

Republic of the Philippines
HOUSE OF REPRESENTATIVES
Quezon City

Eighteenth Congress
First Regular Session



HOUSE BILL NO. 77

Introduced by **Representative JOEY SARTE SALCEDA**

**AN ACT
STRENGTHENING PUBLIC-PRIVATE PARTNERSHIPS AND
APPROPRIATING FUNDS THEREFOR**

EXPLANATORY NOTE

RA No. 6957, as amended: An Offshoot of the Important Role of the Private Sector in Nation Building. The private sector is an indispensable component in sustainable development. Recognizing the contribution of the private sector to nation building, Section 20, Article II of the 1987 Philippine Constitution explicitly provides that "The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments."

Pursuant to this declared State policy, two primary laws were enacted by Congress namely: Republic Act No. 9184 or the Government Procurement Reform Act (RA 9184) for the procurement of goods, supplies and services, and Republic Act No. 6957 as amended by Republic Act No. 7718 or the Philippine Build-Operate-and-Transfer (BOT) Law allowing for a more focused framework in PPP infrastructure development. R.A. No. 9184 was enacted to, among others, promote transparency in the procurement process and in the implementation of procurement contracts. Republic Act No. 6957 allows for LGUs to enter into contractual arrangements with the private sector to implement infrastructure projects thru a Built-Operate-And-Transfer and Build-Transfer-and-Operate. Eventually, R.A. No. 6957 was amended by Republic Act No. 7718 or the Philippine Build-Operate-and-Transfer (BOT) Law broadened the list of PPP government implementing government entities to include government owned and controlled corporations (GOCCs), government financing institutions (GFIs) and state universities and colleges (SUCs); putting up incentives for attracting private sector investments to venture into PPP projects; and allowing negotiated unsolicited proposals provided that these comply with conditions outlined in the Law. More importantly, RA 7718 allowed for other contractual arrangements or schemes to implement PPP projects.

Under existing law, the overall policy making body for all PPP-related matters is lodged with the PPP Governing Board (PPPGB), composed of the Secretary of Socio-Economic Planning as chairperson, the Secretary of Finance, as vice-chairperson and as

members, the Secretary of Budget and Management, Secretary of Justice, Secretary of Trade and Industry, Executive Secretary and the Private Sector Co-Chairman of the National Competitiveness Council.

Salient Features of the Proposed Bill. This proposed bill further enhances and reinforces the provisions of R.A. 6957, as amended to engender transparency in transactions, efficiency in the performance of project obligations, and putting additional thrust and impetus to the PPP program through a more robust cooperation between the public and private sectors. With these in mind, the bill proposes the following additional amendments to RA 6957, as amended, to wit:

Section 1, as proposed, emphasizes the role of the private sector as “prime mover” for national growth and development. It expresses in a categorical and explicit terms the bounden obligation of the government to provide support to allow the private sector to achieve reasonable rate of return on investments (ROI) in financing the construction etc. through a competitive and transparent selection process. It also makes it the declared policy of the state to abide by the principle of transparency with the end in view of protecting the interest of the public by ensuring fair and reasonable pricing and timely delivery of quality services.

Amendments to *Section 2. (Definition of Terms)* under the proposed bill are hereunder enumerated, to wit:

- a) Inclusion of “bulk grains handling facility or logistic support system” among the list of Public-Private Infrastructure or Development Projects or “projects” enumerated in R.A. 6957 as amended.
- b) Inclusion of a definition of “PPP Infrastructure AND Development Plan (PLAN)”.
- c) Under RA6957 as amended, the definition of “Facility operator” spells out in specific terms that Filipino ownership of the public utility franchise should be at least 60% which is reflective of the wording of Sec. 11 Art. XII of the 1987 Constitution. However, under the proposed bill “Facility operator” as defined makes reference not only to the nationality and equity requirements as stated in the Constitution but also to include requirements under all applicable laws.
- d) Allows for a more specific and expanded definition of “Government guarantee” to include “full or partial responsibility” by the government.
- e) The definition of “Return on Investment” as proposed specifies the factors to be considered in determining the ROI. The definition of ROI in RA6957 is more restrictive and does not take into account the aforementioned factors.
- f) More detailed definition of the “Project Cost.”

As proposed, *Section 3. Private Initiative in Infrastructure* includes a proviso that specifically requires the submission to the BOT Authority for approval of all national and local government projects; with the exception of projects that require national government guarantee or undertaking, in which case the project shall be recommended by the BOT Authority Board to the president for approval.

A new section, to be numbered as *Section 4*, defines contractual arrangements.

The previous Section 4, renumbered as *Section 5* in the proposed bill, makes it a requirement for government agencies and LGUs to submit to the PPP authority list of projects for possible listing in the plan and harmonized investment promotion.

Section 4-A of Republic Act No. 6957, as amended, renumbered as *Section 5-A* in the proposed bill, makes it a requirement for Unsolicited Proposals accepted by any appropriate government agencies / LGUs to be submitted to the PPP Authority for evaluation and approval, subject to certain conditions.

Section 5, to be renumbered as *Section 6* in the proposed bill, requires that projects under the law shall be done through competitive and transparent public bidding.

A new section (*Section 8*) is introduced establishing a Project Development Facility (PDF) to serve as a revolving fund to, among others, finance the proper identification, study, validation, development, and preparation for public bidding.

Section 9, as proposed, spells out the consequences of contract terminations as a result of the fault or non-fault of the project proponent. Notice that RA No. 6957, as amended, envisages two situations for contract termination, namely:

- 1) it is the government that initiates contract termination without the fault of the proponent, or
- 2) the government defaults on certain major obligations.

