NEWSLETTER

NISHIMURA & ASAHI

The Public-Private Partnership Act Implementing Rules and Regulations

Asia Newsletter

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On March 22, 2024, the PPP Center published the Implementing Rules and Regulations ("**IRRs**") of Republic Act No. 11966, or the "Public-Private Partnership Code of the Philippines" ("**PPP Code**"), following the PPP Code's effectivity on December 23, 2023.

The IRRs formally took effect on April 6, 2024. While the IRRs provide more details for the enforcement of the provisions of the PPP Code, the following are among the key introductions of the IRRs:

1. Detailed coverage

Under the PPP Code, a "PPP project" is defined as "any public infrastructure or development project and service implemented under this Code." The IRRs clarified this definition by stating that a PPP project must satisfy the elements of a PPP. The IRRs define a PPP as "a contractual arrangement between an implementing government agency and a private partner to finance, design, construct, operate, and maintain, or any combination or variation thereof, Infrastructure or Development Projects and Services which are typically provided by the public sector, where each party shares in the associated risks, and where the investment recovery of the Private Partner is linked to performance." This definition gives more clarity on what types of infrastructure or development projects and services are actually subject to the PPP Code.

In addition, the PPP Code's predecessor, Republic Act No. 7718 or the "BOT Law," provided a list of project types eligible for a PPP. The IRRs expanded this list, emphasizing that it is a non-exhaustive list of the kinds of projects that would be classified as "Infrastructure or Development Projects and Services," including (but not limited to) the following:

(a) Land transportation systems, including railways, road-based transportation systems, bus rapid transit, high priority public utility vehicle systems, active transportation, transit-oriented developments, public utility vehicle stations, transport plazas, intermodal terminals, park and ride, and related facilities;
(b) Transport and traffic management projects, including transportation databases, automated fare and toll collection systems, traffic signaling, traffic monitoring systems, traffic enforcement systems, congestion and management systems, and related facilities;
(c) Maritime infrastructure like navigable inland waterways, shipping and ferry services, shipping vessels or components thereof, shipping and freight enterprises, and related facilities;

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(d) Energy efficiency and conservation, renewal energy, and electric vehicle charging stations, and related facilities;
(e) Telecommunications, backbone network, terrestrial, aerial, and space infrastructure, and related service facilities;
(f) Heritage preservation and adaptive reuse projects;
(g) Cold chain systems or centers, and related facilities;
(h) Climate change adaption and mitigation and disaster risk reduction and management infrastructure projects, biodiversity conservation projects, and related facilities.

The IRRs also clearly enumerated the public infrastructure projects that are excluded from PPP Code coverage, such as projects under the Government Procurement Reform Act ("**GPRA**") and infrastructure projects exclusively funded through foreign loans and grants covered by Official Development Assistance ("**ODA**") loans. The IRRs clarified, however, that a PPP project covered under the PPP Code may still be financed partly from direct government appropriations or ODA loans of foreign governments and institutions through blended finance. With respect to PPP projects partially financed by ODA loans, the procurement activities of a component financed by government appropriations will be governed by the provisions of the GPRA, while those components financed by an ODA loan will be in accordance with the terms and conditions of the relevant ODA agreement.

2. Approval of PPP Projects

Approval of National PPP projects

Under the PPP Code, national PPP projects with a cost of at least PHP15 billion require approval from the NEDA Board – Investment Coordination Committee ("**ICC**"). If the project cost is below this threshold, only approval from the governing board or the head of the implementing agency (as the case may be) is required. The PPP Code however lists certain instances when a national PPP Project with a cost of less than PHP15 billion will still require approval of the ICC. The IRRs reiterate these and in addition, provide more details on when these instances will apply:

a. *Physical overlap 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,*

b. *Negative effect on 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,*

   To determine whether there is physical overlap with or negative effects on another project, the IRRs direct the implementing agency to check the Consolidated List of Investment Programs (CLIPS) and the list of PPP projects, both of which are lists prepared pursuant to the IRRs. The IRRs also specify the factors that the implementing agency must consider in its determination of whether there is physical overlap with or negative effects on another project.

c. *Requires financial government undertakings to be sourced and funded under the General Appropriations Act ("GAA"),*

d. *Involves availability payments to be sourced and funded under the GAA; or*

For the above two instances, the IRRs clarify that ICC approval is not required if the government undertakings or availability payments are sourced from funds other than the GAA.

e. *The contribution of an implementing agency in a proposed joint venture exceeds fifty percent (50%) of its entire assets based on its latest audited financial statements and other pertinent documents, and subject to Section 3 (gg) of the PPP Code.*

To determine the contribution of the implementing agency, the IRRs clarify that information from the latest audited financial statements and other pertinent documents such as, but not limited to valuation reports by third-party appraisers, development plans, financial performance reports, and management reports, of the implementing agency are considered. It also clarifies that the assets contemplated here refer to the entire assets, whether current or noncurrent, of the implementing agency at the time of its submission of the national PPP project to the approving body, and not the assets of the subject PPP project.

Approval of Local PPP projects

The PPP Code requires the respective local development council ("**LDC**") to confirm the local PPP project prior to approval by the local *Sanggunian* of the local government unit or board of the local university or college (as the case may be). The IRRs provide a list of what the submission for confirmation must include and requires the LDC to review and submit the confirmation and results of its review to the approving body within 30 calendar days from receipt of the complete requirements.

