The Public-Private Partnership (PPP) Code of the Philippines

Republic Act No. 11966

A consolidation of all laws and rules on procurement of public assets through Public-Private Partnership (PPP) arrangements

In addition to the Build-Operate-Transfer (BOT) arrangements under the old BOT law, the new PPP Law now covers:

1. Joint Ventures (JVs)
2. Toll operation agreements (TOAs)
3. Lease agreements providing for the rehabilitation, operation, and/or maintenance, including the provision of working capital and/or improvements to, by the Private Partner of an existing land or facility owned by the government for a period of time covering more than one (1) year
4. Lease agreements when such lease is a component of a PPP project
5. All other contractual arrangements which possess characteristics or elements of a PPP

Significant changes in the approval of PPP projects

National PPP projects

- If the Project Cost is greater than or equal to PH₱15bn, it shall be approved by the National Economic Development Authority (NEDA) Board upon the favorable recommendation of the NEDA Board - Investment Coordination Committee (ICC).
- For schools and universities (SUCs) with Project Cost that is greater than or equal to PH₱15bn and have no government undertaking from the national government, the project can be processed through a green lane pursuant to guidelines from NEDA - ICC.
- Generally, projects with Project Cost of less than PH₱15bn shall be approved by the Head of Implementing Agency (IA).
- However, the NEDA - ICC will approve projects with Project Cost of less than PH₱15bn if:
    1. the project **physically overlaps** with a project approved by a government authority, or with a project being developed by another government entity based on national or sectoral development plans
    2. the project **negatively affects the economic benefits, demand, and/or financial viability** of a project approved by a government authority or a

project being developed by another government entity based on national or sectoral development plans

3. the project requires **financial government undertakings** to be sourced and funded under the General Appropriations Act (GAA)
4. the project involves **Availability Payments** to be sourced and funded under the GAA
5. the contribution of an IA in a proposed joint venture (JV) **exceeds 50% of its entire assets** based on its latest audited financial statements and other pertinent documents, and subject to Subsidy as defined in the Code.

- The NEDA - ICC may review, evaluate and update the PH₱15bn threshold.

Local PPP projects

Regardless of project cost,

- Local government unit (LGU) projects – for approval by local Sanggunians
- Local universities and colleges (LUC) projects – for approval by the respective Boards

NEDA - ICC, with the endorsement of Regional Development Council (RDC), shall approve any Government Undertakings (GUs) using National Government funds for Local PPP projects within 60 days from submission of complete documents. Disapproval of GUs not a disapproval of Local PPP projects.

Local PPP Projects affecting national or sectoral development plans and national projects shall likewise secure the endorsement of the national government through the respective RDCs.

Endorsements must be made within 30 days from submission of complete documents; otherwise, deemed approved.

PPP projects shall be approved within 120 calendar days from receipt of complete requirements; otherwise, deemed approved.

New procedures for unsolicited proposals

- Unsolicited Proposals are allowed for projects included in the list of PPP Projects solicited by the IA, provided that there will be:
    - reimbursement of development costs incurred by the IA on the project for the last three years
    - reimbursement of less than or equal to 6% of Project Cost (excluding the cost of Right of Way Acquisition, or ROWA).
- Unsolicited Proposals shall be submitted to the PPP Center for determination of completeness and determination of the appropriate Approving Body, within ten (10) calendar days from receipt thereof. And then endorse it to the appropriate IA.
- The Implementing Agency (IA) may:
    - continue processing of the proposal, or
    - reject such proposals when:
        - deemed not aligned with the development plans of the IA, or
        - the IA is already developing projects with similar scope and/or objective.
- If the implementing agency (IA) fails to act within 90 calendar days after the end of the detailed evaluation period, the project is deemed approved. The IA's decision is final and unappealable.
- Unsolicited proposals involving ROWA shall be submitted with right of way (ROW) and resettlement plan and that in no case IA be obliged to make an advance payment for such ROW acquisition and related costs.
- It is strictly prohibited to have any changes in the composition of the Original Proponent that affect its majority ownership.