The proposed provision however shifts the emphasis and perspective to the project proponent's fault or non-fault which, for all intents and purposes, will have substantial bearing on the burden of proof.

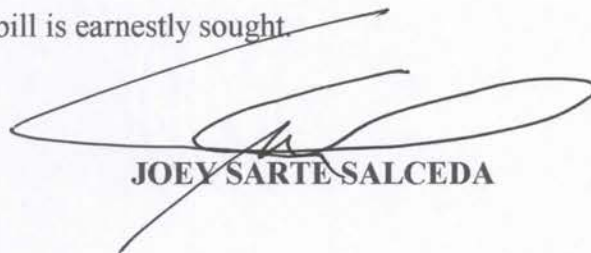
Section 10 of the RA 6957, as amended, renumbered as *Section 12* in the proposed bill, removes the one billion peso (P1,000,000,000) threshold for projects entitled to incentives. As proposed, projects, except unsolicited projects, are entitled to incentives regardless of cost.

A new section, to be numbered as *Section 13* in the proposed bill, makes it the obligation of the Republic of the Philippines or LGUs to uphold the validity and enforceability of a duly executed contract, unless proven otherwise.

A new section (*Section 15*), which we will consider as the most substantive, allows for the creation and establishment of the Public-Private Partnership Authority to serve as the central body of the government for BOT, Private Sector Participation (PSP) or Public-Private Partnership projects (PPP), attached to the Department of Trade and Industry (DTI). This is a significant departure from the organizational structure under RA 6957 which vests upon the PPP Governing Board the power to set the policy direction of the PPP. As envisioned under the proposed bill however, the PPP Authority institutionalizes the policy-making body of the government for BOT and other contractual arrangements. This will make for a more consistent policy direction for the PPP programs. Subsequent provisions as proposed concern the composition of the Authority including its powers and functions, budget, and appointment of its personnel. To give more teeth to the proposed bill, a penalty clause is also introduced,

defining the penalties and sanctions for the violation of any provision of the law and its implementing rules and regulations.

In view of the foregoing, approval of this bill is earnestly sought.



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Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. *Short Title* – This Act shall be known as the “**Public-Private Partnership (PPP) Rationalization Act.**”

SEC. 2. *Declaration of Policies and Principles.* – Section 20, Article II, of the Constitution provides that the State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments. Furthermore, it is the declared policy of the State to recognize the private sector as the main engine for national growth and development, and provide an enabling environment for private sector participation to mobilize private resources for the purpose of financing, designing, constructing, operating and maintaining development programs and projects normally undertaken by the government. Aside from financial incentives as provided by law, the government shall foster robust private sector participation by ensuring a competitive climate through reduced costs of doing business by providing cost-effective and time-saving government regulations and procedures and specific government undertakings in support of the private sector.

It is further declared that the State shall protect the public interest by providing affordable, accessible, and efficient public services. Subject to reasonable rules and under the guiding principle of full public disclosure of all transactions, the State shall ensure fair and

reasonable pricing and timely delivery of quality infrastructure and services through equitable risk allocation inherent in PPP Projects.

Furthermore, it is declared that the State shall ensure that all PPP Projects yield sufficient value for money to optimize the use of resources in order to achieve better quality of PPP Projects at lower costs.

The State shall pursue a policy of maintaining a reasonable balance on infrastructure financing through all means available that will most effectively meet the government's objectives. In optimizing value for money, the State shall determine the appropriate financing by taking into account project drivers and constraints like budget availability, timelines, stakeholder commitments, and market capacity. Alternative sources of financing may include appropriations, official development assistance, and PPPs.

Finally, it is declared that the State shall affirm open, fair, transparent, and competitive selection as the central tenet for securing private investment in PPP Projects.

SEC. 3. *Scope and Application.* – This Act shall apply to all PPP Projects undertaken by Implementing Agencies through PPP contracts with a Private Proponent, including Joint Ventures, as defined under this Act. It shall likewise apply to and be enforceable among all parties to said PPP contracts.

Implementing Agencies are hereby authorized to undertake PPP Projects through PPP contracts with a Private Proponent in accordance with this Act

SEC. 4. *Definition of Terms.* – As used in this Act:

- (a) **Approving Body** - refers to an entity authorized to approve PPP Projects, in accordance with Section 7 of this Act;
- (b) **Brownfield Project** - refers to a project with existing development programs or projects;
- (c) **Construction** - refers to new construction, rehabilitation, improvement, expansion, alteration, and related works and activities including the necessary supply and installation of equipment, materials, labor and services, and related items;

- (d) **Contractor** - refers to any entity allowed under Philippine laws, which may or may not be the Private Proponent, and which shall undertake the actual construction or supply of equipment for the PPP Projects;
- (e) **Cooperation Period** - refers to the period during which the PPP contract is in effect;
- (f) **Facility Operator** - refers to an entity with legal personality authorized under existing laws, which may or may not be the Private Proponent, that shall be responsible for all aspects of operation and maintenance of a facility, including, but not limited to, the collection of tolls, fees, rentals or charges from facility users;
- (g) **Government Undertakings** - refers to any form of contribution and support, which the government may extend to a Private Proponent for the implementation of PPP Projects;
- (h) **Greenfield Project** - refers to a pioneer development program or project;
- (i) **Implementing Agency** - refers to a department, bureau, office, instrumentality, commission, authority of the national government, state universities and colleges (SUCs), local government units (LGUs), or government owned-or-controlled corporation (GOCC) as defined in Republic Act No. 10149, including government instrumentalities with corporate powers (GICP), government corporate entities (GCE), government financial institutions (GFIs), which is authorized to undertake any PPP Project;
- (j) **Joint Venture (JV)** - refers to a contractual arrangement whereby both the Implementing Agency and the Private Proponent contribute to pool resources comprising of capital, services, or assets (including equipment, land or intellectual property) to jointly undertake a specific 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 undertaken through a contract or by creating a JV entity;
- (k) **Local PPP Project** - refers to a PPP Project that shall be undertaken by an LGU;

