core competencies. Common examples of functions that might be contracted out include: meter reading; bill collection; leak repair, pot-hole repair, information technology support services; security; and janitorial services.¹⁴²
6. *Obligations of LGUs.* Under a service contract, the PSP provides a service to the LGU, but provides no financing for capital investment. The contractual obligations of government usually entail, amongst others:¹⁴³
 - a) Providing the PSP such information in its possession as will allow the PSP to discharge its responsibilities;
 - b) Providing access to all required public assets and facilities as will allow the PSP to perform the required tasks;
 - c) Requiring proof of the performance of the services procured in a form that is mutually agreeable; and

- d) Payment to the PSP, upon receipt of such proof, usually on a per-unit basis.
7. *Award Parameters.* For contractual services or general support services, the award shall be given to the PSP/ bidder with the "Lowest Calculated Bid" and when it passes all the criteria for post-qualification, the Bid shall be considered the "Lowest Calculated Responsive Bid." For consulting services, the bidder with the "Highest Rated Bid" shall get the contract, and after complying with all the criteria for post-qualification, the bid shall be considered the "Highest Rated Responsive Bid."¹⁴⁴
8. *Procedures.* All procurement for the PSP-service provider shall be done through competitive bidding, except as allowed under alternative methods of procurement.
- a) *Competitive Bidding.* A method of procurement which is open to participation by any interested party and which consists of the following processes: advertisement, pre-bid conference, eligibility screening of prospective bidders, receipt and opening of bids, evaluation of bids, post-qualification, and award of contract.¹⁴⁵
- b) *Alternative Methods.* Subject to the prior approval of the Local Chief Executive or his/ her representative, and whenever justified by the conditions provided under the GPRA, the LGU may, in order to promote economy and efficiency, resort to any of the following alternative methods of procurement applicable to service contracts:
- i. *Limited Source Bidding/ Selective Bidding* — a method of Procurement that involves direct invitation to bid by the LGU from a set of pre-selected PSPs or consultants with known experience and proven capability relative to the requirements of a particular contract (where only a few consultants are known to be available);
 - ii. *Direct Contracting/ Single Source Procurement* — a method of Procurement that does not require elaborate Bidding Documents because the supplier is simply asked to submit a price quotation or a pro-forma invoice together with the conditions of sale, which offer may be accepted immediately or after some negotiations (Procurement of goods of proprietary nature which can be obtained only from the proprietary source, *i.e.* when patents, trade secrets, and copyrights prohibit others from manufacturing the same item; When the procurement of critical plant components from a specific supplier is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of its contract; or Those sold by an exclusive dealer or manufacturer which does not

1. *Definition.* Under the Proposed PPP Code of Agra, a management contract is defined as:

A contractual arrangement involving the management or provision by the PSP of operation and maintenance or related services to an existing infrastructure or development facility owned or operated by the LGU. The project proponent may collect tolls/ fees/ rentals and charges which shall be turned over to the LGU and shall be compensated in the form of a fixed fee and/ or performance-based management or service fee during the contract term.

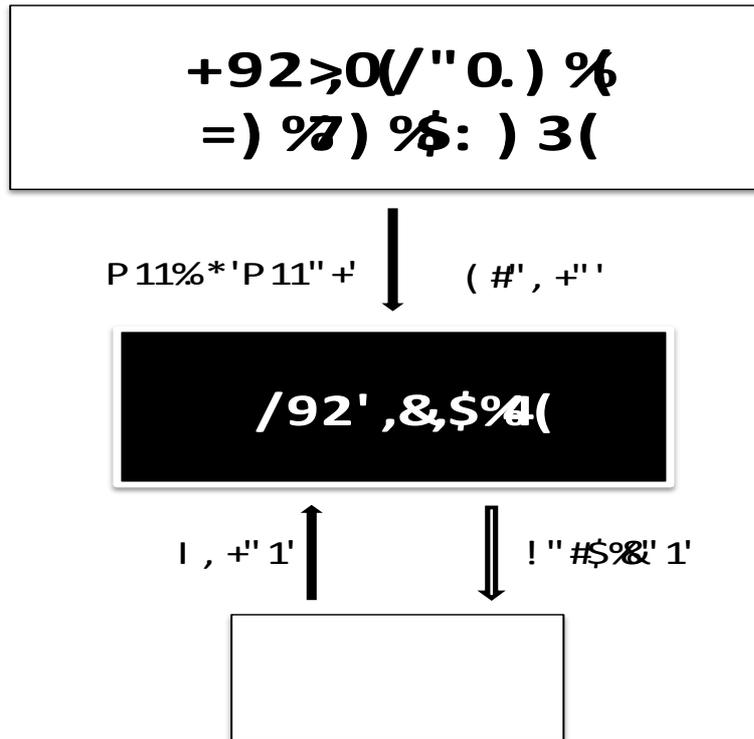
2. *Legal Basis.* Management contracts, like service contracts are procurement contracts governed under the GPRA. Management contracts can be considered a consulting service. If the Management Contract does not involve the use or disbursement of local funds, then this would not be considered a procurement contract. Local ordinances, not the GPRA, will be the governing law.
3. *Nature.* Under a management contract, the PSP assumes responsibility for providing the top-level management team for an existing LGU service delivery system, with the freedom to make day-to-day management decisions. Often this requires providing the top 3-4 management positions. Management contracts do not require significant institutional change to implement. The LGU enterprise generally remains in place which the management contractor-PSP's personnel assuming line management responsibilities.¹⁴⁶
4. *Goal.* The goal of management contracts is typically to improve the overall performance of the LGU enterprise.¹⁴⁷
5. *Period.* The typical duration of a management contract is two to five years. The change requires some time to implement.¹⁴⁸ The management contract can be subject to renewal.
6. *LGU's Obligations.* The obligations of an LGU in a management contract may involve:¹⁴⁹
 - a) Determining, with the PSP, the mechanisms for handling employee performance matters, including discipline and terminations;
 - b) Obtaining the input from the PSP on the operational and maintenance financing needs of the service delivery system, and providing sufficient funding for the operations to be maintained at the agreed upon level;

- c) If the PSP is required to advance any capital expenditure, agreeing on the timing and amount of such expenditure, in a manner that will permit government to (a) agree on the necessity for such expenditure and (b) provide adequate time for government to budget for such expenditure so that it may reimburse the private sector service provider in a timely manner;
 - d) Agreeing with the PSP on the KPIs for the operations and management of the service delivery system in order to receive remuneration; and
 - e) Compensating the PSP in a timely fashion upon receipt of reports indicating that the service delivery system has been managed in accordance with the contract, including the payment of any incentives for performance above the KPIs, and for deducting any penalties for performance below them.
7. *PSP Remuneration.* Under a management contract, the PSP's remuneration is typically some combination of a fixed fee as well as performance-related pay (called "incentive compensation"). By linking a portion of the PSP's pay with its performance, LGU can ensure that the management contractor's priorities are in line with the overall organizational objectives. The overall amount of remuneration is generally determined through the competitive tendering process, with the management contract awarded to that bidder offering to provide the services for the lowest price.

This form of payment does not explicitly link the management contractor's remuneration with the level of the average tariff. Rather, the management contractor's payment becomes a line item in the LGU's budget. As such, management contracts can be useful instruments where tariffs or user fees are not set at a level that allows for full cost recovery.¹⁵⁰

8. *Procedures.* Management contracts, like service contracts, are governed by the GPRA. The process for selecting a management contractor shall be same as choosing a PSP-service provider, as discussed above. If no public funds will be expended, competitive selection, competitive challenge or competitive negotiations may be undertaken.

H. Corporatization



1. *Definition.* Corporatization under the Proposed PPP Code of Agra refers to:

Transformation of a public entity or quasi-municipal corporation established by the LGU into one that has the structure and attributes of a private corporation, such as a board of directors, officers, and shareholders, and having it registered with the SEC as a stock corporation. The process involves the establishment of a distinct legal identity for the company under which the LGU's role is clearly identified as owner; segregation of the company's assets, finances, and operations from other LGU operations; and development of a commercial orientation and managerial independence while remaining accountable to the government or electorate.

Corporatization refers to institutional arrangements where the public retains ownership but control rights over business decisions are handed over from politicians to managers.¹⁵¹

2. *Features.* Corporatization has the following features:¹⁵²

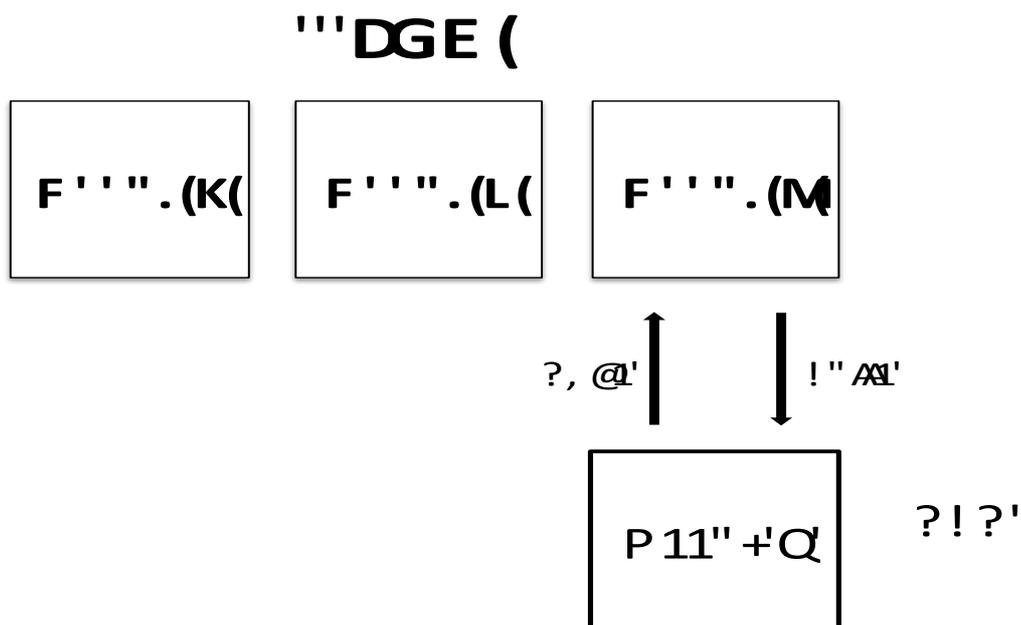
a) *Separate legal entity.* The organization is legally established as an independent entity.

- b) *Managerial autonomy.* Management has virtually complete control over all inputs and issues related to production of services.
 - c) *Transparency and reporting.* The corporation becomes subject to prevailing company law and accounting rules in the country (i.e., Corporation Code, Rules of the SEC).
 - d) *Assets and Liabilities.* The LGU will have transferred to it the assets and liabilities appropriate for it to perform its functions and to be viable.
 - e) *Public law and private law.* Instead of being subject to administrative law and the administrative courts, which is different from that applicable to private citizens and companies, corporatization may result in the corporation becoming subject to private law but not in all cases. Restrictions should be in place in order to prevent any divestment of the LGU's full control over the corporation and the diminution of its assets, and other interests. The Board of directors will represent the LGU's interests but will also have fiduciary duties to the corporation's wellbeing and potentially to other stakeholders such as customers and creditors.
 - f) *Staffing.* The corporation follows different recruiting and staffing rules from the civil service rules.
 - g) *Greater financial independence.* Corporatization allows for increased portion of revenue coming from sales (rather than budget allocation), increased possibilities for keeping and using extra revenue, as well as a hard budget constraint: allowing company to retain excess revenues, but is also making it responsible for losses.
3. *Goal and Activities.* The guiding principle of corporatization is the intent to capture the advantages of a privately run company – including efficiency, productivity, and financial sustainability – while retaining government accountability. The transformation from a public entity to one with the commercial orientation of a private company would typically include three ring-fencing activities:
- a) Establishment of a distinct legal identity for the company under which the government's role is clearly identified as owner;
 - b) Segregation of the company's assets, finances, and operations from other government operations; and
 - c) Development of a commercial orientation and managerial independence while remaining accountable to the government or electorate.¹⁵³

4. *Procedures.* The authority to create a corporation and to provide for its capitalization is evidently vested in the local legislative council. An ordinance authorizes the creation of the corporation, and adopts its articles of incorporation and by-laws, provides for sources of funds or capital contribution, and specifies the rights and obligations of the incorporators, directors, and shareholders vis-à-vis the LGU.

Incorporation imbues the new or offspring corporation with a legal personality separate from the parent LGU. It allows the LGU to limit its liability up to the extent of its investment in the capital of the corporation. This is intended to protect the LGU's (other) assets from being used to discharge the liabilities of the corporation. Incorporation also grants the entity formed the right to enter into contracts, to sue and be sued, to borrow money or to invest funds, and to own property. It allows for governance by a board of directors, which shall be accountable to the shareholders, consisting wholly or partially of the LGU itself.

I. Divestment/ Disposition



1. *Definition.* Divestment or disposition is defined under the Proposed PPP Code of Agra as a:

Manner or scheme of taking away, depriving, withdrawing of title to a property owned by the LGU and vesting ownership thereof to a PSP.

Divestment is often referred to as “privatization.”

Under COA Circular No. 89-296 (January 27, 1989), divestment shall refer to the manner or scheme of taking away, depriving, withdrawing of an authority, power or title. As opposed to investment which signifies the delivery of possession of anything to another, divestment connotes taking away and/or withdrawal of such possession and title.

2. *Governing Law.* For Dispositions, COA Circular No. 89-296 (January 27, 1989) shall govern.

The full and sole authority and responsibility for the divestment or disposal of property and other assets owned by the LGU shall be lodged in the Local Chief Executive according to the Circular.¹⁵⁴

3. *Nature.* In procurement, LGU funds are used where ownership of private property or goods is transferred from the private sector (seller) to the LGU (buyer). In divestment, the reverse happens. Private funds are used as consideration for the transfer of ownership of LGU property from the LGU (seller) to the private sector (buyer).
4. *Separate Modality.* Divestment can take place independent of or as an integral portion of other PPP modalities. Under the BOT Law, the asset can be owned in perpetuity by the PSP under a BOO or ROO arrangement. In a JV, the ownership of the asset or facility can be transferred to the PSP before or after the expiry of the JVA.
5. *Procedures.* The property of the LGU can be disposed through public auction or sale through negotiation.
 - a) *Public Auction.* Conformably to existing state policy, the divestment or disposal of LGU property as contemplated herein shall be undertaken primarily thru public auction. Such mode of divestment or disposal shall observe and adhere to established mechanics and procedures in public bidding:
 - i. adequate publicity and notification so as to attract the greatest number of interested parties;
 - ii. sufficient time frame between publication and date of auction;
 - iii. opportunity afforded to interested parties to inspect the property or assets to be disposed of;

- iv. confidentiality of sealed proposals;
- v. bond and other prequalification requirements to guarantee performance; and
- vi. fair evaluation of tenders and proper notification of award.

It is understood that the Government reserves the right to reject any or all of the tenders.

- b) *Sale through Negotiation*. For justifiable reasons and as demanded by the exigencies of the service, disposal thru negotiated sale may be resorted to and undertaken by the LGU taking into consideration the following factors:
- i. There was a failure of public auction. There is failure of public auction in any of the following instances: if there is only one offeror; and if all the offers/tenders are non-complying or unacceptable.
 - ii. The negotiation may be conducted singly, i.e., on a one-on-one basis, or in groups, provided that due communication between the offerors and the government is established with a view to ensuring that the LGU gets the best price.
 - iii. To avert possible confabulation among unscrupulous parties, a record of the proceedings of the negotiation must be maintained.
 - iv. It is understood that the price agreed upon at the negotiation shall not be lower than the floor price as fixed by the LGU or the highest offer submitted at the failed public auction whichever is higher.

