NEWSLETTER

NISHIMURA & ASAHI

The Public-Private Partnership Act *Key Provisions (Philippines)*

Asia Newsletter

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On December 5, 2023, the President of the Philippines signed into law Republic Act No. 11966, known as the Public-Private Partnership Act ("PPP Code") to attract foreign investments and key infrastructure and other development projects in the Philippines.

The PPP Code took effect on December 23, 2023. The PPP Governing Board ("Board") is currently drafting the Implementing Rules and Regulations ("IRR"), while conducting public consultations with other government and private stakeholders. The PPP Code requires the Board to promulgate the IRR by or before March 22, 2024. Pending the issuance and effectivity of the IRR, the Board on December 21, 2023 issued interim guidelines, which apply to PPP projects whose processing has commenced by the effectivity of the PPP Code and before the effectivity of the IRR.

The following are among the key changes in the PPP Code:

1. Provides a comprehensive legal framework:

Previously, several different laws and regulations applied to public-private partnership ("PPP") projects in the Philippines, which has often caused investor confusion. Now, the PPP Code establishes a comprehensive legal framework for all PPP projects at the national and local levels, including joint ventures ("JVs"). By doing so, the Philippines now has consistent regulations for all government agencies and local government units ("LGUs"), and no government entity may issue or use any PPP regulations and JV codes in conflict with it.

The PPP Code expressly repealed Republic Act No. 6957, as amended by Republic Act No. 7718 (the "BOT Law"), and modified relevant provisions of various laws touching upon PPP arrangements, such as the Bases Conversion and Development Act, the charter of the Philippine Ports Authority, the franchise of the Philippine National Construction Corporation, and special charters of various government-owned and controlled corporations allowing the issuance of guidelines on infrastructure project partnerships outside of the Government Procurement and Reform Act or Republic Act No. 9184.

Similar to the BOT Law, the PPP Code covers all PPP projects between government agencies and the private sector. The PPP Code expressly excludes from its coverage all infrastructure projects undertaken under the Government Procurement Reform Act as well as management contracts, service contracts, divestments or dispositions, corporatization, incorporation of subsidiaries with private sector equity, onerous donations,

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gratuitous donations, and joint ventures involving purely commercial arrangements that neither provide nor include public infrastructure or development services.

The PPP Code also introduced alternative financial instruments such as Green Financing[2] and Land Value Capture Strategies[3] to help optimize the financial feasibility and economic efficacy of a PPP project.

2. Investment recovery mechanisms:

The PPP Code includes investment recovery mechanisms that were introduced in the revised IRR of the BOT Law ("BOT Law IRR"), particularly, revenue-based schemes for tolls, fees, and rentals, and availability payments, which are predetermined payments by the Government Implementing Agency ("GIA") to the private partner in exchange for delivering an asset or service. However, prior to the PPP Code, the allowed repayment scheme for the project depended on the contractual arrangement (e.g. whether a build-operate-transfer, contract-add-operate, design-operate-transfer, etc.). The PPP Code no longer limits the type of repayment scheme based on the contractual arrangement, and a private partner may utilize any of the specified investment recovery schemes or a combination thereof to recover its investments and earn a reasonable profit, regardless of the type of PPP project. The PPP Code also allows the private partner to utilize other investment recovery schemes to supplement the specified investment recovery schemes but clarified that for recovery schemes that involve commercial development rights or the grant of a portion or percentage of reclaimed land, the scheme would be subject to fair valuation (as well as the constitutional requirements on land ownership).

3. Limits judicial actions on PPP projects:

The PPP Code expanded the prohibition on the issuance of temporary restraining orders, preliminary injunctions, preliminary mandatory injunctions, and other provisional remedies by any court, except for the Supreme Court, against the GIA and the PPP Center, to all PPP projects, whether unsolicited or subject to bidding, during the entire PPP process up until its execution, implementation, termination or rescission. Any such orders or provisional reliefs issued in violation of this prohibition would be void and have no force and effect. This limit ensures continuity of the project and safeguards against any untoward delays in the completion of the project. Previously, under the BOT Law IRR, the limitation on judicial action only covered unsolicited proposals that may conflict with government projects.