- (l) **National PPP Project** - refers to a PPP Project that shall be undertaken by the national government, GOCC, GICP, GCE, GFI, or SUCs;
- (m) **Operation and Maintenance** - refers to activities necessary and incidental to preserve or restore the operational status of an asset or system based on specified performance indicators;
- (n) **PPP Project** - refers to infrastructure or development programs, projects, activities, facilities, and related services normally financed and undertaken by the public sector but which shall now be wholly or partly financed, designed, built, operated and maintained by the private sector;
- (o) **Private Proponent** - refers to the private sector entity which shall have contractual responsibility for the PPP Project. The Private Proponent may be Filipino or foreign-owned, and may engage the services of a foreign Contractor or foreign Facility Operator, subject to requirements and limitations provided under the Philippine Constitution;
- (p) **Viability Gap Funding (VGF)** - refers to such financial support the government may provide to a concession-based PPP Project with the objective of making fees affordable, while improving the commercial attractiveness of the project, excluding costs of right-of-way, resettlement, and real estate taxes.

SEC. 5. *Public-Private Partnership.* – A PPP is a contractual arrangement between the Implementing Agency and the Private Proponent for the financing, designing, constructing, operating and maintaining, or any combination thereof, of PPP Projects which are normally provided by the public sector. PPP Projects may be undertaken through contractual arrangements, including joint ventures, authorized under the Implementing Rules and Regulations (IRR) of this Act.

SEC. 6. *Priority Projects.* – Implementing Agencies shall include in their development plans, strategies, and investment programs those priority PPP Projects. In identifying those projects, the Implementing Agencies shall be guided by the following principles: effectiveness in meeting government objectives, value for money, accountability and transparency, consumer rights, affordability, public access, safety, and security. Priority projects shall be consistent with the national and local development and investment plans.

The Implementing Agencies shall submit their list of PPP Projects or any update thereto to the PPP Center, referred to in Section 20 of this Act, for information. Each proposed PPP Project shall be subject to the approval of the appropriate Approving Body.

The PPP Center shall ensure that the Congress of the Philippines and the public shall be provided with adequate and timely information on PPP Projects.

SEC. 7. Approval of PPP Projects. – (a) The approval of PPP Projects under this Act shall be in accordance with the following:

(1) **National PPP Projects.** National PPP Projects costing up to five billion pesos (P5,000,000,000.00) shall be approved by the Investment Coordination Committee of the National Economic and Development Authority (ICC-NEDA). Projects costing more than five billion pesos (P5,000,000,000.00) shall be approved by the NEDA Board, upon prior recommendation by the ICC-NEDA. The ICC-NEDA may, from time to time, update the aforementioned amounts when the need arises. Project cost shall be determined as follows:

- (i) For Greenfield Projects, it shall refer to the total capital expenditure;
- (ii) For Brownfield Projects, it shall refer to the sum of total capital expenditure and remaining book value of the asset or system;
- (iii) For Operation and Maintenance agreements:
 - a. It shall refer to the remaining book value of the asset or system in case of concession-based PPP Project; and
 - b. It shall refer to the present value of total government payments in case of availability-based PPP Project;
- (iv) For JV projects, it shall refer to the total amount of contributions of the government to the project in present value with discount rate as prescribed by the appropriate Approving Body. The said discount rates shall be regularly published in the NEDA website.

(2) **Local PPP Projects.** Local PPP Projects shall be approved by the local *sanggunians*, except in cases where a Local PPP Project: (1) requires any Government Undertaking from the national government for capital-intensive projects; or (2) exposes the national government to significant fiscal and monetary risks, as may be determined by the ICC-NEDA.

(b) The Approving Body shall assess all PPP Projects based on its overall feasibility analysis and accord paramount importance on the affordability of user fees and efficiency in public service. To ensure that all risks associated with PPP Projects are managed and mitigated accordingly, all PPP contracts to be entered into by the Implementing Agency shall adhere to the principles stipulated under the Generic Preferred Risk Allocation Matrix (GPRAM) issued by the ICC-NEDA.

(c) The appropriate Approving Body shall act on the project within thirty (30) working days upon satisfactory compliance by the concerned Implementing Agency with the requirements of the appropriate Approving Body. Failure of the appropriate Approving Body to act on the project within the specified period shall be deemed an approval thereof and the concerned Implementing Agency may proceed with the procurement of the PPP Project.

SEC. 8. *Solicited Proposals.* – Solicited Proposals refer to submissions by the Private Proponent to bid for priority PPP Projects through open, fair, transparent, and competitive public bidding initiated by the Implementing Agency. Government Undertakings are allowed, subject to the approval of the Approving Body.

The public bidding may be conducted in a single-stage or two-stage bidding process. The prequalification documents, technical, and financial proposals shall be submitted in at least three (3) separate envelopes. Electronic bid submission may also be allowed.