The Office of the Treasurer shall undertake the negotiated sale subject to approval by the proper Committee on Award. Where the acquisition or transfer cost of the property exceeds ₱5,000.00 in the case of provinces and cities, the approval of COA is required. In the case of municipalities, where the acquisition or transfer cost of the property is more than ₱3,000.00, the approval of the Provincial Auditor is required.

In all modes or instances of disposal of government property or assets, the proceedings shall be undertaken by the appropriate authority in the presence of the Auditor or other COA representative who shall act as an intelligent, responsive and articulate witness thereto. The said act of witnessing shall not be confined merely to seeing what is being done during the proceedings but

shall be related to the more meaningful discharge by the Auditor of his/her constitutional duty to examine, audit and settle all accounts pertaining to the expenditures or uses of government funds and property. Thus, the Auditor acting as such witness may verbally advise the Local Chief Executive or his/her duly authorized representative of any objectionable feature/s of the proceedings. Otherwise, s/he may sign documents and other papers pertinent only to those proceedings which s/he witnessed with his comments which s/he deems necessary under the circumstances.

J. Rehabilitation Variants

1. *List of Variants.* The three (3) additional rehabilitation variants (other than the ROT and ROO variants mentioned in the BOT Law) are: Rehabilitate-Transfer (RT), Rehabilitate-Lease-and-Transfer (RLT) and Rehabilitate-Transfer-and-Operate (RTO).
2. *Definitions.* Under the Proposed Code of Agra:
 - a) RT is a contractual arrangement whereby an existing facility is turned over to the PSP to refurbish and operate, and after its completion, turns it over to the Province/ City/ Municipality, which shall pay the PSP, on an agreed schedule, its total investment expended on the project, plus a reasonable rate of return thereon.
 - b) RLT is a contractual arrangement whereby an existing facility is turned over to the PSP to refurbish and operate, and upon its completion, turns it over to the Province/ City/ Municipality on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to the Province/ City/ Municipality.
 - c) RTO is a contractual arrangement whereby an existing facility is turned over to the PSP to refurbish and operate. Once the facility is commissioned satisfactorily, title is transferred to the Province/ City/ Municipality. The PSP, however, operates the facility on behalf of the Province/ City/ Municipality under an agreement.
3. *Legal Basis.* These three (3) rehabilitation variants are governed by local ordinances. These variants are not found in the list of variants under the BOT Law. Only ROT and ROO are in the enumeration.
4. *Nature.* Rehabilitation modalities are referred to as “brownfield” projects, unlike “build” variants which are known as “greenfield.”

5. *Period.* RT is a “turnkey” contract. RLT can be a medium term contract, while the RTO can be a medium- or long-term contract.
6. *Procedures.* The selection of the PSP for these variants may be done through competitive selection, limited negotiations or competitive challenge.

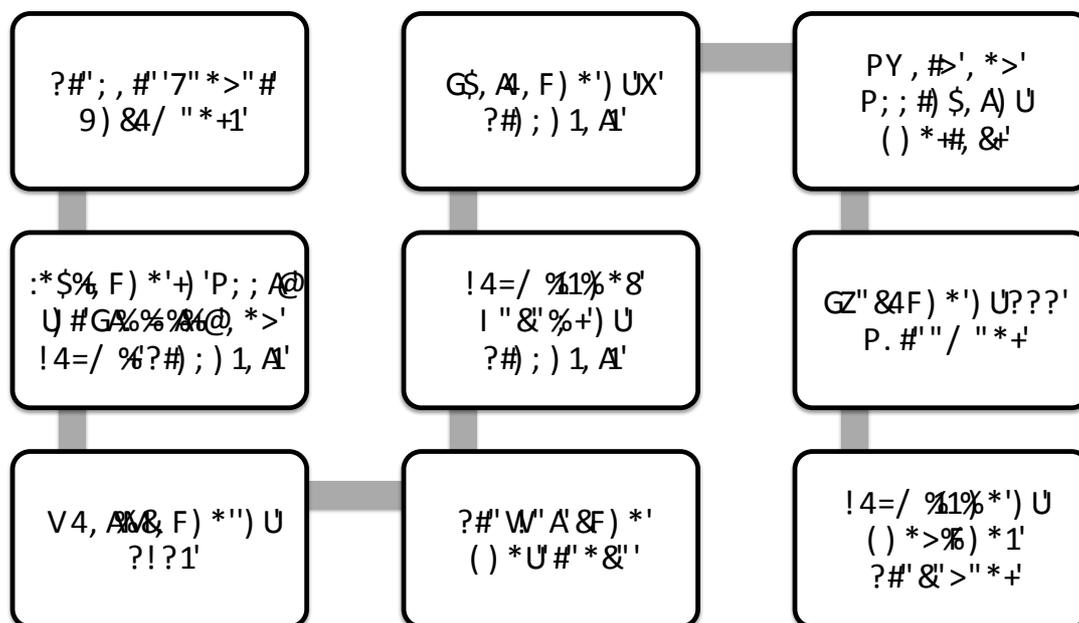
V. PSP Selection Procedures

A. General Requirements

1. *CAT.* The selection of the PSP must be undertaken through a process which adheres to competition, accountability and transparency or CAT. These are the core legal requirements of government contracts with the private sector. Procurement of JV Projects must be competitive and must be undertaken through open competitive bidding or competitive challenge, or in certain cases, limited negotiations. Competition must be legitimate, fair and honest.
2. *Effect if Failure.* Failing to comply with CAT could render the PPP contract is void. Straight negotiations without CAT is not permitted and could subject the local officers liable under the Anti-Graft and Corrupt Practices Act for giving any private party any unwarranted benefits, advantage or preference in the discharge of official administrative functions through manifest partiality, evident bad faith or gross inexcusable negligence.¹⁵⁵
3. *Four Procedures.* In the selection of the PSP, there are four (4) procedures available for the LGU, i.e., Competitive Selection, Limited Negotiations, Competitive Challenge and Competitive Negotiations.

Competitive Selection or Bidding or Open Competition is a method of selection or procurement initiated and solicited by the LGU, based on a transparent criteria, which is open to participation by any interested party. Competitive Challenge or Swiss Challenge is an alternative selection process wherein third parties or challengers shall be invited to submit comparative proposals to an unsolicited proposal. Accordingly, the PSP that submitted the unsolicited proposal, or the original proponent, is accorded the right to match any superior offers given by a comparative PSP/ challenger. Limited Negotiations happens where the desired project is the result of an unsolicited proposal from a PSP or, where the LGU has failed to identify an eligible PSP for a desired PPP activity when there is only one qualified bidder after subjecting the same to a competitive selection or bidding. Competitive Negotiations is a process where the Province/ City/ Municipality negotiates with eligible and qualified PSPs and awards the project to that PSP which offers the best combination of quality and price.

B. Competitive Selection and Limited Negotiations



1. BOT Law Variants. Under the BOT Law and its 2012 IRR, the basic steps are:

- 1) *Project ID and Preparation.* LGUs are tasked to prepare their infrastructure or development programs and to identify specific priority projects that may be financed, constructed, operated and maintained by the PSP through the BOT Law variants. LGUs shall provide wide publicity of the List of Priority Projects proposed for implementation.
- 2) *Approval by Approving Body.* Local projects to be implemented by the LGUs shall be submitted by the concerned LGU for confirmation, as follows:
 - a) to the municipal development council for projects costing up to PhP 20 million;
 - b) to the provincial development council for those costing above PhP 20 million up to PhP 50 million;
 - c) to the city development council for those costing up to PhP 50 million;
 - d) to the regional development council or, in the case of Metro Manila projects, the Regional Development Council for Metropolitan Manila, for those costing above PhP 50 million up to PhP 200 million; and

- e) to the NEDA- Investment Coordination Committee (NEDA-ICC) for those costing above PhP 200 million.

Final approval of projects classified under (i) to (iv) is vested on the Local Sanggunians per provisions of the 1991 LGC. Project cost refers to the total cost to be expended to plan, develop and construct the project to completion stage including but not limited to cost of feasibility studies engineering and design, construction, equipment, land and right-of-way, taxes imposed on said cost, and development cost.

- 3) *Preparation of Pre-Qualification Documents.* The LGU shall prepare the bid/tender documents, which shall include the following:
 - a) Instructions to Bidders;
 - b) Minimum Design, Performance Standards/Specifications, and Economic Parameters” such as discount rate, inflation factor and foreign exchange rate, where applicable, among others;
 - c) Draft Contract;
 - d) Bid Form reflecting the required information to properly evaluate the bid proposal;
 - e) forms of bid and performance securities;
 - f) requirements and timelines/milestones of concerned Agencies in granting of franchise, if applicable; and
 - g) other documents as may be deemed necessary by the LGU.
- 4) *Advertisement/ Invitation to Pre-Qualify and Bid.* The LGU shall, after obtaining approval for the project, forthwith cause to be published, once every week for three (3) consecutive weeks, in at least two (2) newspapers of general circulation and in at least one (1) local newspaper of general circulation in the region, province, city or municipality in which the projects are to be implemented, a notice inviting all prospective infrastructure or development Project Proponents to pre-qualify and bid for the projects so approved. Said invitation should also be posted continuously in the website of the LGU concerned.
- 5) *Pre-Qualification of Bidders.* To pre-qualify, a prospective PSP must comply with the Legal (nationality and joint and several liability if

consortium), Experience or Track Record (firm experience and personnel), Financial (debt and equity) requirements.

All prospective bidders shall be required to submit, as part of their qualification documents, a statement stipulating that the bidder: (i) has accepted the qualification criteria established by the Pre-qualification, Bids and Awards Committee (PBAC) of the LGU concerned, and (ii) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the concerned LGU 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 contract to a successful bidder, and the carrying out of the awarded contract. Such waiver shall, however, be without prejudice to the right of a disqualified or losing bidder to question the lawfulness of its disqualification or 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.

- 6) *Issuance of Tender Documents.* The LGU shall make available the related bid documents to all pre-qualified bidders upon completion of pre-qualification evaluation and issuance of notice of pre-qualification/disqualification to provide respective bidders ample time to examine the same and to prepare their respective bids prior to the date of opening of bids.
- 7) *Bid Submission and Evaluation.* In the exigency of service, the LGU Head may opt to do a simultaneous qualification instead of a pre-qualification of proponents. In case of simultaneous qualification, the publication of the invitation shall be for the submission of qualification requirements and bid proposals. The bidders shall be asked to submit their proposal in three envelopes; the first envelope - the qualification documents; the second envelope - the technical proposal; and the third envelope - the financial proposal.
- 8) *Conduct of Pre-Bid Conference.* For projects costing less than PhP 300 million, a pre-bid conference shall also be conducted by the LGU at least thirty (30) calendar days before the deadline for the submission of bids to clarify any provisions, requirements and/or terms and conditions of the bidding documents and/or any other matter that the prospective bidders may raise. For projects costing PhP 300 million and above, the pre-bid conference shall be conducted no later than sixty (60) calendar days before the submission of bids. Nothing stated at the pre-bid conference shall modify any provisions or terms and conditions of the bidding documents unless such is made as a written amendment thereto by the LGU.

- 9) *Submission and Opening of Bids.* For pre-qualified bidders, their bids shall be submitted in at least two (2) separate sealed envelopes, the first being the technical proposal and the second the financial proposal. In case of simultaneous qualification, at least three (3) envelopes shall be submitted. The first envelope shall be the qualification requirements, the second the technical proposal and the third the financial proposal.

The *Technical Proposal* shall contain the following requirements, as may be deemed necessary by the LGU:

- a) Acceptance/Compliance statements with regard to all terms and conditions in the tender documents including those with regard to financial parameters and any changes which were made thereto by the LGU prior to bid submission;
- b) Operational feasibility of the project, which shall indicate the proposed organization, methods and procedures for the operation and maintenance of the project under bidding;
- c) Technical soundness/preliminary engineering design, including proposed project timeline;
- d) Preliminary environmental assessment, which shall indicate the probable adverse effects of the project on the environment and the corresponding mitigating measures to be adopted;
- e) Project Cost;
- f) Bid Security. The LGU shall determine which form of Bid Security it will require which may be in 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 Government Service Insurance System (GSIS) or an entity duly registered and recognized by the Office of the Insurance Commissioner and acceptable to the LGU, or any combination thereof payable to the LGU concerned based on the total Project Cost (as indicated by the prospective PSP) in accordance with the following schedules:

<i>PROJECT COST (as estimated by the LGU or proposed by the Project Proponent)</i>	<i>Required BID Security</i>
less than PhP 5.0 billion	2.0% of the Project Cost

PhP 10.00 billion and more	1.0% of the Project Cost or PhP 150 million, whichever is higher
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The LGU shall determine whether the Bid Security shall be issued by a local bank, an international bank, or both. In case the bid security is issued by an international bank, said security has to be confirmed and validated by its local branch in the Philippines or by a bank that is duly registered and authorized by the BSP.

The posting of the bid security is for the purpose of guaranteeing that the proposed contract awardee shall enter into contract with the LGU within the time prescribed therefor.

Bids and bid securities shall be valid for a period to be prescribed by the LGU concerned in the bidding documents but in no case beyond one hundred and eighty (180) calendar days from the date of opening of bids. The actual amount of bid security to be posted by the bidders will be fixed by the LGU prior to bidding. Said actual amount shall not be less than the amount prescribed in the above schedule.

- g) Other documents as may be required by the concerned LGU to support the bidder's technical proposal.

The *Financial Proposal* shall contain the following, as the case may be:

- a) Proposed Project Cost, operation and maintenance cost, and all other related costs;
- b) Project financing scheme, which may include the amount of equity to be infused, debt to be obtained for the project, and sources of financing; and
- c) Financial bid corresponding to the parameters set by the LGU.

At the date and time of bid opening, the PBAC shall open only the technical proposal and ascertain whether the same is complete in terms of the data/information required and whether the same is accompanied by the required bid security in the prescribed form, amount and period of validity.

Only those bidders whose technical proposal passed the evaluation criteria shall have their financial proposal opened for further evaluation. Those who failed the evaluation of the technical proposal shall not be considered further, and the PBAC shall return their financial proposals unopened together with the reasons for their disqualification from the bidding.

The evaluation of bids shall be undertaken in two (2) stages, in accordance with the procedures described below. The first envelope evaluation shall involve the assessment of the technical soundness, operational feasibility, environmental standards and project financing, and financing viability of the proposal as contained in the bidders' first envelopes vis-à-vis the prescribed requirements and criteria/minimum standards and basic parameters prescribed in the bidding documents. Only those bids that have been determined to have positively passed the first stage of evaluation shall be qualified and considered for the second stage of evaluation.

Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder:

- i. If, after advertisement, only one prospective Project Proponent applies for pre-qualification and it meets the pre-qualification requirements, after which, it is required to submit a bid/proposal which is subsequently found by the LGU to be complying;
- ii. If, after advertisement, more than one prospective Project Proponent applied for pre-qualification but only one meets the pre-qualification requirements, after which it submits a bid proposal that is found by the LGU to be complying;
- iii. If, after pre-qualification of more than one prospective Project Proponent, only one submits a bid which is found by the LGU to be complying; or
- iv. If, after pre-qualification, more than one prospective Project Proponent submit bids but only one is found by the LGU to be complying.

10) *Recommendation to Award.* The LGU PBAC will submit to the Local Chief Executive a recommendation of award from the date the financial evaluation shall have been completed. The PBAC will prepare and submit a detailed evaluation/ assessment report on its decision regarding the evaluation of the bids and explain in clear terms the basis of its recommendations.

11) *Issuance of Notice of Award.* From the submission by PBAC of the recommendation to award, the Local Chief Executive shall decide on the award. The approval shall be manifested by signing and issuing the “Notice of Award” to the winning PSP.