Unsolicited Proposals shall not contain any of the following Government undertakings

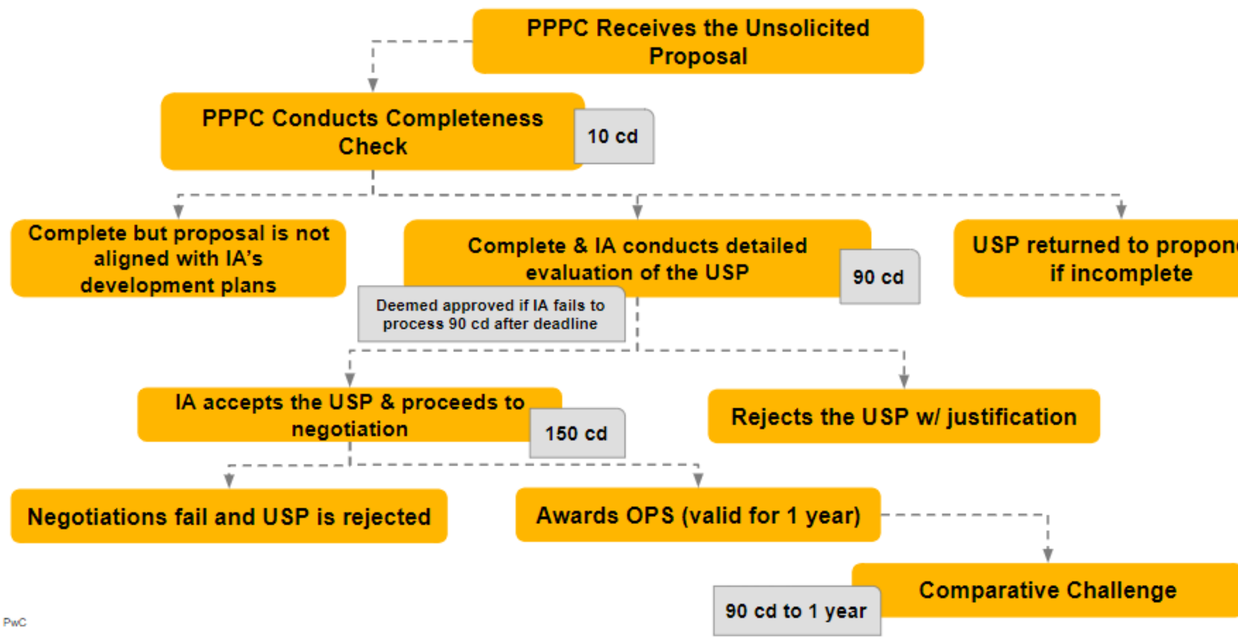
a. VGF and other forms of subsidy
b. Payment of ROW related costs (exception: if the government receives compensation is greater than or equal to the cost usufruct of assets, properties and/ rights)
c. Performance undertaking
d. Additional exemptions from any tax other than provided by law
e. Guarantee on demand
f. Guarantee on loan repayment
g. Guarantee on private sector return
h. Government equity (exception: in case of JV arrangement), and

i. Contribution of assets, properties, and rights (exceptions: (1) if the government receives compensation that is greater than or equal to the cost usufruct of assets, properties and/ rights; and (2) in case of JV arrangement)

Process

1. Within ten (10) calendar days from receipt of the first unsolicited proposal, the IA may entertain similar proposals.
2. Determine the completeness of the proposal.
3. Perform a detailed evaluation of the unsolicited proposals and qualifications of the Private Proponent/s.
    a. If there is more than one proposal, determine the most advantageous proposals to the government and the public considering: economic and financial viability of the project, proposed project scope and terms, investment recovery scheme, risk proposed to be assumed by the government, and qualification of Private Proponent.
4. Negotiation
    a. Conclude within a period that is less than or equal to 150 calendar days.
    b. For successful negotiations, grant the Private Proponent an Original Proponent Status (OPS) that is valid for a period of greater than or equal to one (1) year from conferment.
    c. Submit for approval to the approving body.
5. Comparative Challenge
    a. Conducted for at least 90 calendar days and no more than one (1) year
    b. Under the right-to-match mechanism, the Original Proponent has 30 calendar days to match the proposal of the challenger.

Unsolicited Proposal Process Flowchart



Joint Venture

- Contribution of the government shall in no case:
    - Exceed 50% of Project Cost = for contractual JV
    - Exceed 50% of Outstanding Capital Stock = for JV Company
- JV PPP contracts may allow the private sector to take over the undertaking of the project in its entirety in cases where government deems divestment from JV is the best interest of the public.