The contract shall be awarded to the bidder who has passed the prequalification stage after having satisfied the prescribed minimum financial, organizational, and legal standards, has passed the technical proposal evaluation, and has submitted the most favorable financial bid based on the parameters defined in the bid documents. Affordable user fees and efficient public services shall be of paramount importance in awarding a PPP contract.

The Implementing Agency shall declare failure of bidding in case of any of the following:

- a. If no bids are received;
- b. If there are no complying bids;
- c. If, after advertisement, only one bidder applied for and met the pre-qualification, unless otherwise allowed by the ICC-NEDA.

The Implementing Agency may consider, on a negotiated basis, a single complying and responsive bid in case of any of the following:

- a. If, after advertisement, more than one bidder applied for pre-qualification but only one met the pre-qualification requirements;
- b. If, after pre-qualification of more than one bidder, only one submitted a bid; or
- c. If, after pre-qualification, more than one bidder submitted bids but only one is found by the Implementing Agency to be complying.

If the winning bidder fails to comply with any post-award requirement or fails to enter into a contract with the Implementing Agency, the latter may proceed to consider the next technically and financially qualified bidder. In case the contract is awarded to the next technically and financially qualified bidder, it shall be without prejudice to legal remedies available to the Implementing Agency like forfeiture of bid security, withdrawal of award, and such other remedies allowed under existing laws and the PPP contract.

The head of the Implementing Agency shall create a Bids and Awards Committee (BAC), which shall be responsible for all aspects of pre-bidding and bidding process in solicited proposals, or the comparative bidding process in unsolicited proposals. The composition of the BAC shall be specified in the IRR of this Act which may include other relevant government agencies.

Any change in control of the Private Proponent or composition of the consortium after the submission of a solicited proposal shall be subject to the approval of the Implementing Agency.

SEC. 9. *Unsolicited Proposals.* – Unsolicited Proposals refer to project proposals submitted by a Private Proponent not in response to a formal solicitation or request issued by the Implementing Agency.

In accordance with the provisions of this Section, the Implementing Agency may accept, reject, or convert an unsolicited proposal into a solicited proposal, subject to the evaluation of eligibility and merits of the project, and the qualifications of the Private Proponent who submitted the unsolicited proposal.

An unsolicited proposal involving a priority project may be considered if the Implementing Agency has not awarded any contract to implement such project. In case the Implementing Agency has already incurred any development cost for the priority project, such as the conduct of feasibility study, business case, and surveys, among others, for the last five (5) years, the Private Proponent must undertake to reimburse the Implementing Agency of such

documented development costs. Reimbursable development costs for a specific priority project shall be determined by the Implementing Agency.

An unsolicited proposal for a priority project which requires a Government Undertaking may be accepted by the Implementing Agency: *Provided*, that such proposal shall be automatically converted to a solicited bid.

An unsolicited proposal may also be accepted for a project that is not in the list of priority projects: *Provided*, that it does not require any of the following Government Undertakings:

- a. Viability Gap Funding;
- b. Government equity except in JV arrangements;
- c. Performance undertaking;
- d. Exemption from real property taxes;
- e. Loan guarantee;
- f. Contribution of assets, properties, and rights; and
- g. Right-of-Way and related costs

As an exception, items (f) and (g) above shall not be considered as Government Undertakings in the following instances:

- a. The Implementing Agency owns the assets, properties, rights, including the right-of-way; or
- b. The government receives appropriate compensation pursuant to existing laws, rules, regulations and guidelines.

In cases where the Implementing Agency receives more than one unsolicited proposal involving the same or similar project, the Implementing Agency may reject all such proposals, and instead, bid out the project as a solicited proposal. Otherwise, the Implementing Agency 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 shall only be processed if the first one is rejected or if there is a failure in the negotiation of the first proposal.

If the Implementing Agency accepts, on a negotiated basis, an unsolicited proposal, it shall grant the Private Proponent who submitted the unsolicited proposal an original proponent status, which shall be valid for a period not exceeding one (1) year, unless extended by the head of the Implementing Agency. The Implementing Agency shall publish an invitation for the submission of comparative proposals.

If no other proposal is received for a period of not less than six (6) months from the date of last publication, the PPP contract shall be awarded to the original proponent.

If another qualified comparative proponent submits a superior counter-financial proposal within the period referred to above, and it is accepted by the head of the Implementing Agency, the original proponent shall have the right to match such counter-financial proposal within a period not exceeding thirty (30) calendar days from the receipt of notice.

If the Implementing Agency converts an unsolicited proposal and uses it as basis for public bidding, the original proponent shall be reimbursed of the cost incurred in the preparation of the proposal, such as the cost of any feasibility study undertaken: *Provided*, that such reimbursement shall be in an amount as may be determined in the IRR of this Act, excluding those which are borne by the Implementing Agency, such as the cost of right-of-way acquisition: *Provided*, further, That such reimbursement shall be paid in full by the winning bidder as a requirement for the award of the contract, or by the Implementing Agency in case of two consecutive failures of bidding. The PPP Governing Board, as referred to in Section 21 of this Act, may adjust the amount of reimbursement cost as the need arises. If the Implementing Agency fails to act on an unsolicited proposal within sixty (60) working days from receipt thereof, the project proposal shall be deemed rejected, without prejudice to any liability that the erring or negligent officials or employees may incur under existing laws.

Within ten (10) working days from receipt of the unsolicited proposal, the Implementing Agency shall inform the PPP Center in writing of such receipt and shall furnish it with a copy of the proposal. The PPP Center may assist the Implementing Agency in the evaluation of unsolicited proposals.