The “Notice of Award”, which is issued by the LGU, shall indicate, among others, that the winning PSP must submit the following:

- a) prescribed performance security;
- b) proof of commitment of the required equity contribution, as specified by the LGU:
 - i. in the case where the PSP is a corporation - e.g., treasurer’s affidavit attesting to actual paid-up capital, subscription agreement(s) between a shareholder(s) of the PSP and the PSP itself covering said equity contribution, or shareholders agreement between and amongst two (2) or more shareholders of the PSP undertaking to contribute/subscribe the required equity contribution; or
 - ii. in the case of a consortium - an undertaking of the members thereof to infuse the required equity contribution to the consortium.
- c) proof of firm commitments from reputable financial institution to provide sufficient credit lines to cover the total estimated cost of the project;
- d) in the case of a consortium, the agreement indicating that the members are jointly and severally liable for the obligations of the PSP under the contract; or
- e) in case a SPC is formed for purposes of undertaking the project, proof of registration in accordance with Philippine laws.
- f) such other conditions imposed by the LGU.

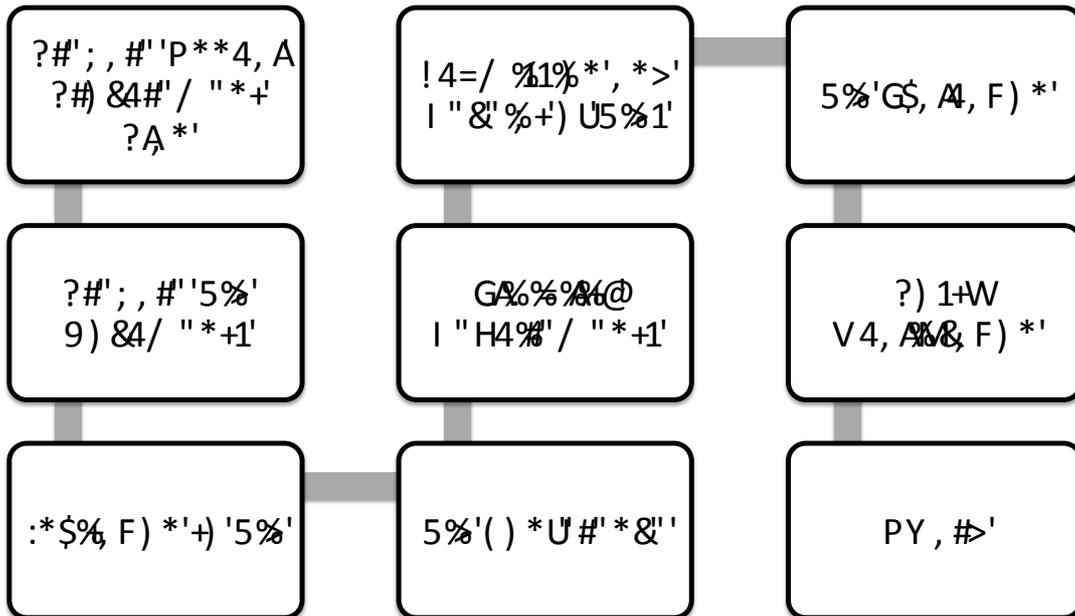
12) *Execution/ Approval of Contract.* The authorized signatory(ies) of the winning bidder and the LGU shall execute and sign the contract from receipt by the winning bidder of the notice from the LGU that all conditions stated in the Notice of Award have been complied with.

13) *Issuance of Notice to Commence Implementation.* The LGU, when deemed necessary, shall issue the “Notice to Commence Implementation” of the project to the proponent within a reasonable period to be determined by the LGU and stated in the contract.

2. *JVs Leases and Local Concessions.* Under the Proposed PPP Code and JV Ordinance of Agra, the Competitive Selection procedure shall consist of the following steps: advertisement, issuance of instructions and tender documents, conduct of pre-bid conferences, eligibility screening of prospective bidders, receipt and opening of bids, posting of proposal securities, evaluation of bids, post-qualification, and award of contract. The details of these may be provided by the LGU through the PPP-Selection Committee (PPP-SC) or JV-SC. The details, which may vary from project to project, shall be supplied to the LGU.

Where the LGU has failed to identify an eligible PSP for a desired PPP activity when there is only one qualified bidder after subjecting the same to a competitive selection or bidding or where the desired JV project is the subject of an unsolicited proposal from a PSP, Limited Negotiations may take place. The negotiations will cover all the technical and financial aspects of the JV project or activity; provided, that the minimum designs, performance standards/specifications and economic parameters stated in the Project Study and Terms of Reference for the Competitive Selection are complied with. The Local Chief Executive shall approve the terms of the Limited Negotiations prior to the award of the contract to the PSP.

3. *Service and Management Contracts.* Under the GPRA, the steps in procuring service and management contracts are:



- 1) *Preparation of Annual Procurement Plan.* All procurement should be within the approved budget of the LGU and should be meticulously and judiciously planned by the LGU. No government procurement shall be undertaken unless it is in accordance with the approved Annual Procurement Plan of the LGU. The Annual Procurement Plan shall be approved by the Local Chief Executive and must be consistent with its duly approved yearly budget.
- 2) *Preparation of the Bid Documents.* The Bidding Documents shall be prepared by the LGU. The Bidding Documents shall include the following: Approved Budget for the Contract; Instructions to Bidders, including criteria for eligibility, bid evaluation and post-qualification, as well as the date, time and place of the pre-bid Conference (where applicable), submission of bids and opening of bids; Terms of Reference; Eligibility Requirements; Plans and Technical Specifications; Form of Bid, Price Form, and List of Goods or Bill of Quantities; Delivery Time or Completion Schedule; Form and Amount of Bid Security; Form and Amount of Performance Security and Warranty; and Form of Contract, and General and Special Conditions of Contract.
- 3) *Invitation to Bid and Pre-Bid Conference.* Prior to the issuance of the Invitation to Bid, the PBAC is mandated to hold a pre-procurement conference on each and every procurement. The pre-procurement conference shall assess the readiness of the procurement in terms of confirming the certification of availability of funds, as well as reviewing all relevant documents in relation to their adherence to law.

All Invitations to Bid for contracts under competitive bidding shall be advertised by the LGU in such manner and for such length of time as may be necessary under the circumstances, in order to ensure the widest possible

dissemination thereof, such as, but not limited to, posting in the LGU's premises, in newspapers of general circulation, the G-EPS and the website of the LGU. At least one pre-bid conference shall be conducted for each procurement.

- 4) *Eligibility Requirements.* The PBAC shall determine the eligibility of prospective bidders based on the bidders' compliance with the eligibility requirements.
- 5) *Submission and Receipt of Bids.* A bid shall have two (2) components, namely the technical and financial components which should be in separate sealed envelopes, and which shall be submitted simultaneously. All Bids shall be accompanied by a Bid security, which shall serve as a guarantee that, after receipt of the Notice of Award, the winning bidder shall enter into contract with the LGU within the stipulated time and furnish the required performance security. The PBAC shall publicly open all bids at the time, date, and place specified in the bidding documents.
- 6) *Bid Evaluation.* Prior to Bid evaluation, the BAC shall examine first the technical components of the bids using "pass/fail" criteria to determine whether all required documents are present. Only bids that are determined to contain all the bid requirements of the technical component shall be considered for opening and evaluation of their financial component.

For the procurement of general services, the PBAC shall evaluate the financial component of the bids. The bids that passed the preliminary examination shall be ranked from lowest to highest in terms of their corresponding calculated prices. The bid with the lowest calculated price shall be referred to as the "Lowest Calculated Bid." For the Procurement of Consulting Services, the Bids of the short listed bidders shall be evaluated and ranked using numerical ratings in accordance with the evaluation criteria stated in the Bidding Documents, which shall include factors such as, but not limited to, experience, performance, quality of personnel, price and methodology. The Bids shall be ranked from highest to lowest in terms of their corresponding calculated ratings. The Bid with the highest calculated rating shall be the "Highest Rated Bid."

- 7) *Post-Qualification.* Post-qualification is the stage where the bidder with the Lowest Calculated Bid, in the case of general contractual services, or the Highest Rated Bid, in the case of Consulting Services, undergoes verification and validation whether he has passed all the requirements and conditions as specified in the Bidding Documents.

- 8) *Award*. Within a period not exceeding fifteen (15) calendar days from the determination and declaration by the PBAC of the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid, and the recommendation of the award, the Local Chief Executive shall approve or disapprove the said recommendation. In case of approval, the Local Chief Executive shall immediately issue the Notice of Award to the bidder with the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid.

C. Competitive Challenge/ Unsolicited Proposals

1. *BOT Law Variants*. Under the 2012 BOT IRR:

- 1) *Conditions*. LGU may accept Unsolicited Proposals on a negotiated basis provided that all the following conditions are met:

- a. the project involves a new concept or technology as determined by the LGU and/or is not part of the List of Priority Projects;

The PSP proposing a project involving a new concept or technology shall incorporate in its proposal information regarding said new concept or technology which it should have directly, or through any of its key members, successfully implemented at a scale similar to the proposed project. The information disclosed must be in sufficient detail so as to allow the LGU to properly evaluate the new concept or technology. Additionally, the new technology must possess at least one of the following attributes:

- i. A recognized process, design, methodology or engineering concept which has demonstrated its ability to significantly reduce implementation of Construction costs, accelerate project execution, improve safety, enhance project performance, extend economic life, reduce costs of facility maintenance and operations, or reduce negative environmental impact or social/economic disturbances or disruptions either during the project implementation/Construction phase or the operation phase;
- ii. A process for which the PSP or any member of the proponent consortium possesses exclusive rights, either world-wide or regionally; or
- iii. A design, methodology or engineering concept for which the proponent or a member of the proponent consortium or association possesses intellectual property rights.

- b. no Direct Government Guarantee, subsidy or equity is required; and
 - c. the LGU concerned has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days.
- 2) *Complete Proposal*. For an unsolicited proposal to be considered by the LGU, the PSP has to submit a complete proposal, which shall include a cover letter, feasibility study which should indicate relevant assumptions, company profile, the draft contract and other documents that are needed even if proprietary in nature.

In the case where the LGU receives more than one Unsolicited Proposal involving the same or similar project prior to acceptance of the proposal as the “original proponent,” the LGU may reject all such proposals or instead, bid out the project as a solicited proposal. Otherwise, the LGU shall evaluate the proposals using a first in time approach. Under this approach, the first complete proposal is evaluated and decided upon. The second complete proposal will only be entertained if the first one is rejected. Otherwise, the second proposal will be considered only if there is a failure in the negotiation of the first proposal or during the invitation for comparative proposals.”

- 3) *Evaluation and Acceptance*. The LGU is tasked with the evaluation of the proposal. The LGU shall: 1) appraise the merits of the project; 2) qualify the proponent; 3) assess the appropriateness of the contractual arrangement and reasonableness of the risk allocation; 4) recommend a reasonable ROR; and, 5) inform the NEDA-ICC and the PPP Center of its receipt of an Unsolicited Proposal. The LGU shall evaluate the proposal, qualify the proponent, and advise whether it accepts or rejects the proposal. The LGU shall indicate in its letter of acceptance the confirmation of the proponent as “original proponent.”

In case of acceptance, the LGU shall endorse the unsolicited proposal and submit all pertinent documentation to the NEDA-ICC/Approving Body. At this point, the LGU will no longer entertain other similar proposals unless the parties are unable to agree during the period for negotiations, or the original proponent is unable to comply with the parameters set by the Approving Body, or until the solicitation of comparative proposals has been completed.

- 4) *NEDA-ICC Determination of RoR*. The LGU shall endorse to the NEDA-ICC the proposed unsolicited project. The NEDA-ICC shall determine the reasonable

RoR on investments and operating and maintenance cost based on the reasonable ROR recommended by the LGU.

- 5) *Approval of Contract.* The LGU shall review and approve the draft contract which shall be based on the parameters, terms and conditions set forth by the Approving Body. Prior to approval of the LGU, the draft contract shall undergo review by the statutory counsel of LGUs.
- 6) *Tender Documents.* The qualification and tender documents shall be prepared. The draft contract as agreed upon by the LGU and the original proponent and as approved by the LGU, which shall be part of the tender documents, will be considered final and non-negotiable by the comparative proponents. Proprietary information shall, however, be respected, protected and treated with utmost confidentiality. As such, it shall not form part of the bidding/tender and related documents.
- 7) *Invitation for Comparative Proposals.* The LGU PBAC shall publish the invitation for comparative proposals after receipt of the notification from the Original Proponent that the latter accepts all the terms and conditions. The invitation for comparative or competitive proposals should be published at least once every week for three (3) consecutive weeks in at least one (1) newspaper of general circulation. Said invitation should also be posted continuously in the website of the LGU concerned, if available.
- 8) *Posting of Bond.* The original proponent shall be required at the date of the first day of the publication of the invitation for comparative proposals to submit a bid bond equal to the amount and in the form required of the comparative proponents.
- 9) *Qualification of Comparative Proposals.* The evaluation criteria used for qualifying the original proponent should be the same criteria used in the "Term of Reference" for the comparative proponents.
- 10) *Evaluation of Comparative Proposals.* Proposals shall be evaluated in three stages: Stage 1, qualification documents; Stage 2, the technical proposal; and Stage 3, the financial proposal. Only those bids which pass the first stage will be considered for the second stage and similarly, only those which pass the second stage will be considered for the third stage evaluation.

The decision to disclose the price or financial proposal of the original proponent in the Tender Documents shall be mutually agreed upon between the LGU and the original proponent. If the original proponent's price proposal was not disclosed in the Tender Documents, it should be revealed upon the opening of the financial proposals of the comparative proponents.

- 11) *Right to Match*. If no comparative or competitive proposal or no complying bid is received by the LGU, the original proponent shall immediately be awarded the contract. In the event that a comparative proponent submits a price proposal better than that submitted by the original proponent, the latter shall have the right to match such price proposal within thirty (30) working days from receipt of a notification from the LGU of the result of the comparative or competitive bid. Should the original proponent fail to match the price proposal of the comparative proponent within the specified period, the contract shall be awarded to the comparative proponent. On the other hand, if the original proponent matches the price proposal of the comparative proponent within the specified period, the project shall immediately be awarded to the original proponent.
- 12) *Recommendation to Award*. The LGU PBAC will submit to the Local Chief Executive a recommendation of award from the date the financial evaluation shall have been completed, The PBAC will prepare and submit a detailed evaluation/ assessment report on its decision regarding the evaluation of the bids and explain in clear terms the basis of its recommendations.
- 13) *Issuance of Notice of Award*. From the submission by PBAC of the recommendation to award, the Local Chief Executive shall decide on the award. The approval shall be manifested by signing and issuing the “Notice of Award” to the winning PSP.

The “Notice of Award”, which is issued by the LGU, shall indicate, among others, that the winning PSP must submit the following:

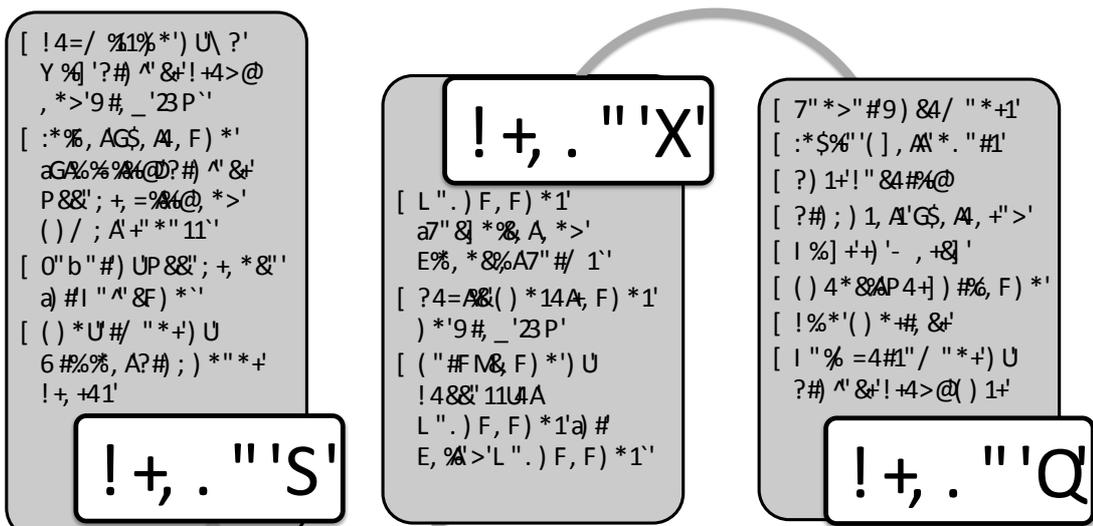
- a) prescribed performance security;
- b) proof of commitment of the required equity contribution, as specified by the LGU:
 - i. in the case where the Project Proponent is a corporation - e.g., treasurer’s affidavit attesting to actual paid-up capital, subscription agreement(s) between a shareholder(s) of the PSP and the PSP itself covering said equity contribution, or shareholders agreement between and amongst two (2) or more shareholders of the PSP undertaking to contribute/ subscribe the required equity contribution; or
 - ii. in the case of a consortium - an undertaking of the members thereof to infuse the required equity contribution to the consortium.

