

PPP LEGAL FRAMEWORK SNAPSHOT - PHILIPPINES

GENERAL INFORMATION

Capital: Manila

Population: 99.14 million

GDP: USD 284,777 million

LEGAL AND INSTITUTIONAL FRAMEWORK

PPP Law and other applicable texts

The Philippine Amended BOT Law R.A. 7718, 2012 (BOT Law 2012), and its Implementing Rules & Regulations, 2012 (IRR 2012)

Other applicable sectoral laws

Commonwealth Act No.146 (Public Service Law)

PPP Unit

Public-Private Partnership Center of the Philippines (under the National Economic and Development Authority (NEDA))

Definition (BOT Law 2012)

Infrastructure or development projects normally financed and operated by the public sector but which will be wholly or partly implemented by the private sector, including but not limited to, power plants, highways, ports, airports ... and other infrastructure and development projects as may be authorized by the appropriate agency/LGU (government agency/local government unit) pursuant to this Act. (sec.2.(a))

General Principles (BOT Law 2012)

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." (sec.1.)

Tendering and contracting process / Choice of the private partner (BOT Law 2012; IRR 2012)

- Competitive public bidding of projects (two-envelope system):
 - In the case of BOT project, the contract shall be awarded to the bidder who submitted the lowest bid and most favorable terms for the project, the winning Project Proponent shall be automatically granted the franchise to operate and maintain the facility and collect the fees.
 - In the case of BT or BLT project, a Filipino contractor who submits an equally advantageous bid with exactly the same price and technical specifications shall be given preference. (BOT Law 2012, sec.5.)
- Direct Negotiation of Contracts shall be resorted to when there is only one complying bidder left. (BOT Law 2012, sec.5-A.)

- Unsolicited Proposals may be accepted by Agency/LGU on a negotiated basis, provided (1) such projects involve a new concept or technology and/or are not part of the list of priority projects, (2) no direct government guarantee, subsidy or equity is required, and (3) no other proposal is received, or the original proponent resubmits a lower price against new proponents after publication of such unsolicited proposal. (BOT Law 2012, sec.4-A; IRR 2012, rule 10)

Project Evaluation

(BOT Law 2012; IRR 2012)

- All concerned government agencies shall include in their development programs those priority projects that may be financed, constructed operated and maintained by the private sector. (BOT Law 2012, sec.4)
- The list of all national projects costing up to 300 million pesos (USD 6.42 million approx.) shall be submitted to Investment Coordination Committee (ICC) of the NEDA for its approval and to the NEDA Board if projects costing more than to 300 million pesos (USD 6.42 million approx.). (BOT Law 2012, sec.4)
- The list of local projects shall be submitted to different level of development councils or ICC of NEDA for approval according to respective economic scales. (BOT Law 2012, sec.4)
- Projects undertaken through the Build-own and operate (BOO) scheme shall require recommendation from ICC of NEDA and then approval of the President. (BOT Law 2012, sec.2.(d); IRR 2012, sec.1.3.f.iv., sec.2.9)

Rights and Obligations of the public partner

(IRR 2012)

- Obligation to publish list of Priority Projects at least once every 6 months in national newspaper and international newspapers, where applicable. (sec. 2.4)
- Obligation to publish the notice of award and/or bidding results in the PHILGEPS, website of PPP Center and of the Agency/LGU within 7 days from the issuance of Notice of Award. (sec. 11.4)
- Obligation to provide the necessary assistance to the Project Proponent in securing all required clearances. (sec. 12.2)
- Obligation to automatically grant in favor of the Project Proponent a Franchise to operate the facility and collect the fees once a contract is executed by both of parties upon application. If the final approval results in a decrease in the amount of fees stipulated under the contract, the government shall ensure that the Project Proponent recovers the difference. (sec. 12.3)
- Right to inspect and check whether the project is constructed, operated and maintained properly. (sec. 12.10)
- Right to rescind the contract and take over the facility, if the Project Proponent refuses or fails to perform certain crucial provisions of the contract and cannot correct in time after notification, or in cases of emergency/public interest. (sec. 12.21)
- Obligation to provide certain undertakings, subject to laws and regulations, based on approved risk allocation matrix issued by the Approving Body/ICC, to the Project Proponent. (sec. 13.3)

Rights and Obligations of the private partner

(BOT Law 2012; IRR 2012)

- Right to be compensated by the government if a project is revoked, cancelled or terminated by government/court's final judgment through no fault of the project proponent or by mutual agreement. (BOT Law 2012, sec.7.; IRR 2012, sec. 12.21 c.)
- Right to be compensated by government if the government defaults on certain major obligations in the contract and such failure is not remediable or if remediable shall remain un-remedied for an unreasonable length of time. (BOT Law 2012, sec.7.; IRR 2012, sec. 12.21 c.)
- Right to be entitled to certain incentives for projects in excess of 1 billion pesos (USD 21.37 million approx.). (BOT Law 2012, sec.10.)
- Obligation to post a performance guarantee in favor of the Agency/LGU concerned in cash, bank draft, guarantee confirmed by a local bank (in case of foreign bidders

bonded by a foreign bank), L/C or surety bond etc. determined by the Agency/LGU. (IRR 2012, sec. 12.8, sec. 12.9)

- Obligation to pay the Agency/LGU concerned liquidated damages if the Project Proponent fails to satisfactorily complete the work on or before completion date. (IRR 2012, sec. 12.14)
- Right to divest or accede the ownership and/rights to a project, subject to approval, after the holding or lock-in period and the new project proponent has equal or better qualification. (IRR 2012, sec. 12.20)
- Right of lenders/creditors/banks to exercise their rights and interests, subject to approval of the Agency/LGU after its rescission of the contract. (IRR 2012, sec. 12.21 b.ii)
- Right to be entitled to various investment incentives, exemptions or reliefs according to respective investment scales and sectors of the projects. (IRR 2012, sec. 13.2)

Obligations and Rights of Both Public and Private Partners

(IRR 2012)

- Obligation to include certain clauses in the contract. (sec. 4.4)
- If the project/contract is revoked, cancelled, or terminated by government/mutual agreement/court's final judgment through no fault of the Project Proponent, an independent appraiser mutually acceptable to both parties shall make a binding determination on amount of compensation to the Project Proponent. (sec. 12.21)

Applicable Law

Dispute resolution

(IRR 2012)

- Law of Philippines.
- The venue for resolution of dispute, arbitration or litigation shall be as mutually agreed upon by parties to the contract. In default thereof, the venue shall be in the Philippines. (IRR 2012, sec. 12.22)

EXAMPLES OF PROJECTS STRUCTURED AS PPP

Infrastructure sector - Telecom

Globe Telecom

Infrastructure sector - Water

Maynilad Water Services, Manila

Infrastructure sector - Power

Transco Philippines National Grid