Upon submission of the unsolicited proposal, the Private Proponent shall pay an administrative fee to the Implementing Agency for processing of the same, subject to existing laws, rules and regulations.

Any change in control of the Private Proponent or composition of the consortium after the submission of an unsolicited proposal shall be subject to the approval of the Implementing Agency.

SEC. 10. *Protest Mechanism.* – In all stages of the procurement process, the following protest protocol shall be strictly followed:

(a) Decisions of the BAC may be questioned by filing a motion for reconsideration

within fifteen (15) working days from receipt thereof. The BAC shall act on the motion and render a decision within thirty (30) calendar days, otherwise it shall be deemed denied.

(b) The decision of the BAC on the motion for reconsideration in the immediately preceding paragraph may be further questioned by filing an appeal to the head of the Implementing Agency concerned, and paying a non-refundable appeal fee in an amount equivalent to no less than $\frac{1}{2}$ of 1% of the project cost within fifteen (15) working days from receipt thereof. The head of the Implementing Agency shall act on the appeal and render a decision within thirty (30) calendar days, otherwise it shall be deemed denied.

If the head of the Implementing Agency in the immediately preceding paragraph is not a Department Secretary, the decision of the head of the Implementing Agency may be further questioned by filing an appeal to the Secretary of the Department to which the Implementing Agency is attached within fifteen (15) working days from receipt thereof. The Department Secretary shall act on the appeal and render a decision within thirty (30) calendar days, otherwise it shall be deemed denied.

(c) The decision of the Department Secretary in the immediately preceding paragraph may be questioned by filing an appeal to the Office of the President within fifteen (15) working days from receipt thereof. If, within sixty (60) calendar days, the Office of the President does not act on the appeal, the same is deemed denied.

In no case shall an appeal taken from any decision rendered pursuant to this Act stay or delay the bidding process.

SEC. 11. *Project Supervision and Monitoring.* – Every PPP Project shall be implemented in accordance with the designs, plans, specifications, and standards as approved by the Implementing Agency, and costs as approved by the appropriate Approving Body. The Implementing Agency shall supervise the project and provide periodic monitoring reports to the appropriate oversight agencies.

The PPP Governing Board shall set the framework for monitoring of the compliance of the parties to PPP contracts.

The PPP Center shall be responsible for the coordination and monitoring of projects implemented under this Act. For this purpose, the Implementing Agency shall submit to the PPP Center all executed PPP contracts, information on the status of projects implemented by, as well as copies of all unsolicited proposals and related documents received by, the former.

At the end of every calendar year, the PPP Center shall submit a report to the President of the Philippines and to the Congress of the Philippines on the progress of all projects implemented under this Act.

SEC. 12. *Investment Incentives.* – The PPP Governing Board shall recommend to the Board of Investments the variations or specific priority projects/activities and the threshold amounts to qualify a PPP Project for incentives under applicable laws or policies governing investments in the country.

SEC. 13. *Investment Recovery Scheme.* – In undertaking PPP Projects, the Private Proponent shall be allowed to recover its investments and earn profit through any of the following schemes or a combination thereof:

(a) ***Revenue-based*** - refers to a scheme where the Private Proponent is authorized to charge and collect, in whole or in part, from the public reasonable user fees or tariffs not exceeding those agreed in the contract subject to appropriate regulation in accordance with Section 14 of this Act. Where applicable, the Private Proponent may likewise be repaid in the form of a share in the revenue of the project; and

(b) ***Availability-based*** - refers to a scheme where the Implementing Agency commits to make predetermined payments, which do not take the form of charges paid by the users of the works or of the service, but of regular payments by the Implementing Agency based on contractually-defined performance delivery.

Other non-monetary payments, such as commercial development rights, or the grant of a portion or percentage of the reclaimed land, subject to the constitutional requirements on land ownership, may also be allowed to supplement the foregoing schemes.

In determining the Rate of Return (ROR), the maximum ROR shall be equal to the post-tax weighted average cost of capital for the same or comparable businesses computed using established methodologies such as the capital asset pricing model. Income tax shall be allowed as a cash outflow for rate-determination purposes. This provision shall not bar the application of performance based-rate regulation or any other rate methodologies, should the administrative agency regulating such public service deem it efficient and in the public interest.

SEC. 14. *Regulation.* – All PPP Projects shall be subject to regulation by the appropriate regulatory body or by contract in the absence of the former.

SEC. 15. *Variation, Expansion, or Extension of an Existing PPP Project.* – A contract variation, expansion, or extension may be allowed by the Implementing Agency, subject to the rules and procedures as provided in the IRR of this Act: *Provided*, That in case of project expansion or extension, it shall not exceed the cost of the civil works of the original project, and shall be adjacent or contiguous to the same, otherwise, the project shall be considered a new project and shall be tendered accordingly.

For avoidance of doubt, application for variation, expansion, or extension shall be governed by existing laws, decrees, orders, rules and regulations at the time of application.

SEC. 16. *Divestiture / Divestment.* – Subject to the approval of the head of the Implementing Agency, a Private Proponent may divest its ownership, rights, or interest in a PPP Project: *Provided*, that the divestiture shall be after a holding or lock-in period as indicated in the PPP contract: *Provided further*, that the new Private Proponent has equal or better qualifications as with the previous Private Proponent.