- c) proof of firm commitments from reputable financial institution to provide sufficient credit lines to cover the total estimated cost of the project;
- d) in the case of a consortium, the agreement indicating that the members are jointly and severally liable for the obligations of the PSP under the contract; or
- e) in case a SPC is formed for purposes of undertaking the project, proof of registration in accordance with Philippine laws.
- f) such other conditions imposed by the LGU.

14) *Execution/ Approval of Contract.* The authorized signatory(ies) of the winning bidder and the LGU shall execute and sign the contract from receipt by the winning bidder of the notice from the LGU that all conditions stated in the Notice of Award have been complied with.

15) *Issuance of Notice to Commence Implementation.* The LGU, when deemed necessary, shall issue the "Notice to Commence Implementation" of the project to the PSP within a reasonable period to be determined by the LGU and stated in the contract.

2. *JVs, Leases, Local Concessions, Management Contracts and Service Contracts where no Public Funds are used.* Under the Proposed PPP Code and JV Ordinance of Agra, the Competitive Challenge process shall be divided into three (3) Stages, described as:



Stage One/ Unsolicited Proposal – The steps are:

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

Stage Two/ Detailed Negotiations – The steps are:

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

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

1. The PPP-SC shall prepare the tender documents. The eligibility criteria used in determining the eligibility of the private sector entity shall be the same as those stated in the tender documents. Proprietary information shall, however, be respected and protected, and treated with confidentiality. As such, it shall not form part of the tender and related documents.
2. The Provincial Governor/ City Mayor/ Municipal Mayor shall approve all tender documents including the draft contract before the publication of the invitation for comparative proposals.
3. The PPP-SC shall publish the invitation for comparative proposals.
4. The PSP or Original Proponent shall post the proposal security at the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.
5. In the evaluation of proposals, the best offer shall be determined to include the original proposal of the PSP. If the Province/ City/ Municipality determines that an offer made by a comparative PSP or challenger other than the negotiated terms with original proponent is superior or more advantageous to the Province/ City/ Municipality than the original proposal, the PSP who submitted the original proposal shall be given the right to match such superior or more advantageous offer. Should no matching offer be received within the stated period, the PPP Project shall be awarded to the comparative PSP submitting the most advantageous proposal. If a matching offer is received within the prescribed period, the PPP Project shall be awarded to the original proponent. If no comparative proposal is received by the Province/ City/ Municipality, the PPP Project shall be immediately awarded to the original proponent.
6. In the event that the Original Proponent is not able to match the superior offer of the challenger, the winning challenger shall reimburse, within 30 days from issuance of the notice of award, the original proponent the cost of preparing the project study, provided, that this reimbursement arrangement and the cost of preparing of the project study are expressly stated in the terms of reference for the competitive challenge, and that the PPP-SC has determined that the cost is reasonable.

The Local Chief Executive, upon recommendation of the JV-SC, shall have the authority to adopt and prescribe the appropriate schedules and timelines for each PSP selection process: provided, that the periods are reasonable and will not undermine free competition, transparency and accountability.

PSPs have also a vested right over the procedure. Government entities are precluded from stopping the process already commenced. The Supreme Court¹⁵⁶ ruled that government entities cannot abort an unsolicited proposal/ challenge process commenced under existing regulations. Rules must therefore be followed. "Allowing government agencies to retract their commitments to the project proponents will essentially render inutile the incentives offered to and have accrued in favor the private sector entity." Further, City officials have to obey the Ordinance. Failure to do would subject the officials to disciplinary action for dereliction of duty and abuse of authority, among other offenses.

3. *Service and Management Contracts*. Under the GPRA, unsolicited proposals or giving the PSP a right to match a superior offer is not provided. The GPRA however, allows alternative methodologies of procurement. Under the GPRA IRR:

1) *Limited Source Bidding*. The PBAC of the LGU shall directly invite all the consultants appearing in the pre-selected list. All other procedures for competitive bidding shall be undertaken, except for the advertisement of Invitation to Bid/ Request for Expression of Interest.¹⁵⁷

2) *Direct Contracting*. A PSP is simply asked to submit a price quotation or a pro-forma invoice together with the conditions of sale. The offer may be accepted immediately or after some negotiations.¹⁵⁸

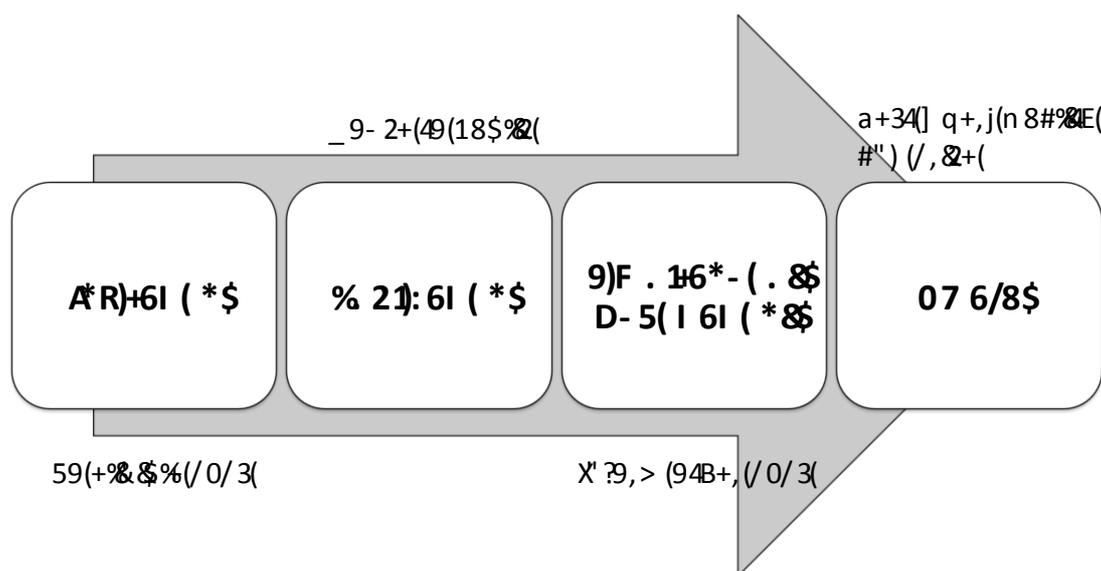
3) *Negotiated Procurement*. The LGU directly negotiates a contract with a technically, legally and financially capable contractor or consultant. Authority to negotiate contracts for projects shall be subject to prior approval by the Local Chief Executive, within their respective limits of approving authority.¹⁵⁹

D. Competitive Negotiations

1. *Overview*. Under the Proposed PPP Code of Agra, a third procedure is available. Competitive negotiations is different from straight negotiations, limited negotiations and detailed negotiations. Straight negotiations may be challenged for not adhering to the requirements of competition, accountability and transparency. Limited negotiations takes place after the acceptance of an unsolicited proposal and before the conduct of the competitive challenge. Detailed negotiations happen when there is a failed bidding where there is only one eligible bidder with a compliant bid, and when a prior competitive process has already been undertaken. An example of a prior completed competitive process is the award of a service contract with the PSP.

2. *Competitive Negotiations*. Competitive Negotiations, as defined under the Proposed Code, is available for concession arrangements, leases or affermage,

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



VI. LGU PPP Enabling Structures

<i>LGU PPP Enabling Structures</i>	
<i>LGU Structures</i>	<i>National Government Structures</i>
1. Local Chief Executive	1. President
2. Snggunian	2. DILG
3. Selection Committee	3. NEDA
4. Regulatory Authority	4. DOF
5. LGU PPP Sub-Committee	5. COA
6. PPP Audit Body	6. Local Government Academy
7. Civil Society Organizations	7. PPP Center
	8. Regulatory Agencies

A. LGU Structures

The following are the responsible officers and offices, and the enabling structures for local PPPs:

1. *Local Chief Executive*. The Governors, City Mayors, Municipal Mayors and Punong Barangays for provincial, city, municipal and barangay PPP projects must sign the contracts on behalf of the LGU entering into a PPP arrangement.¹⁶⁰ This is part of the executive and administrative functions of local chief executives.
2. *Sanggunian*. The local legislative councils such as the *Sangguniang Panlalawigan, Panlungsod, Bayan* and *Barangay*, in the exercise of their legislative powers,¹⁶¹ must authorize the Governor, City Mayor, Municipal Mayor and Punong Barangay to sign the PPP contract on behalf of the LGU.¹⁶² Without the authorization or ratification, the contract is unenforceable.

On the part of the higher or supervising LGUs (e.g. provinces insofar as a component cities or municipalities are concerned), a PPP contract entered into by the city or municipality which is not embodied in an ordinance is not subject to review by the former. Under the 1991 LGC, only “approved ordinances and the resolutions approving the local development plans and public investment programs formulated by the local development councils”¹⁶³ are subject to review whereby the former can declare invalid an ordinance or aforementioned resolutions on the basis that “such an ordinance or resolution is beyond the power conferred upon the sangguninag panlungsod or sangguniang bayan concerned.”¹⁶⁴

3. *Selection Committee*. The selection committee oversees the process of selection of the PSP.
 - a) *BOT Law Variants*. Under the 2012 BOT IRR, the PBAC shall be responsible for all aspects of the pre-bidding and bidding process in the case of solicited proposals, and for the comparative bidding process (otherwise known as the “Swiss Challenge”), in the case of Unsolicited Proposals, including, among others, the preparation of the bidding/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, the conduct of bidding, evaluation of bids, resolution of disputes between bidders, and recommendation for the acceptance of the bid and/or for the award of the project.¹⁶⁵

The LGU shall determine the appropriate composition of the PBAC, provided it includes the following among its members:¹⁶⁶

- a. At least a third ranking regular official of the LGU as Chairperson;
- b. A legal officer as Member-Secretary;

- c. One (1) technical officer knowledgeable with the technical aspects or requirements of the project, duly designated by the Local Chief Executive concerned on a project-to-project basis - Member (provisional);
 - d. One (1) technical officer knowledgeable with aspects or requirements of the project from a concerned regulatory body, when applicable, to be invited by the LGU concerned on a project-to-project basis as Member (provisional and non-voting);
 - e. An officer knowledgeable in finance as Member;
 - f. An officer knowledgeable in management/operation of the project as Member;
 - g. Two (2) representatives from the private sector: one from duly recognized Contractors associations; and the other from either the facility users, or duly recognized accounting associations as Observers (non-voting); and
 - h. A representative from the COA as Observer (non-voting);
 - i. One (1) representative from the local DILG office, for LGU projects as Observer (non-voting).
- b) *JVs*. Under the Proposed PPP Code and JV Ordinance of Agra, the PPP-SC for PPPs and JV-SC for JVs, shall be responsible for all aspects of the pre-selection and selection process, including, among others, the preparation of the Feasibility or Project Study and selection/ tender documents; determination of the minimum designs, performance standards/ specifications, economic parameters and reasonable RoR or tariff-setting mechanism appropriate to the PPP Modality; drafting or evaluation of the PPP contract; publication of the invitation to apply for eligibility and submission of proposals or comparative proposals; defining the eligibility requirements, appropriate form and amount of proposal securities, and schedules of the selection and challenge processes; pre-qualification of prospective PSPs, bidders or challengers; conduct of pre-selection conferences and issuance of supplemental notices; interpretation of the rules regarding the selection process; conduct of the selection or challenge process; evaluation of the legal, financial and technical aspects of the proposals; resolution of disputes between PSPs and challengers; defining the appeals mechanisms; and recommendation for the acceptance of the proposal and/ or for the award of the contract.

The PPP or JV-SC shall be composed of the following:

- a. Chairperson – At least a third ranking officer of the LGU;
- b. Secretary – LGU Legal Officer;
- c. The LGU Treasurer;
- d. The LGU Planning and Development Officer;
- e. One (1) representative from and selected by the Sanggunian; and

- f. Two (2) representatives from and chosen by the accredited civil society groups, people's and non-governmental organizations who are members of the Local Development Council.

The PPP or JV-SC with the approval of the Mayor may invite provisional non-voting members from the NGAs, regulatory agencies, NEDA, DILG, and the private sector to observe in the proceedings of the PPP or JV-SC; and form a support staff composed of employees and staff of the LGU.

- c) *Service and Management Contracts*. There shall be a PBAC which shall be composed of the following: one representative each from the regular offices under the Office of the Local Chief Executive such as, but not limited to, the following: Office of the Administrator, Budget Office, Legal Office, Engineering Office, General Services Offices; and a representative from the end user unit. The members shall elect among themselves who shall act as the Chairperson and Vice-Chairperson. The Chairperson of the PBAC shall be at least a third ranking permanent official of the LGU. The members of the PBAC shall be personnel occupying *plantilla* positions of the LGU concerned.¹⁶⁷

The PBAC shall have the following functions: (a) advertise and/or post the invitation to bid/request for expressions of interest; (b) conduct pre-procurement and pre-bid conferences; (c) determine the eligibility of prospective bidders; (d) receive bids; (e) conduct the evaluation of bids; (f) undertake post-qualification proceedings; (g) resolve motions for reconsideration; (h) recommend award of contracts to the Local Chief Executive or his duly authorized representative; (i) recommend the imposition of sanctions in accordance with Rule XXIII; (j) recommend to the Local Chief Executive the use of Alternative Methods of Procurement; and (k) perform such other related functions as may be necessary, including the creation of a Technical Working Group (TWG) from a pool of technical, financial, and/or legal experts to assist in the procurement process, particularly in the eligibility screening, evaluation of bids, and post-qualification.¹⁶⁸

4. *Regulatory Authority*. The PPP Regulatory Authority (PPP-RA), under the Proposed PPP Code of Agra, shall be tasked with performing contract management functions, such as partnership management (i.e., corporate governance, communication and information sharing, and dispute resolution), performance or service delivery management (i.e., risk management and performance management), contract administration (i.e., variation management, contract maintenance and financial administration), and tariff-setting and regulation for all PPP arrangements entered into by the LGU. Aside from these,

the PPP-RA shall be responsible for setting and monitoring the tariff, and administering the subsidy pursuant to the PPP contract.

The PPP-RA shall be composed of the following:

- a. Chairperson – The Local Chief Executive or the Administrator if so designated by the Local Chief Executive;
- b. Vice-Chairperson – The Vice-Local Chief Executive or a member of the sanggunian to be chosen by the sanggunian;
- c. Two (2) representatives of the sanggunian belonging to two (2) distinct registered political parties to which the Local Chief Executive does not belong to chosen on the basis of proportional representation of all parties represented in the sanggunian;
- d. LGU Legal Officer;
- e. LGU Treasurer;
- f. LGU Planning and Development Officer; and
- g. Two (2) representatives from and chosen by the accredited civil society groups, people's and non-governmental organizations who are members of the Local Development Council. These representatives shall not be the same representatives in the PPP-SC.