4. Dynamic project approval threshold amounts:

The PPP Code updated the project approval thresholds for PPP projects:

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[2] Green Financing refers to investments that create environmental benefits in support of green growth, low-carbon, carbon avoidance, and sustainable development, and the use of alternative assets such as carbon credits, such as those pursuant to the Paris Agreement or Ecosystem Services.

[3] Land Value Capture Strategies refer to mechanisms to recover and re-invest land-based value increases that arise in the catchment area of public infrastructure investments.

Required Approval for National Projects	
Approving Body	**Total Project Cost Threshold / Conditions**
By the NEDA Board, upon favorable recommendation of its Investment Coordination Committee ("ICC")	Total Project Cost is **PHP15 billion (approx. USD 268,822,274.25) and above,** increased from the previous PHP300 million (approx. USD 5,409,691.12) threshold under the BOT Law.
By the governing board, head of the main department, or agency head (whichever applies) of the GIA	Total Project Cost is **below PHP15 billion**

Required Approval for Local Projects	
Approving Body	**Conditions**
By the local city/provincial board/municipal councils of LGUs or boards of local universities and colleges ("LUC"):	If a PPP project is implemented by an LGU, it should be approved by the respective local city/provincial board/municipal council of such LGU. If a PPP project is implemented by an LUC, it should be approved by the board of such LUC.
By the NEDA Board – ICC	Approval by the ICC is required if national government funds will be used or government undertaking is required for the PPP project. Under the BOT Law, the approval of the ICC was only required for local projects costing above PHP200 million (approx. USD 3,606,594.45).

5. Required provisions in PPP contracts – mandatory alternative dispute resolution ("ADR") mechanisms, reasonable rate of return, and other provisions:

The PPP Code requires that the following provisions are included in PPP contracts:

Required components of PPP Contracts	
Accountability and Risk Management	The PPP Code requires the private partner and the GIA to define each party's accountability under the PPP project. Further, all PPP contracts must provide for the adoption of contract management and risk mitigation plans which shall include the agreed project execution plan, all the risks assumed by the government under the PPP contract, risk mitigating measures, estimated costs to be incurred, target timeline to have each measure in place, and the appropriate action plan to manage each type of risk. Under previous regulations, accountability and risk management of the respective parties to the contract was laid squarely on the private proponent notwithstanding the GIA's approval of the project design and engineering, as well as the GIA's supervision of the construction, operation and maintenance.[4]

[4] Sections 12.06 and 12.10, BOT Law IRR.

Required components of PPP Contracts	
Reasonable Rate of Return	The PPP Code specifies that the excess realized return of the prescribed reasonable rate of return should be remitted to the Philippine Treasury. There is no such requirement under previous regulations.[5]
Alternative Dispute Resolution	The PPP Code now mandates that all PPP contracts shall include provisions on the use of dispute avoidance and ADR mechanisms while giving the parties the freedom to choose which ADR mechanisms to employ. There is no such mandate under previous regulations and parties were allowed to agree to resolve disputes either through arbitration or litigation.[6]
Contract Termination	The PPP Code reiterates previous regulations that PPP contracts shall define all events that may lead to its termination, as well as the remedies, curing periods, and written notice requirements for each event. The PPP project shall not be terminated for an event of default without exhausting the corresponding remedy or curing period.
Wind-up and Transfer Measures	The PPP Code specifies that the transfer and warranty requirements include the training of the GIA's or the project successor's personnel. Under previous regulations, the transfer measures were limited to the posting of a transfer security (bond to be released back to the private partner upon the GIA's determination that the transfer was completed) and provision of a warranty security (bond to be released back to the private partner after one year from transfer if the PPP project meets the key performance indicators and targets).
Financial Close	The PPP Code provides that the private partner must secure all necessary project and financing agreements within a specified period or be subject to penalties if such failure is not due to the fault of the government. This condition is not under the previous regulations as it only required the private partner to periodically report and submit to the PPP Center the status of its loan and financing agreements.