The Implementing Agency may divest its ownership, rights, or interest in a project: *Provided*, that projects which involve full or partial divestment or transfer of ownership of government assets or properties shall be subject to approval of the appropriate Approving Body and applicable laws, decrees, orders, rules and regulations.

SEC. 17. *Contract Termination.* – If a PPP contract is revoked, cancelled or terminated prior to its completion, either contracting party shall compensate the other party pursuant to terms as defined in the PPP contract. Depending on the contractual stipulations, the grounds for contract termination which would warrant the right of compensation may include, but are not limited to, default, insolvency, unlawful divestment or divestiture, or other unlawful acts, by the Private Proponent or by the government.

SEC. 18. *Wind-up and Transfer Measures.* – All PPP contracts shall provide for wind-up and transfer measures.

SEC. 19. *Prohibition on the issuance of Temporary Restraining Orders, Preliminary Injunctions and Preliminary Mandatory Injunctions.* – No temporary restraining order, preliminary injunction, or preliminary mandatory injunction shall be issued by any court, except the Supreme Court, against any Implementing Agency or the PPP Center, its officials or employees, or any person or entity, whether public or private acting under the government direction, to restrain, prohibit, or compel the following acts:

- a. Bidding, rebidding, or declaration of failure of bidding of PPP Projects;
- b. Qualification or disqualification of bidders;
- c. Awarding of PPP contract;
- d. Acceptance of any unsolicited PPP project proposal, even if not acted upon by the Implementing Agency concerned under Section 9 of this Act;
- e. Acquisition, clearance, development of the right-of-way, site or location of any PPP Project;
- f. Construction, operation and maintenance of any PPP Project;
- g. Commencement, execution, implementation, termination or rescission of any PPP contract; and
- h. Undertaking or authorization of any other lawful activity necessary for such PPP Project or contract.

This prohibition shall apply in all cases, disputes or controversies instituted by any person, including, cases filed by bidders or those claiming to have rights through such bidders. This prohibition shall not apply when the matter is of extreme urgency involving a constitutional issue, such that unless a temporary restraining order is issued, grave injustice and irreparable injury will arise.

In addition to any civil and criminal liabilities a judge may incur under existing laws, any judge who shall issue a temporary restraining order, preliminary injunction or preliminary mandatory injunction in violation of this Section, shall suffer the penalty of suspension of at least sixty (60) days without pay.

Any temporary restraining order, preliminary injunction, or preliminary mandatory injunction issued in violation of this section is void and of no force and effect.

SEC. 20. *PPP Center.* – To achieve the goals of this Act, the PPP Center created under Executive Order No. 8, series of 2010, as amended by Executive Order No. 136, series of 2013,

is hereby institutionalized. It is hereby authorized to adopt its current organizational structure, absorb its existing employees, and upgrade its human resource component, as may be necessary.

Towards a more efficient and effective performance of its mandate, the PPP Center shall have the following powers and functions:

- a. Assist Implementing Agencies in identifying, developing, prioritizing, and maintaining a pipeline of PPP Projects;
- b. Provide advisory services, technical assistance, trainings, and capacity development to Implementing Agencies in all PPP-related matters, and act as a procurement agent upon the request of the Implementing Agency;
- c. Manage and administer the Project Development and Monitoring Facility (PDMF) as provided in Section 22 of this Act;
- d. Recommend plans, policies, and implementation guidelines related to PPP, in consultation with appropriate oversight committees or agencies, Implementing Agencies, private sector and other relevant stakeholders;
- e. Ensure the sustainability of the PPP program by monitoring, capturing, and sharing lessons learned from PPP Projects;
- f. Submit reports to the Office of the President and the Congress of the Philippines on the implementation of PPP program and projects of the government at the end of each year;
- g. Promote and market PPP programs and projects, in collaboration with other government investment promotion agencies;
- h. Issue advisory opinions relating to PPPs;
- i. Serve as the central repository of all PPP Project documents, including all executed PPP contracts and any subsequent amendment or supplement thereto, including settlement agreements, entered into by Implementing Agencies;
- j. Act as Secretariat to the PDMF Committee and the PPP Governing Board;
- k. Perform such other functions as may be necessary to achieve the objectives and purposes of this Act.

The PPP Center shall report directly to the PPP Governing Board and shall be attached to the Department of Finance (DOF) for purposes of policy and program coordination.

The PPP Center shall be headed by an Executive Director with the rank equivalent to

an Undersecretary, who shall be appointed by and co-terminus with the President of the Philippines. The Executive Director shall perform the following functions:

- a. Undertake the day-to-day management and supervise the operations of the PPP Center;
- b. Recommend to the PPP Governing Board such policies and measures which are deemed necessary for the effective exercise and discharge of the powers and functions of the PPP Center;
- c. Sit as a non-voting member of the PPP Governing Board, and as a member of the INFRACOM, ICC-NEDA, and other inter-agency bodies in cases where PPPs are concerned; and
- d. Perform such other functions as may be assigned by the PPP Governing Board.

SEC. 21. *PPP Governing Board.* – The PPP Governing Board, created under Executive Order No. 136, series of 2013, and hereinafter referred to as the Board, is hereby institutionalized. It shall be the overall policy-making body for all PPP-related matters, including the PDMF. It shall be responsible for setting the strategic direction of PPP programs and projects and in creating an enabling policy and institutional environment for PPP.