Under the Proposed PPP Code of Agra, a PPP-RA Manual Committee (PPP-RA-MC) shall be composed of the LGU Legal Officer, Treasurer and Planning and Development Officer and one of the civil society representatives of the PPP-RA. The PPP-RA-MC is tasked with the drafting of the contract management manual for each executed PPP contract for approval of the PPP-RA.

5. *LGU PPP Sub-Committee.* In every LGU, there shall be a PPP Sub-Committee in Local Development Councils (LDCs) that will assist the LDCs in the formulation of action plans and strategies on LGU PPPs. The PPP Sub-Committee shall be headed by the Local Economic and Investment Promotion Officer in case of provinces and cities, and a designated officer or staff for municipalities. The Sub-Committee shall be composed of representatives of the: (1) local tourism office, (2) public employment service office, (3) local planning and development office, (4) local engineering office, (5) local chamber of commerce, (6) local trade unions/ organizations or cooperatives, (7) private organizations, foundations, business clubs, (8) national government agencies such as Department of Trade and Industry, Department of Public Works and Highways, and DOF, (9) other offices in the LGU and NGAs as well as other sectors, non-governmental organizations and civil society organizations that may be included by the Local Chief Executive.¹⁶⁹
6. *PPP Audit Body.* Under the Proposed PPP Code of Agra, the LGU, in order to ensure transparency and accountability, shall encourage civil society

organizations, people's and non-governmental organization and civic aggrupations to establish a PPP monitoring, evaluation and governance audit body functionally and fiscally independent from the LGU and other government institutions.

7. *Civil Society Organizations.* Under the 1991 LGC,¹⁷⁰ LGUs shall promote the establishment and operation of people's and non-governmental organizations to become active partners in the pursuit of local autonomy. To operationalize this, PPP and JV-SC and the PPP-RA under the Proposed PPP Code and JV Ordinance of Agra are composed of representatives of the local development councils in the host LGUs. They are not just observers but are voting members. Their representation is in furtherance of social accountability.

B. National Government Structures

8. *President.* Projects undertaken through the Build-Own-and-Operate (BOO) scheme or through Contractual Arrangements or schemes other than those listed under the Act shall require Presidential approval. For this purpose, the LGU shall submit the proposed project to the NEDA Board through the NEDA-ICC which shall evaluate the proposal and forward its recommendations to the President. However, such projects shall be deemed to have been approved by the President when approved at a NEDA Board meeting presided over by the President.¹⁷¹ Surely, this requirement only applies to BOO and BOT Law additional variants, not JVs.
9. *DILG.* The DILG's avowed mission, in connection with PPPs, is to strengthen capability of LGUs through active people participation.¹⁷² The DILG shall assist the President in the exercise of general supervision over local governments, advise the President in the promulgation of policies, rules, regulations and other issuances on the general supervision over local governments, establish and prescribe rules, regulations and other issuances implementing laws on the general supervision over local governments and the promotion of local autonomy and community empowerment and monitor compliance thereof; provide assistance towards legislation regarding local governments, among other powers and functions.¹⁷³

Under the Proposed PPP Code of Agra, the DILG shall extend technical and financial assistance to LGUs.

10. *NEDA.* NEDA shall primarily be responsible for formulating continuing, coordinated and fully integrated social and economic policies, plans and programs, on the basis of major socio-economic policies, plans, programs and projects of different government agencies must be properly coordinated with the Authority at both the national and regional levels prior to their adoption, in order

to ensure their consistency with established national priorities and coordination with other policies, plans, programs and projects of the government.¹⁷⁴

- a) For BOT Law modalities chosen by LGUs, the NEDA-ICC shall confirm the projects if the project cost is above Two Hundred Million Pesos.¹⁷⁵
- b) In the instances where negotiated projects are allowed, the NEDA-ICC shall determine the Reasonable RoR prior to the negotiation in the case of solicited proposals.¹⁷⁶
- c) The LGU shall endorse to the NEDA-ICC the proposed unsolicited project. The NEDA-ICC shall determine the reasonable ROR on investments and operating and maintenance cost based on the reasonable ROR recommended by the LGU. The Approving Body shall act on the unsolicited project upon recommendation by the NEDA-ICC of the project including the determination of the reasonable ROR and other parameters for negotiation.¹⁷⁷

11. *DOF*. Local projects which will involve funds of the national government, and those which requiring NEDA-ICC review/approval, the draft contract must also be reviewed by the DOF before the LGU approves the same.¹⁷⁸

12. *COA*. The COA shall have the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to LGUs. The COA shall have exclusive authority to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties.¹⁷⁹ Thus, contributions, expenditures and revenues of LGUs in PPP arrangements are subject to COA audit. Further, COA also has the authority and power to settle all debts and claims of any sort due from or owing to LGUs,¹⁸⁰ such as those obligations which may arise from a PPP arrangement.

13. *Local Government Academy*. The Local Government Academy (LGA), being the country's leading provider of capacity building services to LGUs and to the DILG personnel, can undertake and spearhead PPP trainings.

14. *PPP Center*. The PPP center, formerly the BOT Center, an attached agency of the NEDA, shall conduct project facilitation and assistance to LGUs, provide advisory services, technical assistance and capacity development to LGUs, recommend plans, policies and implementation guidelines in consultation with LGUs, manage and administer a revolving fund to be known as the Project Development and Monitoring Facility for the preparation of business case, pre-feasibility and feasibility studies and tender documents, monitor and facilitate the

implementation of priority PPP projects, establish and manage a central database system, recommend improvements to timelines in processing PPP programs and project proposal and monitor compliance, prepare reports to the President.¹⁸¹

LGUs are not precluded from seeking assistance from either the PPP Center or any competent independent consultant/s from the private sector. LGUs may avail of the PPP Center's Capacity Building Program to enable LGUs to be self-sustaining and ready to undertake PPP projects on their own. The PPP Center is designed, among others, to walk through all LGUs on the PPP process, starting from identifying PPP projects as these are filtered in their respective local planning and programming activities. The PPP Center continuously banks on building technical capacities of LGUs starting from selection, preparation, implementation up to monitoring and evaluation of local PPPs.¹⁸²

To aid LGUs, the PPP Center has developed a PPP Code that can be used by LGUs in promulgating their own PPP frameworks and ordinances. PPP Center also published a PPP Manual for LGUs consisting of three volumes – Understanding PPP Concepts and Framework (Volume 1), Developing PPP Projects for LGUs (Volume 2), and Utilizing LGU PPP Project Templates and Bid Documents (Volume 3). The three volumes may be downloaded from the official website of the PPP Center.¹⁸³

Verily, the PPP Center has no power to approve LGU PPP projects, compel adoption of procedures and requirements which are not founded on statutes, mandate that LGUs adopt certain PPP modalities or follow its own version of a PPP Code/ ordinance, or direct the amendment or repeal of PPP contracts entered into by LGUs.

15. *Regulatory Agencies.* There are various government agencies which, under the respective mandates, regulate LGU PPP Projects. An Environmental Compliance Certificate must be secured from the Department of Environment and Natural Resources. The Philippine Reclamation Authority needs to evaluate LGU reclamation projects. Tariffs on LGU power projects must be approved by the Energy Regulatory Commission.

VII. PPP Contracts

A. Contracts in General

1. *Nature of PPP Contract.* A contract must have an offer, acceptance, competent parties, legal purpose/ object, mutuality/ consensual, and consideration. A PPP contract is the law between the parties insofar as the PPP project is concerned. The PPP contract shall govern the relationship between the parties. The

regulation of the PPP shall be pursuant to the PPP contract. Provisions thereof must not be inconsistent with law.

B. Contractual Provisions

Key PPP Contractual Provisions	
1. Party Clause	9. Divestment, if any
2. Preambulatory/ Whereas Clauses	10. Formation of SPC or JV Company
3. PPP Modality	11. Governance
4. Description of the Project	12. Milestones and KPIs
5. Period	13. Performance Securities
6. Contributions of Parties	14. Renewals and Amendments
7. Grant of Concession or Award of Franchise, if relevant	15. Dispute Mechanisms
8. Government Support	16. Representations and Warranties

17. *BOT Law Contracts.* For BOT Law Variants, the following are the mandatory provisions according to the 2012 BOT Law IRR:¹⁸⁴

- a) specific contractual arrangement, term, and scope of work;
- b) project technical specifications and system features;
- c) implementation milestones including those for securing other approvals, project completion date;
- d) cost recovery scheme via proposed tolls, fees, rentals and charges, as the case may be;
- e) liquidated damages;
- f) performance and warranty bonds;
- g) minimum insurance coverage as may be required for the project, such as Contractors' all risk, motor vehicle, workmen's compensation, third party liability, or comprehensive general liability insurance;
- h) acceptance tests and procedures;
- i) warranty period and procedures (after transfer);
- j) grounds for and effects of contract termination including modes for settling disputes;
- k) the manner and procedures for the resolution of warranty against corruption, and
- l) compliance with all other applicable laws, rules, and regulations.

18. *PPP Code of Agra.* Under the Proposed PPP Code of Agra, the principal PPP Contract shall describe the PPP Project, the rights, functions, obligations and responsibilities of and risks assumed by each of the contracting party, and dispute mechanisms. The other ancillary contracts may include insurance contracts; loan agreements; bonds; guarantee arrangements; equity

arrangements; operations and maintenance contracts; and engineering, procurement and construction (EPC) contracts. The PPP Contract shall also contain the:

- a) Preambulatory Clauses or Whereas Clauses,
- b) Party Clause,
- c) Rules of Interpretation,
- d) Nature of the PPP,
- e) Term of the Project,
- f) Contract Objective,
- g) Performance Bonds,
- h) Key Performance Indicators,
- i) Risk Allocation,
- j) Rights,
- k) Payment to PE or PSP,
- l) Tariff Scheme,
- m) Subsidy or Support Mechanism,
- n) Insurance Requirements,
- o) Delay Provisions,
- p) Force Majeure,
- q) Governmental Action,
- r) Government and PE Warranties,
- s) PSP Warranties,
- t) Change in the Law,
- u) Regulatory Regime,
- v) Variations,
- w) Termination,
- x) Indemnification,
- y) Intellectual Property,
- z) Claims,
- aa) Financial security,
- bb) Dispute Resolution,
- cc) Step-in Rights,
- dd) Changes in the Composition of the PSP/ Service Provider,
- ee) Partnership Management,
- ff) Compliance with all Laws,
- gg) Personnel,
- hh) Conditions Precedent,
- ii) among others.

19. *Proposed JV Ordinance of Agra.* Under the Proposed JV Ordinance formulated by Agra, the provisions are:

- a) The date on which the agreement is established, executed, and considered effective;

- b) The names, addresses and identification of the parties, including the type of business of each member of the JV;
- c) The name under which the JV will do business;
- d) The principal place of business of the JV;
- e) Clearly defined purpose and objective/s, contractual/agreement mode (whether JV Company/Corporate JV or contractual JV), term and scope of the JV;
- f) The term of the JV activity;
- g) Total cost of the JV activity, project specifications and features;
- h) The relationship between the parties, management roles of each party in the JV activity, and a statement that the parties are actually co-venturers for the project, whether or not the contract is in the name of all members;
- i) The establishment of a fund by the parties to finance the work, together with the amount, type (cash, assets, etc.), and valuation of committed contributions of each party and when such contributions will be made, with the fund being deposited in a special bank account under dual control and all progress payments and other revenues being deposited in such account. If the equity/contribution of the private sector is to be borrowed, a statement that a LGU government guarantee for said loan will be extended or not;
- j) Procedure for additional capital infusions, if required, and a statement that a LGU government guarantee for loans to be incurred by the private sector in case the additional contribution of the private sector is to be borrowed will be extended or not;
- k) A declaration of the participation of the parties and percentage in which profits and losses are shared, in proportion to the contributions of the party to the working fund. The amount of contribution of funds by the parties can be increased or decreased, depending on the contributions of equipment or expertise;
- l) The formation of a governing board or equivalent structure in the case of a Contractual JV and a board of directors in case of a Company JV;
- m) Specified termination/liquidation of the JV Company, buy-out provisions, and details on the transfer of ownership of the JV activity/facility including provisions on what happens to the JV's assets after the expiration of the JV agreement or end of the JV period. If equity other than cash is to be contributed, a statement as to how the property will be valued and the ownership of the property during and after the effectivity of the JVA;
- n) Designation of one of the parties as general manager of the project, with authority to bind the JV Company/Partnership/Parties; or, in the alternative, the constitution of a management committee, with a provision for remuneration. The basic management structure, management duties, other duties of the co-venturers and procedures to be followed in dealing with unusual situations or problems that may develop should be specified;
- o) Implementation milestones, regular meeting schedules, financial and periodic JV and progress reporting procedure;
- p) Establishment of a JV bank account, and the appointment of a chartered accountant and lawyer;

- q) Provide for the acquisition of licenses in the name of the JV or each co-venturer, as required;
- r) Type of insurance carried by the JV and clearly defined liabilities to be insured against by each participant;
- s) Definition of items which are to be considered as costs to the JV for the purpose of determining profit or loss and a description of items which are not reimbursable to members of the JV and specified division of the profits and, risks and losses;
- t) Confidentiality of trade information passed between the co-venturers;
- u) Ownership or retention of patents, technology, and consultant reports;
- v) Performance security requirements of the project and the bonding obligations of the co-venturers;
- w) Undivided pro-rata interests held by the co-venturers on all assets of the JV;
- x) Restriction regarding assignment of private sector participant's undivided pro-rata interests in assets of the JV;
- y) Cost recovery scheme, including payment to the government of royalties/rights, the form/description and amount of earnings (cash, asset, etc.), whether it is in absolute amounts or variable, and the period and timing such earnings or payment shall be received. In case of non-cash payment or payment in form of asset, a statement/provision on how it will be valued, the minimum value of the asset, and the determination/selection of asset such as how and who will determine/select the asset;
- z) Indemnification and liquidated damages;
- aa) Performance and warranty bonds;
- bb) Minimum insurance coverage;
- cc) Acceptance tests and procedures;
- dd) Validity of the performance security, warranty period and procedures;
- ee) Grounds for and effects of contract termination/default including modes for settling disputes, procedure for handling guarantees, defects and insurance after termination, and threshold (in terms of amount, time/period, or both) for which non- payment or delay in payment and delay in starting the project/s shall be grounds for termination/rescission of the JV contract/agreement;
- ff) The manner and procedures for the resolution of warranty against corruption;
- gg) Compliance with all other laws, rules and regulations;
- hh) Procedure and/or period for withdrawal by the government entity of its contribution to the JV, or exit divestment by the Government Entity of its interest in the JV, and Substitution or addition of parties;
- ii) Payout of funds;
- jj) Alternative Dispute Resolution;
- kk) Disputes arbitration clause; and
- ll) Anti-Corruption warranties.

All BOT Contracts must contain alternative dispute resolution (ADR) mechanisms. For local JVs, LGUs are encouraged to stipulate the use of ADR mechanisms in accordance with their own JV rules, guidelines and procedures.¹⁸⁵

C. Procedures and Amendments

20. *LGU Procedures.* In terms of procedure, and as stated in the proposed PPP Code of Agra, the PPP Contract shall be signed by the Local Chief Executive on behalf of the LGU with the prior authorization or ratification by the Sanggunian, and the duly authorized representative of the PSP.” Under the 1991 LGC,¹⁸⁶ “no contract may be entered into by the local chief executive in behalf of the local government unit without prior authorization by the sanggunian concerned. A legible copy of such contract shall be posted at a conspicuous place in the provincial capitol or the city, municipal or barangay hall.”