6. Removal of preconditions set forth in the BOT Law in unsolicited proposals:

Unsolicited proposals may now be submitted for government agencies' priority PPP projects, without having to involve a new concept or technology. Under the previous regulations, unsolicited proposals were only allowed if they met certain preconditions under the BOT Law including that (i) the project involves a new concept or technology and/or is not part of the government's list of priority projects; and (ii) no direct government guarantee, direct government subsidy or direct government equity is required.[7] The PPP Code removed some of these preconditions in the BOT Law. Instead, the PPP Code requires (with some exceptions discussed below) that the unsolicited proposal shall not contain any of the following government undertakings:

Prohibited government undertakings in unsolicited proposals	
(a)	Viability Gap Funding ("VGF") and other forms of subsidy,
(b)	Payment of Right-of-Way ("ROW") related costs,
(c)	Performance undertaking,

[5] Section 1.3(ff), BOT Law IRR.

[6] Section 12.22, BOT Law IRR.

[7] Section 10.1, BOT Law IRR.

Prohibited government undertakings in unsolicited proposals	
(d)	Additional exemptions from any tax other than those provided for by law,
(e)	Guarantee on demand,
(f)	Guarantee on loan repayment,
(g)	Guarantee on private sector return,
(h)	Government equity, and
(i)	Contribution of assets, properties, and rights.

Items (b) and (i) are allowed if the government receives appropriate compensation, which shall, in no way, be lower than the value of the costs of ROW to be acquired and the usufruct of assets, properties, and rights contributed. In the case of JV arrangements, items (h) and (i) are allowed.

7. Modification of the procedure and comparative challenge for unsolicited proposals:

The PPP Code now authorizes the PPP Center to first receive all unsolicited proposals and review the completeness of the proposals before they are endorsed to the appropriate government agency. Only unsolicited proposals endorsed by the PPP Center may reach the relevant government agency or LGU for further evaluation. Under the regulations prior to the PPP Code, all unsolicited proposals for PPP projects were submitted directly to a government agency or LGU.

Furthermore, the PPP Code now provides a more flexible time period for challenges to unsolicited proposals. Under the PPP Code, unsolicited proposals must undergo a comparative challenge following a right-to-match mechanism within a reasonable and fair period, which must be within 90 days to one year, as proposed by the GIA and approved by the Approving Body. Under the previous regulations, challengers were given 60 working days from the issuance of the tender to submit their bids. Then, the original proponent was granted the right to match lower proposals submitted by other proponents within a 30-day period.

8. Overall, easier and streamlined processing of PPP project proposals:

The PPP Code did not change how solicited proposals under the BOT Law IRR were conducted. However, some changes were introduced on how unsolicited proposals ("USP") are to be undertaken as shown below:

Proposal Stage
The PPP Code lifted preconditions imposed under previous regulations for submission of USPs. Previously, a USP was required to introduce a new concept or technology or should not be among those already listed by the government as a priority project. The PPP Code requires that all USPs must be submitted to the PPP Center for a completeness check. Previously, USPs only needed to be submitted to the GIA.
Evaluation Stage
Under the PPP Code, once a USP is endorsed by the PPP Center and is accepted by the GIA, the latter shall grant the private proponent an "Original Proponent Status", which shall be valid for one year. This validity period was not provided for under previous regulations. The comparative challenge and right-to-match

mechanism granted to an approved USP under previous regulations however were carried over in the PPP Code.
Award Stage
Similar to previous regulations, if no challengers bid, or if all challenging bids fail to outbid the original proponent, the original proponent is issued a "Notice of Award".
Contract Signing Stage
Under the PPP Code, before the GIA may sign the final draft of the PPP contract for national PPP projects, the clearance of the PPP Center, the Philippine Department of Finance ("DOF") for government undertakings and the statutory counsel (the Office of the Solicitor General or the Government Corporate Counsel) is required. Previously, the BOT Law IRR did not require the PPP Center's clearance and only required the approval of the DOF and the statutory counsel.

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