The Board shall be composed of the following:

- a. The Secretary of Finance as Chairperson;
- b. The Secretary of Socio-Economic Planning as Vice-Chairperson;
- c. The Secretary of Budget and Management;
- d. The Secretary of Justice;
- e. The Secretary of Trade and Industry;
- f. The Executive Secretary;
- g. The Secretary of Interior and Local Government;
- h. The Executive Director of the PPP Center, as non-voting member; and
- i. A private sector representative, appointed by and co-terminus with the President of the Philippines.

The principal members of the Board may designate their respective alternates, who shall be the official next-in-rank to them, and whose acts shall be considered the acts of their principals.

The presence of the Chairperson and four (4) other members of the Board shall

constitute a quorum and a majority vote of the members present shall be necessary for the adoption of any issuance, order, resolution, decision or other act of the Board in the exercise of its functions. The Board shall act as a collegial body. In the conduct of meetings, the Chairperson shall not vote except to break a tie.

The Board shall act on any matter for its consideration not later than thirty (30) working days from the date of submission thereof.

SEC. 22. *Project Development and Monitoring Facility.* – (a) The PDMF is hereby established and shall be used for the procurement of advisory and support services related to the preparation, structuring, probity management, procurement, financial close, project evaluation, and monitoring of implementation of PPP Projects.

(b) The PDMF referred to under EO No. 8, series of 2010, as amended by EO No. 136, series of 2013, shall be transferred to the PDMF under this Act. The PDMF may be funded through and such amount as may be needed and included in the general appropriations act, official development assistance, or other sources.

(c) The PDMF shall be managed and administered by the PPP Center as a revolving fund. In order to sustain the PDMF, the PPP Center may collect and receive fees and recover costs expended through PDMF in accordance with the guidelines to be approved by the PPP Governing Board. Such amount shall be retained and authorized to be used by the PPP Center for the purposes indicated herein.

A PDMF Committee is hereby created which shall approve applications for PDMF support submitted by the Implementing Agencies.

The PDMF Committee shall be composed of: (1) the Secretary of Socio-Economic Planning as chairperson; (2) the Secretary of Finance, (3) the Secretary of Budget and Management, and (4) the Executive Director of the PPP Center, as members. The PPP Center shall serve as the Secretariat for the PDMF Committee.

Subject to approval of the PPP Governing Board, the PDMF Committee shall also formulate, prescribe, and recommend policies, procedures, and guidelines for the use of PDMF and recovery of costs charged to the fund.

SEC. 23. *Creation of a Risk Management Fund.* – Under an optimal allocation of risks between the Implementing Agency and the Private Proponent, each risk in a PPP Project shall

be assigned to the party that is best able to control the likelihood of its occurrence, manage its impact on the project, and absorb the risk at the lowest cost.

To ensure fiscal sustainability, enhance the ability of the Implementing Agency to discharge its obligations under risks allocated to it, and improve terms of financing of PPP Projects, there is hereby created a trust fund named Risk Management Fund, herein referred to as the Fund, which shall be financed through dedicated budgetary appropriations and contributions from the budgets of the Implementing Agencies.

The Risk Management Fund shall provide a reliable pool from which disbursements on government obligations on liabilities that have materialized can be drawn. Any appropriation and contribution to the Fund, including accrued interests thereon, are permanently appropriated and shall not revert to the general fund if not disbursed during the fiscal year. The Fund shall be administered by the DOF following fiduciary standards for fund management. The operations of the Fund can be enhanced through official development assistance.

The initial seed fund of Three Billion Pesos (P3,000,000,000.00) shall be constituted to the Fund from the effectivity of this Act.

Notwithstanding the establishment of this fund, the government may still provide an un-programmed appropriation for unforeseen risks that the government may incur from PPP Projects.

To monitor such government obligations on liabilities that have materialized and other unforeseen risks that may arise from PPP Projects; and to develop the guidelines to access the Fund, the inter-agency technical working group created under Development Budget Coordination Committee (DBCC) Resolution No. 2015-2, is hereby institutionalized.

As part of the budget submission, the DOF shall submit an annual report on the status of the fund to Congress of the Philippines. Proceeds of the fund shall be invested in risk-free highly liquid assets.

SEC. 24. Establishment of a PPP Unit. – Each concerned Implementing Agency shall organize a PPP unit headed by a senior official, who shall be responsible for planning, overseeing, and monitoring PPP Projects of the Implementing Agency. The PPP unit may also include as members, among others, technical and legal personnel who are knowledgeable on the technical and legal aspects, respectively, of the PPP Projects.

SEC. 25. *Contracts and Public Disclosure.* – Copies of all PPP contracts executed under this Act shall be considered as public documents. The procedure for the disclosure of such documents shall be consistent with existing policies, laws, decrees, orders, rules and regulations.

SEC. 26. *Miscellaneous Provisions.* – (a) ***Issuance of Legislative or Administrative Franchise, License or Permit.*** All PPP Projects requiring legislative franchise under existing laws shall secure the same prior to project implementation. Upon compliance by the Private Proponent of the requirements set by the appropriate regulatory body, the Private Proponent shall be automatically granted or issued by the appropriate regulatory body the franchise, permits, license, certificates, or other similar authorizations necessary for the conduct of its business.

(b) ***Standardization of Real Property Tax Valuation.*** The DOF shall issue the guidelines on real property tax valuation of PPP Projects to ensure uniform and consistent implementation among all LGUs.

(c) ***Exemption from Payment of Transfer Taxes.*** For all PPP Projects, the transfer of ownership of the PPP Project to the Implementing Agency shall be exempt from capital gains tax, documentary stamp tax, donor's tax, and all taxes and fees, whether from national or local, related to the transfer thereof.