If there is no prior authorization, a PPP contract may be ratified, expressly or impliedly, by the sanggunian. There is implied ratification when the sanggunian does not repudiate the PPP contract and when the community has continuously enjoyed the material and public service benefits from the PPP project.¹⁸⁷

21. *Bidding Necessary.* An amendment to a contract awarded through public bidding, when such subsequent amendment was made without a new public bidding, is null and void.¹⁸⁸

22. *Incomplete Contracts.* PPP contracts on BOT Law, JV and concessions, being long-term agreements are described as “incomplete contracts.” They often need adjustments because of the practical impossibility of covering every contingency in a contract, irrational behavior of parties, shifts in bargaining power, and unforeseen and unexpected events which changes the business environment and undermine the viability of the business deal.¹⁸⁹ There is nothing in our laws that prohibits parties to a contract from renegotiating and modifying in good faith the terms and conditions thereof so as to meet legal, statutory and constitutional requirements.¹⁹⁰

23. *Material Deviations.* Under the Proposed PPP Code of Agra, the Local Chief Executive shall not proceed with the award and signing of the contract if there are material deviations from the parameters and terms and conditions set forth in the proposal/ tender documents that tend to increase the financial exposure, liabilities and risks of the LGU or any other factors that would cause disadvantage to government and any deviation that will cause prejudice to losing PSPs. Any amendment to a PPP contract, which if effected will not violate the policy on competition and fairness, after award and signing of contract shall undergo approval by the Local Chief Executive with prior authorization by the sanggunian.

Non-compliance with the corresponding approval process stated shall render the amendment null and void.

If material deviations are allowed post-signing and post-bidding, public bidding will cease to be competitive and worse, government would not be favored with the best bid. Bidders will no longer bid on the basis of the prescribed terms and conditions in the bid documents but will formulate their bid in anticipation of the execution of a future contract containing new and better terms and conditions that were not previously available at the time of the bidding. Such a public bidding will not inure to the public good. The resulting contracts cannot be given half a life but must be struck down as totally lawless. If there were changes and the contracts end up unfavorable to government, the public bidding becomes a mockery and the modified contracts must be struck down.¹⁹¹

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

While there must be stability in contracts, a PPP does not confer upon the parties absolute and perpetual rights. Recent case law¹⁹² establishes that, the “freedom to contract is not absolute” and “all contracts and all rights are subject to the police power of the State and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity.”

25. *Obligations and Claims against the LGU.* The obligations of the parties in a PPP contract are set forth in the PPP contract. The obligations can come in the form of contributions, grant of concessions and exclusive rights, waivers, adherence to procedures, deliverables, governance, warranties and representations, among others.
26. *Dispute Resolution.* Failure on the part of the contracting LGU to comply with its obligations could result in breach, payment of liquidated damages, rescission of the contract, claim on insurance, dispute resolution, arbitration, and money claims. For money claims due from or owing to any LGU, the Commission on Audit, not the courts, has primary jurisdiction.¹⁹³

All PPP contracts are subject to judicial review. However, rather than bringing disputes to the courts at the first instance, use of alternative dispute resolution

(ADR) is encouraged. Under Presidential Executive Order No. 78, s. of 2012, use of ADR mechanisms in PPP contracts is mandated.

LGU PPP contracts may likewise be enjoined in injunction cases. Republic Act No. 8975 which prohibits courts from issuing temporary restraining orders, preliminary restraining orders, preliminary injunctions and preliminary mandatory injunctions only covers national government projects, not LGU PPPs.

D. Contract Management

1. *Overview.* After the PPP Contract has been signed, the PSP shall construct or rehabilitate the facility, after which, the PSP shall lease out, maintain and operate the same. This post-award segment of a PPP arrangement is referred to as “contract management.”
2. *Components.* There are four (4) components of contract management. These are:
 - a) *Partnership Management* which is concerned with structures of accountability, and how government and the private sector service provider relate to each other. Some of the key dimensions of Partnership Management are Corporate Governance, Communication and Information Sharing; and Dispute Resolution.

Partnership management involves the development of processes to ensure accountability and manage the relationship between LGU and the PSP. The way the parties regard each other and the way in which their relationship operates is vital to making a success of the arrangement.¹⁹⁴ Trust is key to a sustainable relationship between the LGU and PSP based on the terms and provisions of the PPP Contract.

The CMM, under the Proposed PPP Code, must describe

- i. each party’s governance structure, including the overall system of institutional structures, operating rules, compliance mechanisms and accountability procedures;
- ii. guidelines on communication and information sharing between the Province/ City/ Municipality and the PSP, including reporting requirements, frequency and purpose of regular meetings, record-keeping of all exchanges, and the acceptable modes of correspondence between them; and
- iii. the process for resolving disputes between the parties, identifying, among others, the different levels of dispute resolution, offices and officials involved, timetable for resolving such disputes, and possible actions to compel a party to adequately comply with contractual terms.

b) *Performance or Service Delivery Management* which consists of systems and procedures designed to manage risk and performance. The components are Risk Management and Performance Management. There should be:

- i. an identification of risks under the PPP contract, the timetable for resolving such risks when they arise, contingency plans that ensure immediate resumption of services in the event of an interruption of service delivery by the PSP, and penalties for failing or refusing to resolve them, provided that a separate risk mitigation plan shall be developed and periodically reviewed and updated throughout the life of the contract for contracts with significant risks;
- ii. clear and demonstrable key performance indicators that demonstrate evidence of poor, satisfactory or non-performance by the PSP, taking into consideration the cost and value obtained, performance and customer satisfaction, delivery improvement, delivery capability, benefits realized and relationship strength and responsiveness;
- iii. a performance management plan and performance monitoring system that will be used by the Province/ City/ Municipality to monitor affordability, service delivery, value for money, quality, and performance improvement; and
- iv. a performance review and corrective actions system that apply to non-compliance or breach of contract, and penalties for non-performance and bonuses for good performance.

c) *Contract Administration* relates to the administrative processes required to ensure that all the procedures contained in the PPP contract and all the documentation relating to it are effectively managed. Contract administration activities can be broadly grouped into three main categories: Variation Management; Contract Maintenance; and Financial Administration.¹⁹⁵ This aspect includes:

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

- d) *Tariff-setting* which determines the tariff end-users and consumer will pay for use of the facility.
3. *Responsibility*. Under the Proposed PPP Code of Agra, the responsibility for oversee the implementation and managing the PPP contract is collegial. Contract management is not the sole responsibility of the local chief executive, and the LGU. The template ordinance provides for the creation of a PPP-Regulatory Authority (PPP-RA). The PPP-RA shall be composed of:
- a. Chairperson – The Local Chief Executive or the Administrator if so designated by the Local Chief Executive;
 - b. Vice-Chairperson – The Vice-Local Chief Executive or a member of the sanggunian to be chosen by the sanggunian;
 - c. Two (2) representatives of the sanggunian belonging to two (2) distinct registered political parties to which the Local Chief Executive does not belong to chosen on the basis of proportional representation of all parties represented in the sanggunian;
 - d. LGU Legal Officer;
 - e. LGU Treasurer;
 - f. LGU Planning and Development Officer; and
 - g. Two (2) representatives from and chosen by the accredited civil society groups, people’s and non-governmental organizations who are members of the Local Development Council. These representatives shall not be the same representatives in the PPP-SC.
4. *Contract Management Manual*. The Proposed PPP Code of Agra suggests the adoption of a Contract Management Manual (CMM) to be drafted by the PPP-RA Manual Committee (PPP-RA-MC) composed of the Local Treasurer and Planning and Development Officer and one of the civil society representatives of the PPP-RA. The PPP-RA shall approve the CMM. A CMM shall include the following information:
- a. a description of the PPP project and its history;
 - b. a summary of the key terms of the PPP contract;
 - c. roles and responsibilities of each member of the PPP-RA and other Provincial/ City/ Municipal personnel and contractors, as applicable, who are involved in the PPP project;
 - d. roles and responsibilities of key personnel of the PSP;
 - e. details of the post-award conference;
 - f. partnership management procedures;
 - g. performance or service delivery management;
 - h. contract administration; and
 - i. project closeout procedures.

Effective and efficient monitoring of LGU and PSP performance starts with a well-structured and comprehensive monitoring process. This process shall be embodied in a contract management manual and should include specific program and fiscal oversight activities, written policies and procedures, standardized tools and forms and written duties and responsibilities for the monitor position.¹⁹⁶

VIII. Reframing PPPs: “P³-7654321”

A. Premises

1. *Expansion of Concept.* The public good cannot be served without the participation and involvement of the private sector in government projects through PPPs. To facilitate the public good, the concept of PPP must be expanded beyond the current characterization of PPPs as simple contractual arrangements. Having a comprehensive and operative PPP framework will facilitate the realization of the public good. PPPs, as proposed, must be viewed as a development strategy using the “P³-7654321” framework. The exercise of transformational leadership, particularly, but not exclusively, in managing political and social risks is critical. Failure of leadership in PPPs will result in failure to manage political and social risks, which, in turn, will not lead to the public good which is the object of PPPs.
2. *Risk Management.* Managing, either by reducing or curbing, or in certain cases, enhancing or calibrating political and social risks in PPPs, can be effected by enabling the proposed “P³-7654321” framework through transformational leadership. Political and social risks should be reduced and curbed, if the PPP policy or project does not promote the fundamentals of PPPs.
3. *Integrative Framework.* The fundamentals and pillars of PPPs are embodied in a comprehensive framework by which PPP is to be governed. The “P³-7654321” framework is an integrated and holistic strategy re-orienting PPPs as a means and vehicle to implement and undertake infrastructure, development, and social alleviation interventions in the form of projects, facilities, and services. The development strategy is offered to broaden and ground the operative anchors of PPPs beyond the traditional, rote, and typical appreciation and utilization of PPPs which primarily focuses on contractual legal, technical, financial and credit considerations.

B. P³-7654321

P³-7654321	
P³ PPP	5 Pillars
7 Categories	1. Public Good with Inclusive Growth and

P³-7654321	
6 Evils 5 Pillars 4 Stakeholders 3 Legal Requirements 2 L's – holistic leadership in a learning ecology 1 paradigm "Future-Proofing PPP and Public Good through PPPs	Sustainable Development 2. Public Trust and Ethical Accountability in Government Administration 3. Social Accountability and Popular Participation 4. Good Governance and Rule of Law 5. Transformational Leadership.

The proposed "P³-7654321" framework consists of the following components:

1. *7 Categories*. Reclassifies PPPs into seven (7) Categories to capture the organizational, cultural, relational, ethical and accountability dimensions of PPPs overlooked by most proponents of PPPs;

PPP must be viewed as: (1) a 4-Stakeholder Interdependent and Collaborative Relationship; (2) a 3-Level Innovation in Governance; (3) an Accountability and Ethical Reform Strategy; (4) a Public Good-Driven Change Initiative; (5) a Democratic Deficit and Human Rights Tool; (6) a 3-Level Organizational Cultural Transformation and Formation of a Learning Culture; and (7) an Inclusive Growth, Marketization and Decentralization Vehicle.

2. *6 Evils*. Promotes the utilization of PPPs to address the mismanagement and the misuse of government projects manifested in the six (6) C's or PPP Evils, and as a means to advance vested interests;

PPP may be employed to curb: (1) Corruption; (2) Capture; (3) Clientism; (4) Conflict of Interest; (5) Concealment; and (6) Complacency. PPP arrangements must also be protected from these.

3. *5 Pillars*. Presents the foundations and basics of PPPs, as well as a counterpoint to the six (6) evils, by anchoring PPPs on five (5) PPP Pillars;

These are: (1) Public Good with Inclusive Growth and Sustainable Development; (2) Public Trust and Ethical Accountability in Government Administration; (3) Social Accountability and Popular Participation; (4) Good Governance and Rule of Law; and (5) Transformational Leadership.

4. *4 Stakeholders*. Identifies the four (4) Stakeholders who must benefit from and participate in PPP policies and projects; and

An interdependent and synergistic relationship must exist amongst these stakeholders: (1) government (i.e., implementing agencies, regulatory agencies, public corporations, law and policy-making institutions, NEDA, PPP Center, Governance Commission for GOCCs); (2) private companies (i.e., proponents, lenders, insurers, equipment suppliers, foreign donor agencies); (3) civil society organizations (church, academic institutions, people's and non-governmental organizations and networks); and (4) end-users (of existing and prospective PPP projects).

5. *3 Legal Requirements.* Reinforces the need to adhere to the three (3) Core Legal Requirements governing government contracts with the private sector.

These are: (1) Competition; (2) Accountability; and (3) Transparency or CAT.

6. Underscores the inter-relation between two (2) L's – holistic leadership in a learning ecology.

PPP knowledge and praxis should be de-monopolized. No particular sector should have monopoly of knowledge and understanding, over policy and decision-making, prioritization of projects, audit and regulation of projects, and award of projects. To achieve this, a learning ecology is needed where learning-centered leadership is critical.

7. Institutionalizes the integration into one (1) paradigm "Future-Proofing PPP and Public Good through PPPs."

If PPPs serve the public good, then PPPs must be future-proofed. PPP projects and contracts must withstand changes in administration and policies. PPPs must be protected. PPPs by themselves must be immutable. However, PPPs must not be placed on pedestals. PPP programs are only implemented if they are designed and maintained for the very end by which they exist, and this is the public good. If however, PPPs do not serve the public good, then they can and must be challenged. It is the public good which must be future-proofed. And one way of doing this is through PPPs. Future-proofing is therefore purposive, value-laden, and people-centered.

C. 5 Pillars

To achieve this noble purpose of PPPs, the PPP agenda must be shaped to identify, qualify, quantify and promote the five pillars and anchors of PPPs. These are: *Public good, public trust and public accountability, social accountability, good governance and transformational, adaptive and ethical leadership.*

These five pillars and foundations must concur and be vigorously undertaken together. They are equally important and not stand-alone constructs. One cannot exist and be pursued without the others, as they form one integral whole in pursuing PPPs for the Public Good. All the five pillars and anchors are like *spokes in a wheel*. Advancing one pillar without balancing and building on the rest will result in a collapsed tire and failed PPP agenda and PPP projects.

1. *Public Good*. PPPs must promote the public good and must serve the public interest. Public good, as the end goal and as a value, is not solely pursued by or is in the exclusive domain of public servants who deliver public service. Public good is a collective responsibility shared with PSPs of PPPs and civil society in general.

Focusing on public good for PPPs translates into the realization of the avowed objective of providing more, better, affordable and timely services, and the harmonization and consistency with the other pillars. All PPP projects should translate into immediately realizable public service, and must necessarily be responsive and responsible to the public.

The value of public good, the core of all the other pillars, must be constantly communicated to all stakeholders, and must permeate and cascade through the whole PPP process, from policy reform, project identification, to the selection of the PSP, and all throughout the management of the contract and award.

PPP laws, regulations, policies, and projects must also adhere to the principle of *sustainable and integrative development*, and ensure that the needs of the present generation are met without compromising the ability of future generations to meet their own needs. PPP proponents from the public and private sectors must act as stewards and be responsible for and accountable to the environment. Integrated development shall ensure that all communities develop, and that national development will co-exist with the development of local governments, and vice-versa.

2. *Public Trust*. In all PPP arrangements, and in operationalizing all the pillars, public trust and public accountability are indispensable.

The realization of public good alone in PPPs will not yield the desired results and be sustainable if there is no public trust, and if public offices and officials are not accountable. This twin requirement should be a patent, operative and enforceable policy. Because of the public nature of PPPs, both government and PSPs shall be held accountable and must be worthy of public trust.

Public trust must be present amongst PPP leaders, proponents and stakeholders; between PPP parties; between PPP parties and regulators; between PPP proponents and policy-makers; and between PPP parties and the general public.

Public officials, PSPs, regulatory agencies and the PPP processes must be trustworthy for PPP is an interdependent, resource-exchange collaborative relationship.

Pro-accountability approaches must be built into the process and incorporated in the framework. Public offices and public officials must be held and hold themselves accountable, responsible and responsive to their oath and to the public good. The PSPs and service providers must also be held accountable. The mandates of the public sector must be strengthened, integrity mechanisms must be in place, and representatives of the public and private sectors must be held accountable for PPP contracts and projects.