Criteria for approval

Supplementing the PPP Code, the IRRs also provide criteria to guide the approving body in evaluating and approving national and local PPP Projects and specify the minimum parameters, terms, and conditions ("**PTCs**") that an implementing agency must submit to the approving body as part of the proposed PPP project for approval.

Timeline for approval of PPP projects

The PPP Code generally requires an approving body to render a decision within 120 calendar days from receipt of the complete requirements. The IRRs clarify this by stating that when the approving board is the ICC, it must render its decision on the PPP Project within 120 calendar days and where the approving body is the governing board or head of the implementing agency, the approving body must render its decision in writing within 90 calendar days, extendible up to 120 calendar days.

The IRRs also state that the approving body of a local PPP project must approve the PPP project within 120 calendar days from receipt of the complete requirements, including confirmation of the LDC.

3. Unsolicited Proposals

The PPP Code requires the private proponent to submit its unsolicited proposal to the PPP Center which will check the proposal for completeness before endorsing the proposal to the appropriate implementing agency. The IRRs specify the minimum documents a private proponent must submit and also directs the PPP Center to issue detailed guidelines on the procedures for submitting unsolicited proposals, including a list of requirements to determine completeness of the submitted unsolicited proposal, the description of each requirement, and the use of a digital platform to facilitate efficient processing.

When processing an unsolicited proposal, the PPP Code requires the implementing agency to conduct a detailed evaluation of the unsolicited proposal and the qualifications of the private proponent. The IRRs specify guidelines for the implementing agency when conducting the detailed evaluation.

4. Bidding Process

The PPP Code directs the head of the implementing agency undertaking PPP projects to create a PPP Pre-qualification, Bids and Awards Committee ("**PBAC**"), which shall be responsible for all aspects of pre-bidding and bidding processes in solicited proposals, or the comparative bidding processes in unsolicited proposals. The IRRs provide (among others) more details on the actual bidding process, including the (i) requirements for the invitation to qualify/pre-qualify and bid or invitation for comparative proposals, (ii) preparation and issuance of the tender documents, (iii) instruction to bidders/challengers, (iv) conduct of the pre-bid conference and one-on-one meetings, (v) considerations in qualifying/pre-qualifying prospective bidders/challengers, (vi) requirements and criteria of technical and financial bids/comparative proposals, and (vii) protests of PBAC resolutions and procedures in filing motions for reconsideration with the PBAC, appeals to the head of the implementing agency and, thereafter, appeals to the relevant Department Secretary.

5. Framework for supervision and monitoring of PPP Projects, and mechanism for setting the Reasonable Rate of Return

The PPP Code extended more power to the PPP Center for the coordination and monitoring of all PPP Projects. In consonance with this, the IRRs mandated the PPP Governing Board to set the framework for monitoring and reporting the progress of PPP Projects to cover both national and local PPP Projects, as well as to provide the protocols for monitoring compliance with contractual obligations and project performance.

6. Mechanism for setting the Reasonable Rate of Return

The PPP Code allows an implementing agency to consider, on a negotiated basis, a single complying and responsive bid if:

(a) After advertisement, more than one bidder applied for pre-qualification but only one met the pre-qualification requirements;

(b) After advertisement, only one bidder applied for and met the pre-qualification requirements, provided such was allowed by the head of the implementing agency, upon recommendation of the PBAC;

(c) After pre-qualification of more than one bidder, only one submitted a bid; or

(d) After pre-qualification, more than one bidder submitted bids but only one is found by the implementing agency to be in compliance.

The PPP Code also requires that negotiations shall be limited to the financial proposal of the bidder and in compliance with the reasonable rate of return (**"RROR"**) prescribed by the approving body.

In prescribing the RROR, the IRRs require that (i) the prevailing market conditions, risks to be assumed by the private partner, and duration of the project are considered, (ii) the RROR is provided in the PPP contract, and (iii) the detailed process in approving, and the methodology in calculating, the RROR is in accordance with the guidelines to be issued by the ICC.

7. Government Undertakings that may be granted to a PPP Project

The IRRs specify the form of government undertakings or the form of support or contribution the government may provide to PPP Projects, unless otherwise prohibited under the PPP Code. Such government undertakings listed under the IRRs are as follows:

a. Viability gap funding and other forms of subsidy,

b. Payment of right-of-way related costs,

c. Performance undertaking,

d. Exemptions from any tax, unless otherwise prohibited by the IRRs or other applicable laws, rules, and regulations,

e. Guarantee on demand,

f. Guarantee on loan repayment,

g. Guarantee on private sector return,

h. Government equity,

i. Contribution of assets, properties, and/or rights,

j. Monetary payment of contingent liability through the PPP Risk Management Fund of the national government, in the case of local PPP Projects, and

k. Credit enhancements.

The PPP Code however generally prohibits government undertakings listed in items (a) to (i) above for unsolicited proposals.

In the near future, we expect the PPP Center and the implementing agencies to issue their own rules in relation to PPP projects, as directed by the IRRs. Nevertheless, the IRRs are a welcome progress in developing the policy framework for PPPs in the Philippines, as they introduce transparent guidelines that will consistently apply to all PPP projects. This creates a level of certainty intended to attract investors and private proponents to collaborate with the government and encourage them to do more business in the Philippines.

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