Clearer Tariff Regulations

- During the implementation of the project, the Private Partner shall have the right to file the application for fees and charges and adjustments thereof to the appropriate regulatory body.
- Approval of initial fees and charges shall be based on:
    - Service quality

    - Key Performance Indicators
    - Principles of fairness, transparency, predictability and protection of public interest while providing Reasonable Rate of Return
- In absence of appropriate regulatory body, initial fees and charges and its adjustments shall be stipulated in the PPP contract
- For local PPP Projects, IA may opt to create a local rate setting body

Legislative creation and recognition of the enabling institutions and policies for PPPs

1. **Empowered further the PPP Center**
   The PPP Center is institutionalized with additional powers and functions in order to work towards a more efficient and effective performance of its mandate, to wit:
    a. Draft policy opinions and issue non-policy opinions.
    b. Manage and administer PPP Risk Management Fund.

2. **Expanded the membership of PPP Governing Board**
   The Law provided additional members of the Board from the PPP Center, DILG, DENR, and CHED.

3. **Institutionalized the Project Development and Monitoring Facility**
   The PPP Code institutionalized and expanded the use of PDMF for other critical services (i.e., for the procurement of advisory and support services related to the preparation, structuring, evaluation, procurement, probity management, financial close, and monitoring of implementation of PPP projects).

4. **Created a PPP Risk Management Fund (RMF)**
   This facility is for the payment of contingent liabilities arising from PPPs; to be funded from:
    a. general appropriations
    b. income from existing PPP projects
    c. other sources as may be determined by the Development Budget Coordination Committee (DBCC)
    d. adoption of Contract Management and Risk Mitigation Plans in PPP Projects

5. **Made the following to be mandatory in the PPP process and contracts**
    a. dispute avoidance and ADR mechanisms in PPP contracts mandatory
    b. procurement of independent consultants mandatory
    c. inclusion on wind-up and transfer measures in PPP contracts
    d. disclosure of tender documents and PPP contract

Introduction/adoption of new concepts

1. Claw-back of excess **ROR** (Reasonable Rate of Return refers to the net gains of an investment over a specified time period, expressed as an annualized percentage as prescribed by the appropriate Approving Body and reflected in the PPP contract. Where the realized rate of return exceeds the prescribed reasonable rate of return, the excess shall be remitted to the National Treasury.)

2. Alternative sources of financing include **Green Financing**, which refers to investments that create environmental benefits in support of green growth, low-carbon avoidance and sustainable development, and the use of alternative assets.

3. Adoption of **land value capture strategies**, which refers to a set of mechanisms used to recover and re-invest land-based value increases that arise in the catchment area of public infrastructure investments. This may be employed to optimize the financial and economic efficacy of a PPP project.

Transitory clauses

Existing Contract/ Upcoming PPP Project	**Treatment**
All existing contracts	Governed by the agreements entered into by the parties. The Code only applies suppletorily so long as no rights are infringed upon
All PPP Projects with notices of award but no executed contracts at the time of the effectivity	Governed by the Code so long as no rights are infringed upon
Solicited PPP Projects which have commenced bidding; **USPs which have commenced Swiss challenge**	Governed by the Code so long as no rights are infringed upon; otherwise, apply rules in effect at the commencement of bidding or Swiss challenge
All proposed PPP Projects under the BOT Law and its IRR which are either pending approval or approved but no bidding or Swiss challenge yet	Governed by the Act except those that govern project approval; **Original Proponents with USPs pending approval have the option to resubmit their USPs under the Code**
National and Local JVs, TOAs/STOAs, pending approval of regulatory bodies	Governed by Section 7 of the PPP Act (Approval of PPP Projects)

- IRR shall govern, among others, the:
    a. procedures for approval of PPP projects
    b. processing of USPs
    c. evaluation of bids
    d. mechanism for setting the RROR, and
    e. list of allowed Government Undertakings.

Source: "Republic Act No. 11966 – An Act Providing for the Public-Private Partnership (PPP) Code of the Philippines", 5 December 2023, Public-Private Partnership Center of the Philippines.