The PPP process, from inception to implementation, must embody the core values of integrity, credibility, intent, results and capabilities; deliver the results, outputs and outcome intended; create transparency; be aligned with responsibilities and expectations; and contribute to the public good. These guarantees must also hold true for the PPP project, PPP policy environment and PPP contract management and implementation.

Corollary to this, it must be emphasized that all government contracts with the private sector, not just PPP contracts, must adhere to three core requirements of fair competition, mutual accountability and full transparency. *Transparency* guarantees the right of the people to information and the accompanying duty of the responsible officials to explain, solicit and consider feedback and comments concerning the processes, documents, contracts and policies about the PPP project.

Competition in the selection of the private sector proponent must be legitimate, fair and honest. In the field of government contract law, competition requires not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, and the same undertaking; but also that the process be legitimate, fair and honest, and not designed to injure or defraud the government and the public. Competition must also broaden the market of PSPs and bidders.

3. *Social Accountability*. End-users, taxpayers, citizens' groups, the academe, the consumers, and the general public must be proactive in constructively engaging and working with government and the private sector. Citizen collaboration – consultations, dialogues, and other meaningful participation schemes, and voting representation in the whole PPP process – must be ensured. In the whole process, all stakeholders will jointly learn, discuss, and resolve matters. Citizens' groups, private investors and public entities shall all be part of the *PPP learning organization, a new learning ecology*. Multi-stakeholder and multi-directional accountability will ensure reciprocal and holistic accountability. This in turn will

operationalize the two constituent components of social accountability – transparency and participation.

The meaningful participation of ordinary citizens is an integral component of public trust and accountability; and thus, must be guaranteed by government in the overall PPP process. Social accountability, coupled with public accountability, will methodologically hold government and the private sector accountable for their conduct and performance in using public resources to deliver services, improving people's welfare, and protecting people's rights.

For the facility users of the PPP project, government must conduct a full and extensive willingness-and-ability-to-pay survey to determine the viability of the project. Government, at the very least, must undertake broad consultations for those who will be directly and adversely affected by a PPP project or regulation. PPP laws must protect human and basic rights of the people and promote a *democracy intervention initiative*. The moral hazards of PPPs where either the government does not a "skin" in the arrangement or the PSP assumes an inordinate amount of risks and functions can be mitigated or obviated by an active citizenry.

4. *Good Governance and Rule of Law.* Good governance principles must be embodied in PPP frameworks, regulatory set-ups, procedures, rules and policies. PPP laws, regulations and policies must be fair, applicable to all, impartial, transparent, freely and easily accessible, popular and understandable, and enforceable.

Regulation. As a governmental function, regulation must be separate and distinct from PPP policy-making and PPP project selection and implementation. Regulatory agencies on PPPs must be independent from and only subject to administrative supervision by the Executive Branch. Regulatory Agencies must have the freedom to decide without seeking approval elsewhere; must have clear functions; must enjoy functional and fiscal autonomy; must have the requisite authorities and powers; and must adopt transparency and accountability mechanisms.

Judicial Review. PPP contracts and decisions are only reviewable by the courts. There must be formal and predictable regulations in tariff-setting, a framework on contract management (consisting of partnership management, performance and delivery management, contract administration, and tariff-setting) and a judicial review process. PPP contracts must be respected and not impaired by the successor administration.

The five principles adopted by the United Nations Development Program may serve as a good starting point to the development of our own set of good governance principles: (a) legitimacy and voice which ensure participation and

consensus; (b) direction in having a strategic vision; (c) performance necessitating responsiveness, and effectiveness and efficiency; (d) accountability and transparency; and (e) fairness which embodies equity and rule of law.

Rule of law does not simply mean following the laws, regulations and policies. Rule of law, in order to yield public good, must be realized with good governance, advanced with transparency, accountability and participation, and must not be dissociated in substance, policy and praxis with public good and delivery of public service.

5. *Transformational, Adaptive and Ethical Leadership.* Since the immediate and ultimate objective of any PPP Project is the public good, and deep and real change, transformational and adaptive leadership approaches to PPP reform strategies and in prioritizing, and implementing and regulating PPP initiatives must be adopted. The process will involve learning and re-learning, and re-orientation of roles and responsibilities. All stakeholders must participate. Existing policies may be challenged in order to be consistent with these pillars.

While the very nature of PPPs pursued by government bureaucracies and legally incorporated entities demand that leaders must exercise transactional and technical leadership for specific PPP transactions, this type of leadership approach must be calibrated with transformational and adaptive leadership in terms of the overall PPP agenda and strategy.

Ethical leadership is also necessary since PPPs are undertaken for the public good. PPPs must effectively and sustainably address the six C's or evils of PPP projects – corruption, clientism, capture, conflict of interest, complacency and concealment. A code of ethics must be adopted and any violation thereof will render the responsible person accountable. Audit and accountability mechanism must be in place.

D. Accountability Mechanisms

The proposed PPP Code of Agra contains several accountability mechanisms. These are:

1. *Beneficiary.* The direct and ultimate beneficiary of any PPP shall be the constituents of the LGU. This is consistent with the general welfare clause and the responsibility of the LGU to promote the public good.
2. *Code of Conduct.* Before commencing their functions, each member of the PPP-SC and PPP-RA and the contract manager shall sign a Code of Conduct, which shall guide each member in the performance of their duties.

Below is the proposed text of a Code of Conduct:

WE, the undersigned members of the Public-Private Partnership – Selection Committee (PPP-SC), tasked and responsible for overseeing the competitive selection/ competitive challenge/ competitive negotiation process for the Project (Project) pursuant to the Provincial/ City/ Municipal PPP Ordinance (Ordinance) hereby voluntarily undertake:

1. To act at all times with fidelity, honesty, integrity and in the best interests of the City and the general public it serves;
2. To diligently perform the duties of a member of the PPP-SC efficiently, effectively and strictly in accordance with relevant laws and the Ordinance;
3. To properly prepare for and attend each meeting of the PPP-SC, and failing this to withdraw as a member;
4. To recognize the public's right to access to public information in the interests of administrative justice;
5. To take the utmost care in ensuring that there is reasonable protection of the records of the Province/ City/ Municipality and all competitive challenge documentation;
6. Not to misuse the position and privileges of a member, or privileged or confidential information obtained as a member;
7. To carry out duties with the skill and care expected from a person of knowledge and experience, and to exercise due judgment;
8. Not to unfairly discriminate against any challenger/ proponent on the grounds of race, gender, ethnic or social origin, color, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language;
9. Not to abuse any position in the public services to promote or prejudice the interest of any person, political party or interest group;
10. To give responsible officials all the information and explanations they require to carry out their functions;
11. To report to the appropriate authorities any case of fraud, corruption, nepotism, mal-administration and any other acts which constitute an offense or which are prejudicial to the public interest, arising during the competitive challenge process;
12. To declare, diligently, accurately and honestly, in the declaration of interest, all personal and/or business interests that we individually or our family members may have in any business of any proponent/ challenger, and to willingly abide by any decision of the Provincial Governor/ City Mayor/ Municipal Mayor and PPP-SC;
13. To be open and honest about all decisions and actions taken regarding the competitive challenge process, and to give clear reasons for these, which can be accurately recorded;
14. Not to make any dishonest allegations about any challenger/ proponent;
15. Not to make any false or misleading entries into the records of the PPP-SC;
16. To make no contractual commitments related to the Project, to any challenger/ proponent, on behalf of the Province/ City/ Municipality;

17. To proactively protect privileged or confidential information of the PPP-SC from theft, unauthorized disclosure or inappropriate use, and specifically: (a) not respond to any queries relating to the competitive challenge process on behalf of the Province/ City/ Municipality, unless expressly authorized in writing by Provincial Governor/ City Mayor/ Municipal Mayor or PPP-SC to do so; and (b) not to speak to or correspond carelessly with any person (i.e., fellow member, colleague, friend, family member or otherwise) or any matter related to the competitive challenge process;
18. Not to request, solicit or accept any reward, gift or favor in return for voting or not voting in a particular way on any matter, or for disclosing privileged or confidential information;
19. Not to accept or agree to later accept, any “kickbacks” in the form of money, favors, inappropriate gifts, or anything else of value from a member of the public, government, a political or social movement, or any stakeholder or potential stakeholder which is or may be viewed as aimed at influencing or directing the evaluation of the comparative proposals;
20. To disclose immediately to the Provincial Governor/ City Mayor/ Municipal Mayor or PPP-SC Chairperson any attempted inducement or offers of perks that may be construed as aimed at influencing or directing the evaluation of the comparative proposals;
21. To report to the Provincial Governor/ City Mayor/ Municipal Mayor or PPP-SC Chairperson any invitations to any kind of entertainment by any party that may be construed as being associated in any way with the outcome of the comparative challenge process; and
22. To not vote at, attend or participate in any other way in any meeting or hearing in relation to any matter before the PPP-SC, if any interest prevents me from carrying out my member functions in a fair, unbiased and proper way in accordance with this Code of Conduct.

3. *Disciplinary Action.* Mirroring accountability provisions in the 1991 LGC,¹⁹⁷ any violation of the PPP Code and the Code of Conduct insofar as local elective officials are concerned shall constitute a ground for disciplinary action or amount to loss of confidence under the 1991 LGC and relevant laws, and with regards local appointive officials, such violation shall render them administratively liable. Officials may also be rendered criminally liable under applicable laws and ordinances. Representatives of the PSP shall be held liable for damages, offenses and crimes depending on the nature of their participation and involvement in the unlawful act or omission.
4. *Liability.* Underscoring public office is a public trust,¹⁹⁸ the LGU and its officials, in undertaking a PPP project, selecting a PSP and implementing a PPP contract, shall not be exempt from liability for death or injury to persons or damage to property.¹⁹⁹

5. *Social Accountability.* The local communities are not and should not be fencesitters in local governance. The citizenry is an indispensable stakeholder in PPP projects and any reform strategy. The LGU should therefore ensure, promote and eliminate all obstacles to social accountability and allow and enhance constructive engagement between citizens' groups, academe, consumers, rate-payers, general public, LGU, NGAs, regulatory agencies, and PSP.
6. *Transparency and Right to Information.* The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen.²⁰⁰ To realize this, the PPP Contract, feasibility or project studies, bidding documents, terms of reference, results of the PSP selection process, Code of Conduct, Contract Management Manual, minutes of the post-award conference, PPP-RA, and PPP-RA-Manual Committee, and other relevant documents and instruments shall be posted in two conspicuous places of the LGU and uploaded in a dedicated website of the PPP-RA which can be freely accessed by the public. The LGU shall also implement a strategic communication plan addressed to all stakeholders.

The PPP contract shall be a public document which can be freely accessed by the public, shall be posted in two conspicuous places of the LGU and uploaded in the website of the LGU.

7. *Capability-Building Program.* The LGU shall design and implement a continuing education and capacity-building program on PPPs for its officials, and the members of the PPP-SC and PPP-RA. The LGU shall also undertake a comprehensive and sustained education and governance campaign aimed at informing all stakeholders and civil society organizations about PPPs ventures of the LGU and allowing them to participate in the overall PPP program of the LGU. The program shall include strategic and annual evaluation and planning sessions, workshops, seminars, focus-group discussions on PPPs, market opportunities, projects, management of contracts and regulation of PPPs and other PPP-related topics.
8. *Monitoring and Governance Audit Program.* The LGU, in order to ensure transparency and accountability, shall encourage civil society organizations, people's and non-governmental organization and civic aggrupations to establish a PPP monitoring, evaluation and governance audit body functionally and fiscally independent from the LGU and other government institutions.

IX. Case Studies of LGU PPPs

A. BT and BOT: Marketplace by Mandaluyong City

According to a Case Study on “The Marketplace: Mandaluyong’s PPP”.²⁰¹

1. *Parties.* The City of Mandaluyong (then a Municipality) entered into a PPP arrangement with Market Realty Development and Credit Funders Corporation, a special purpose consortium.
2. *Project.* The PPP arrangement was for the construction of the public market and commercial complex/ shopping mall housed in a 7-storey commercial center called the Mandaluyong Public Market (The Marketplace).
3. *Modality.* Under the Contract, the public market shall be implemented under a BT arrangement while the commercial complex shall be undertaken under a BOT arrangement. The governing law is the BOT Law.
4. *Value Drivers.* The value drivers are: responsiveness (the ability to ensure that vendors and purchasers are safe), feasibility (low financial outlay on the part of the LGU), economical (minimal operation costs), and innovation (combination of two variants, BT and BOT).
5. *Procedure.* The project was awarded through competitive selection/ bidding. There were two biddings where the first one was declared a failure.
6. *Periods.* With regards the public market, the same will be transferred to the LGU upon completion after nine months. Insofar as the commercial complex is concerned, the franchise which gives the PSP the right to lease, control and super vise the complex is 40 years. The construction period of the complex is set at 24 months.
7. *Risk Allocation.* Project, construction and financing risks shall be borne by the PSP.
8. *Rights of Parties.* The LGU shall have the right to own the establishment, to operate the market, fix the rental fees and liquidated damages for delay in completion of project. The LGU shall fix the rental fees, award stalls through a permanent market committee, set policies and limitations on right to sub-lease. The PSP shall have the right to develop the complex, lease the land for free, renew the lease contract and receive revenues from operating the complex, be exempt from paying real property tax for 40 years.
9. *Contributions of Parties.* The LGU contributed the land for free use. There are no lease payments due the LGU. The PSP shouldered majority of capital outlay and excess of estimated construction costs.
10. *Obligations of Parties.* The LGU shall exercise supervision of the project, be solely responsible for operation, maintenance and supervision of market and

slaughterhouse, grant a franchise to the PSP, secure permits and licenses, among others. The PSP shall develop, finance and construct the complex, turn over the ownership of the complex upon its completion, determine the price of sub-lease contracts, be entitled to free lease of property for 40 years, etc..

B. JV: Wind Power by Camarines Sur

1. *Parties.* The PPP arrangement entered into on April 26, 2012 is between the Province of Camarines Sur and Cornerstone Energy Corporation.
2. *Project.* The Project is the development, construction, operation and maintenance of a 50 – 70 MW wind energy farm and related facilities.
3. *Modality.* The Project will be undertaken through a JV pursuant to its PPP Code, Provincial Ordinance No. 3, s. of 2010 which provides for guidelines for JVs with the private sector consistent with the 2008 NEDA JV Guidelines.
4. *Procedure.* The PSP was selected through competitive challenge initiated by an unsolicited proposal. There were no comparative proposals/ challengers.
5. *Vehicle.* The Project shall be carried out through a contractual or non-equity JV.
6. *Period.* The PSP is given the exclusive right to complete the development and construction of the project for a period of four (4) years.
7. *Obligations of Parties.* The LGU shall provide the Project Area, establish at its own cost the infrastructure facilities, provide right-of-way, assist in securing power supply agreements, among others. The PSP shall be responsible for the construction and operation of facilities, provide the technology, responsible for connecting the facility to the National Grid.
8. *Sharing of Parties.* The LGU shall be entitled to 1.8% of the gross revenue from the Project to be paid 15 days after the last day of every year for the duration of the Operation Period.

C. JV: Ferry Terminal of Iloilo City

1. *Parties.* The Parties to the PPP arrangement are Iloilo City and DoubleDragon Properties. The Contract was notarized on October 1, 2012.
2. *Project.* The Project is the construction, development, and operations and maintenance of the Iloilo City-Guimaras Ferry Terminal or Parola Port Development Project and surrounding areas within the property of the City.