(d) ***Standardization of Required Endorsements and Permits for PPP Projects.*** The PPP Center, in consultation with relevant government agencies, bodies, and LGUs, shall ensure the adoption of standard timelines and requirements for the issuance of relevant endorsements, approvals, and permits for PPP Projects.

(e) ***Mandatory Inclusion of Dispute Avoidance and Alternative Dispute Resolution Mechanisms in PPP Contracts.*** All PPP contracts shall include provisions on the use of dispute avoidance and Alternative Dispute Resolution (ADR) mechanisms. The contracting parties shall be given complete freedom to choose which ADR mechanisms and venue shall govern their dispute, as well as the rules or procedures to be followed in involving the same.

(f) ***Conflict of Interest.*** Conflict of interest shall be prohibited at all times in the interpretation and implementation of this Act. Conflict of interest, which refers to any act or omission tending to oppose or disrupt the faithful performance of one's duty or mandate, shall include personal, pecuniary, and regulatory conflicts of interests: *Provided, That* with regard

to regulatory conflicts of interest, no regulatory body shall be allowed to enter into any PPP contract that they regulate: *Provided further*, That a regulatory agency that owns public infrastructure or right-of-way that is intended for a PPP Project shall assign the same to the department exercising administrative supervision over it, or to the department to which it is attached, in order that such department may enter into a PPP contract involving such public infrastructure or right-of-way.

(g) **Capital Market Financing.** In addition to equity and loans, capital markets may also be accessed to finance PPP Projects under proper guidance by the appropriate regulatory bodies.

SEC. 27. *Implementing Rules and Regulations.* – A committee called the IRR Committee shall, within sixty (60) working days from the effectivity of this Act, formulate and prescribe, after public hearing, the IRR for the proper implementation of this Act. The IRR shall be published after the 60-day period and shall take effect fifteen (15) days after its publication.

The IRR Committee shall be composed of the members of the PPP Governing Board, and other agencies as may be identified by the PPP Governing Board.

From time to time, the Committee may formulate and prescribe, after due public hearing, amendments or revisions to the IRR, consistent with the provisions of this Act. The amended or revised IRR shall take effect fifteen (15) days after its publication.

SEC. 28. *Administrative, Civil, and Penal Sanction.* – Any person, whether private individual or public officer or employee, who commits any of the prohibited acts hereunder proscribed, shall be punished by imprisonment from a minimum of three (3) years to a maximum of six (6) years and one (1) day:

- a. Downgrading the category of the project cost for purposes of evading the required approvals under this Act;
- b. Representation that the Private Proponent has the necessary capitalization to commence, complete, and implement the PPP Project when the same is false in material respects;

- c. Falsification or insertion of certain provisions in the execution copy of the contract which are materially and substantially different from the approved final draft contract; and
- d. Any violation of Section 26 (F) under this Act.

In addition, such act committed by the Private Proponent and its concerned officers shall cause the rescission of its contract for the said PPP Project without compensation and shall be perpetually disqualified from participating in any bidding or other contractual arrangement for any government project. This is without prejudice to any other civil or administrative liability that erring officials or Private Proponents may incur.

SEC. 29. *Accountability in PPP Projects.* – The Commission on Audit (COA) shall have jurisdiction over the activities and transactions of the PPP Project, which shall be limited to the exercise of its visitorial power as defined in the 2009 Revised Rules of Procedure of the COA, and any amendments thereto. Such power shall be further limited to determining whether the contribution or share of the Implementing Agency in the PPP Project is being allocated and utilized according to its intended purpose, and if the Implementing Agency is getting its rightful share from the revenues generated, as may be applicable

SEC. 30. *Transitory Clause.* – The provisions of this Act shall apply to all PPP Projects except: (a) all projects wherein a PPP contract between the winning Private Proponent and the Implementing Agency concerned has been executed prior to effectivity of this Act; and (b) all projects undertaken through competitive selection wherein the bid/s have already been opened prior to the effectivity of this Act. For PPP Projects not covered under items (a) and (b) above, this Act shall govern, provided that this Act shall not, in any manner, operate to impair vested rights already accruing to a party.

All unexpended funds for the calendar year, properties, equipment, contracts and records of the PPP Center are hereby retained. The amount necessary to carry out the organizational changes of the PPP Center provided in this Act shall be determined by the PPP Governing Board. Appropriations for succeeding years shall be incorporated in its budget proposals for congressional action.

All officials and employees of the PPP Center shall be retained and shall not suffer any loss of seniority or rank or decrease in emoluments.

SEC. 31. *Separability Clause*. – If any provision of this Act is declared unconstitutional or invalid, other parts or provisions hereof not affected thereby shall continue to be in full force and effect.

SEC. 32. *Repealing Clause* – The following are hereby repealed:

- a. Republic Act No. 6957;
- b. Republic Act No. 7718;
- c. Executive Order No. 8 (s. 2010) as amended by Executive Order No. 136 (s. 2013);
- d. Executive Order No. 78 (s. 2012);
- e. Section 8 of Executive Order No. 423 (s. 2005);
- f. 2013 Revised Guidelines and Procedures for Entering Into Joint Venture Agreements Between Government and Private Entities; and
- g. Joint Venture Guidelines issued by LGUs.

All other laws, decrees, orders, rules and regulations, and all other related national and local issuances or parts thereof inconsistent with this Act are hereby repealed or amended accordingly

SEC. 33. *Effectivity*. This Act shall take effect fifteen (15) days after its publication in the *Official Gazette* or in a newspaper of general circulation.

Approved,