3. *Value Drivers.* The Project aims to address the urgent necessity of providing safe, efficient and modern ferry terminal for commuters going to Guimaras, to promote and improve the vicinity where the LGU property is located, and to optimize the economic potential of the property.
4. *Modality.* The Project shall be implemented through a JV pursuant to Ordinance No. 213, s. of 2012.
5. *Procedure.* The PSP was selected through the competitive challenge route where the PSP submitted an unsolicited proposal to the LGU.
6. *Term.* The term of the JVA is 25 years counted from the first day of commercial operation of the Terminal. The PSP shall have the sole option to renew the JVA for another 25 years under mutually agreed terms.
7. *Rights and Obligations.* The LGU appoints the PSP as its attorney-in-fact with full power and authority to perform all transactions under the JVA. The LGU shall ensure that the PSP has sole, exclusive and unimpeded use of the Property, turn over possession of Property, shall ensure that no other port or terminal going to Guimaras or if another terminal will be operated, there will be a reduction of the LGU share in the revenues. Mooring fees imposed on watercraft moored offshore shall pertain solely to the LGU. Real property taxes over the Property shall be for the account of the LGU, while the PSP will be responsible for real property taxes for the improvements.

The PSP shall own all improvements until their transfer to the LGU at the end of the term, operate and maintain the Terminal, sub-lease portions of the property, have the right to collect terminal fees, berthing fees, handling fees and other port-related fees. The PSP shall design, construct and operate the Property, bear all construction and development costs, and pay all taxes.

8. *Contributions.* The LGU shall contribute the exclusive and unimpeded use of the property, grant the PSP exclusive rights to develop and operate all port/ terminal services and collect corresponding fees. The PSP shall shoulder development costs and manpower to implement the project.
9. *Revenues.* The LGU shall get a 1% of gross terminal fee revenues from year 1 to 5, and an additional 1% every five (5) years; 1% of gross berthing fees exclusive of VAT, 1% gross cargo fees exclusive of VAT, and 1% of gross rental revenue exclusive of VAT.
10. *Operations.* The PSP shall be primarily responsible for implementing the Project, and have sole and exclusive management control over the Project. From time to time, the parties shall discuss safety guidelines for the operation of the Terminal.

D. JV: Reclamation and Horizontal Development by Pasay City

1. *Parties.* The PPP contract was executed between Pasay City and SM Land on November 15, 2013.
2. *Project.* The object of the PPP contract is the implementation of a reclamation project and to perform the desired raw land reclamation and horizontal development, at no cost to the LGU, of 300 hectares. The land use development shall include mixed-use commercial/ residential districts, commercial development, institutional centers, public use and other related uses.
3. *Value Drivers.* The purpose of the project is to provide additional land area to accommodate the growing demands for residential, commercial and institutional sites due to the thriving population and commercial activities of the LGU.
4. *Modality.* The project shall be implemented through a contractual JV pursuant to the 2008 NEDA JV Guidelines which the LGU adopted.
5. *Procedure.* The PSP was selected through a competitive challenge whereby the PSP submitted an unsolicited proposal. No comparative proposals from challengers were submitted. The Project shall be subjected to the evaluation and consideration by the Philippine Reclamation Authority (PRA) and subsequent endorsement to the National Economic and Development Authority under Presidential Executive Order No. 146, s. of 2013.
6. *Obligations of Parties.* The LGU shall contribute to the JV its rights and privileges to implement the project, provide right-of-way and other easement rights, secure clearances from the PRA, among others. The PSP shall fully finance all raw land reclamation and horizontal development works, provide manpower, equipment, technology for the full implementation of the Project, ensure that all foreshore and offshore areas of the project shall be cleared of all structures, among others.
7. *Governance.* The Parties shall form a Project Supervision Team with five members composed of three (3) representatives from the LGU and two (2) representatives from the PSP and one (1) representative from the PRA. The Team shall monitor and manage all activities of the project.
8. *Sharing in Proceeds.* The LGU/ PRA/ National Government shall be entitled to 63 hectares (21%), PSP 147 hectares (49%), roads/ open spaces 90 hectares (30%).

E. JV: Reclamation and Horizontal Development by Parañaque City

1. *Parties.* The PPP contract was executed between Parañaque City and SM Prime Holdings, Inc. on December 3, 2014.
2. *Project.* The object of the PPP contract is the implementation of a reclamation and development project and to perform the desired raw land reclamation and horizontal development, at no cost to the LGU, of 300 hectares. The land use development shall include mixed-use commercial/ residential districts, commercial development, institutional centers, public use and other related uses.
3. *Value Drivers.* The purpose of the project is to provide additional land area to accommodate the growing demands for residential, commercial and institutional sites due to the thriving population and commercial activities of the LGU.
4. *Modality.* The project shall be implemented through a contractual JV pursuant to the City PPP Ordinance No. 13-06 which the LGU adopted.
5. *Procedure.* The PSP was selected through a competitive challenge whereby the PSP submitted an unsolicited proposal. No compliant Expressions of Interest was filed by interested PSPs. The Project shall be subjected to the evaluation and consideration by the Philippine Reclamation Authority and subsequent endorsement to the National Economic and Development Authority under Presidential Executive Order No. 146, s. of 2013.
6. *Obligations of Parties.* The LGU shall contribute to the JV its rights and privileges to implement the project, provide right-of-way and other easement rights, secure clearances from the Philippine Reclamation Authority (PRA), among others. The PSP shall fully finance all raw land reclamation and horizontal development works, provide manpower, equipment, technology for the full implementation of the Project, ensure that all foreshore and offshore areas of the project shall be cleared of all structures, among others.
7. *Governance.* Without prejudice to the powers and functions of the PPP-Regulatory Authority the Parties shall form a Project Supervision and Monitoring Team with five members composed of two (2) representatives from the Project Owner, two (2) representatives from the Project Developer and one (1) representative from the PRA. The Team shall monitor and manage all activities of the project.
8. *Sharing in Proceeds.* The LGU/ PRA/ National Government shall be entitled to 153 hectares inclusive of roads and open spaced (51%), and PSP 147 hectares (49%).

F. JV: Balintingon Reservoir by the Municipality of General Tinio

1. *Parties.* The Municipality of General Tinio, Nueva Ecija partnered with Kaltimex Energy Philippines in an unincorporated JV Agreement on June 9, 2014.
2. *Project.* The project comprises a dam and its appurtenant structures, and a reservoir. The components shall include, but not limited to, a rockfilled dam, spillway, reservoir, diversion structure, tunnel together with housing facilities, and other associated equipment and improvements necessary to divert water from the Sumacbao River to Balintigon Reservoir for bulk water and other purposes.
3. *Modality.* The PPP arrangement is an unincorporated JV entered into pursuant to its PPP Code, Ordinance No. 5, s. of 2013.
4. *Value Drivers.* The explicit value drivers are public good and general welfare, acceleration of development, creation of value for money, fiscal space, and expertise and technology that the PSP will contribute.
5. *Procedure.* The PSP was chosen through a competitive challenge/ unsolicited proposal where no comparative proposals were submitted, hence, the award to the PSP.
6. *Period.* The JV shall be for a period of 50 years commencing from the completion date.
7. *Sharing and Contributions.* 90% of the project cost (acquiring project site, all financing costs) and cost overruns required to complete the design and construction of the Project shall be absorbed by the PSP. The PSP shall be entitled to 90% of the net profits, and the LGU 10%. The PSP shall cause and be responsible for the financing, design, construction, completion, testing, commissioning, and operation of the Project.

The LGU shall handover, use of project site and all access roads and 10% of project cost and cost overruns, acquire or expropriate property required for the Project. The 10% of the project cost and cost overruns shall be repaid by the LGU without interest for 25 years. The PSP shall deduct or set-off the annual amortization solely from the LGU's 10% share.

The Parties shall have joint ownership of the Project.

8. *Vehicle.* The PSP shall incorporate a wholly-owned subsidiary which shall act as a SPC to assume all the rights, interests, liabilities and obligations under the JVA.
9. *Governance.* A Project Management Committee shall be created composed of five (5) members from PSP, one (1) from the LGU and one (1) jointly appointed by the parties. The Committee shall enjoy exclusive powers and authority in the

conduct of construction, financing, development, operation and maintenance of the Project.

G. JV: Housing Program by Cavite Province

1. *Parties.* The Province of Cavite and the R-II Builders, Inc. are the parties to the JV Agreement. The JV Agreement was entered into on June 24, 2008.
2. *Project.* The Project seeks to generate a total of 6,642 residential units consisting of house and lot packages and commercial lots. Housing credits recognized by the Housing and Land Use Regulatory Board shall also be generated. The price per unit for the house and lot package under the socialized housing is fixed in the JV Agreement but subject to adjustment. The price for the commercial lots shall be sold at a minimum price per square meter per approval of the Steering Committee.
3. *Beneficiaries.* The Project shall be for primary benefit of buyers to be qualified by the Province, but not limited to factory workers, government employees and non-formal income earners.
4. *Procedure.* The PSP was selected through an open bidding.
5. *Period.* The Project shall be completed within three years in accordance with approved Production Schedule.
6. *Sharing Scheme.* The Province shall be entitled to recover cost of its property from proceeds of the commercial lots, housing credits and sale of housing units, in order presented. The PSP shall reimburse the Province for its equity in the form of land that shall be site development for the Project.
7. *Obligations of Parties.* The Province shall provide the land for the Project, secure the annotation of the JV Agreement on title of land, secure all permits, and act as Project Manager for the development of the Project. The PSP shall prepare the subdivision and housing plans, arrange and source the funding for the Project, undertake marketing of completed units, maintain and repair the common areas. Both parties shall secure the certificates of occupancy and insurances, approve final list of qualified beneficiaries and turn-over completed roads and facilities of the Project to government agencies or homeowner's association.
8. *Governance.* A Steering Committee shall be created composed of one representative from the Province, as Chairman, one representative from R-II and one representative from the Provincial Housing Group, as voting members.

H. JV: City Center by Valenzuela City

1. *Parties.* The unincorporated JV Agreement was executed between Valenzuela City and Megabuild JPG Development, Inc. in October 2014.
2. *Project.* The Project shall be the construction, development, financing and operation of the Valenzuela City Center, a 2-storey community mall with one basement located at the Valenzuela City People's Park.
3. *Governing Law.* The JV is being implemented pursuant to JV Ordinance No. 140, s. of 2014.
4. *Period.* The JV shall be for 25 years.
5. *Procedure.* The selection of the PSP was through an unsolicited proposal which was subjected to competitive challenge.
6. *Obligations of Parties.* The PSP shall provide full financing for the Project, secure tenants, shoulder operating cost, implement, manage and operate the Project, amnd assume all national tax liabilities. The City shall allow the use of the People's Park, grant an exclusive right to the PSP and issue the necessary permits.
7. *Sharing Scheme.* Based on gross revenues, the City shall be entitled to 25% and the PSP 75%.
8. *Governance.* A Governing Board composed of seven representatives, five from PSP and two from City shall provide policy directions for the overall management and operations of the JV.

I. JV: CALABARZON Regional Government Center by Calamba City

1. *Parties.* The JV Agreement between Calamba City and MTD Philippines was signed on December 21, 2012.
2. *Governing Law.* The JVA was entered into pursuant to Ordinance No. 528, s. of 2012 which prescribes the guidelines and procedures for JVs patterned after the 2008 JV Guidelines issued by the NEDA.
3. *Procedure.* The PSP was selected through the competitive challenge approach which originated from an unsolicited proposal submitted to the City.
4. *Obligations and Contributions of Parties.* The contractual JV requires the PSP to finance, design and construct, operate and maintain the Project. The City shall contribute the use of the donated 3-hectare land, deliver the Project Site, assist the PSP in securing all permits and obtaining site utilities, endorse the Project

with the Board of Investments as pioneer status, and grant to the PSP all local tax incentives. Both Parties shall jointly market all the available leasable areas through the O&M Company which will be set up by the PSP.

5. *Sharing Scheme.* From rentals or lease fees CUSA fees, concession fees and other charges, the City shall be entitled to a guaranteed annual payment based on the total rate of occupancy, and 5% of total net income after tax of the O&M Company, while the PSP shall be entitled to the 95%.

J. Corporatization: Cebu Property Ventures by Cebu Province

1. *Parties.* This PPP modality involves the Province of Cebu and Ayala Land.²⁰²
2. *Modality.* The PPP modality is corporatization where the LGU caused the incorporation of Cebu Property Ventures and Development Corporation (CPVDC) as a stock corporation before the SEC. CPVDC was incorporated on August 2, 1990. CPVDC has been in existence for 24 years.
3. *Value Drivers.* The LGU wanted to fund its infrastructure projects from proceeds of the disposition of its patrimonial properties and to actualize its long-desired plan to weld a working partnership with the business sector.
4. *Material Dates.* On March 3, 1992, CPVDC was listed with the Philippine Stock Exchange. On July 31, 1995, Cebu Holdings, Inc. acquired 76% of CPVDC in a successful tender offer. On June 24, 1996, CPVDC launched the Cebu Civic and Trade Center. On September 1, 1996, commercial operations started.
5. *Nature.* In 1990, the CPVDC formed a subsidiary corporation under a joint partnership with Ayala Land, Inc. with a P1.0 billion authorized capital stock and conducted the flotation of Cebu Equity Bond Units (CEBUs) for the LGU; and, the Secondary Share Sale Program via a public offering through the local stock exchanges.

When CPVDC started as a joint venture, its ownership profile showed a 74.8 percent - 25.2 percent partnership between the LGU and PSP. The LGU contributed patrimonial properties as its equity contribution (comprising its 74.8 percent ownership share.), including the 23-hectare site of what was formerly the Lahug Airport.

For its part of the equity participation in CPVDC, the PSP initially contributed P63 Million as the initial 25 percent paid-up subscription for its 250 million shares, with the understanding that the full payment would be called when the properties offered by the LGU would be free and clear of occupants, and thus ready for development.

CPVDC is engaged in real estate development in the LGU and has entered into a general contract with PSP to manage its day-to-day operations.

K. Lease, Operations and Management: Pharmacy of Provincial Hospital by Northern Samar

1. *Parties.* The PPP Contract was executed between the Provincial Government of Northern Samar, as Client, and Planet Drugstore Corporation, as Pharmacy Manager.
2. *Modality.* The PPP partakes of a lease, management and operation of the Pharmacy of Northern Samar Provincial Hospital to operate, supply and manage the Hospital Pharmacy located at Northern Samar Provincial Hospital located at Catarman, Northern Samar.
3. *Procedure.* The selection of the PSP was through public bidding where the PSP's offer was considered the lowest complying, responsive and most advantageous to the interest of the LGU.
4. *Value Drivers.* The arrangement was entered into in order to improve pharmacy processes and operating standards by contracting a quality and experienced expertise in pharmacy operations. The PSP shall also develop new concepts and practices in pharmacy operations to enhance the quality of services, optimize efficiency and maximize revenues without sacrificing Northern Samar Provincial Hospital primary mission of equitably serving all constituents.
5. *Responsibilities.* The PSP shall manage and operate the inpatient (IP)/ outpatient (OP) pharmacies and assume full responsibility of all aspects of the management and operations of the IP/OP pharmacies including, but not limited to recruiting, training and employment of pharmacy personnel, manage inventory and ensure maintenance of sufficient but cost-effective composition and size of stock of pharmacy items, sort and prepare medicine for inpatient and outpatient dispensing, such that each patient will be given the appropriate drug, dosage and dosage form, provide Northern Samar Provincial Hospital with expertise and advice on pharmacy matters, including serving as secretariat (if so appointed) to its Therapeutic Committee, provide pharmacy equipment, reference books/publications to meet regulatory standards and to respond to Northern Samar Provincial Hospital medical requirements, among other responsibilities.
6. *Payments.* The LGU shall pay for the supply of medicines to patients classified by Northern Samar Provincial Hospital as In Patients, Out-Patient (Private/Paying), and Other Provisions (Special Cases).

7. *Period.* This contract shall remain in full force and effect for a period of one (1) year, unless otherwise extended by the LGU, on a month-month basis under the same terms and conditions.

Endnotes

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- ⁶ Section 22, Republic Act No. 7160 or the Local Government Code of 1991, 1990 or 1991 LGC
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