



EXECUTIVE ORDER NO. 158
Series of 2022

**DETAILED GUIDELINES FOR THE DEVELOPMENT, APPROVAL,
PROCUREMENT, AND IMPLEMENTATION OF PUBLIC-PRIVATE PARTNERSHIP
SOLICITED JOINT VENTURE PROJECTS**

WHEREAS, on February 27, 2013, the Sangguniang Panlalawigan of Bataan passed Provincial Ordinance No. 02, S. 2013 entitled, "INTEGRATED PUBLIC-PRIVATE PARTNERSHIP (PPP) CODE OF THE PROVINCIAL GOVERNMENT OF BATAAN;"

WHEREAS, Provincial Ordinance No. 2, Series of 2019 or the "Bataan PPP and Investment Center Ordinance" was enacted by the Sangguniang Panlalawigan on February 26, 2019 which created the Public-Private Partnership and Investment Center (PPPIC) and provided for its functions and power to set the policies concerning PPP projects in the Province as well as to coordinate and regulate the implementation of all approved PPP projects;

WHEREAS, on June 22, 2020, the Sangguniang Panlalawigan of Bataan enacted Provincial Ordinance No. 11, S. 2020 entitled, "AN ORDINANCE ADOPTING THE REVISED PUBLIC-PRIVATE PARTNERSHIP (PPP) CODE OF THE PROVINCIAL GOVERNMENT OF BATAAN, PROVIDING FOR THE PROCEDURE FOR SELECTING THE PRIVATE SECTOR PROPONENT, ADOPTING A CONTRACT MANAGEMENT FRAMEWORK, PROVIDING APPROPRIATIONS AND FOR OTHER PURPOSES;"

WHEREAS, on February 26, 2021, Executive Order No. 12, S. 2021 was issued providing for Detailed Guidelines for the Submission, Detailed Negotiation and Competitive/Swiss Challenge of Unsolicited Proposals for Public-Private Projects;

WHEREAS, on 12 July 2021, in order to encourage more businessmen to invest in the Province of Bataan and pursuant to Republic Act No. 11032 or the "Ease of Doing Business and Efficient Government Service Delivery Act of 2018", the eligibility requirements for private sector proponent were modified under Executive Order No. 68, Series of 2021 or the "Revised Detailed Guidelines for the Submission, Detailed Negotiation and Competitive/Swiss Challenge of Unsolicited Proposals for Public-Private Partnership Projects;

WHEREAS, although the Revised PPP Code of the Province of Bataan allows submission of solicited proposals, a detailed guideline for PPP solicited proposals has yet to be approved and implemented;

NOW, THEREFORE, I, **JOSE ENRIQUE S. GARCIA III**, Governor of Bataan, by virtue of the powers vested in me by law, promulgate these Detailed Guidelines for the Development, Approval, Procurement, and Implementation of Public-Private Partnership (PPP) Solicited Joint Venture Projects:

ARTICLE 1
DEVELOPMENT STAGE

Section 1. Selection of Project and Preparation of Feasibility Study.

From the approved and published List of the Priority Projects of the Province, the Public-Private Partnership Selection Committee (PPP-SC) will choose a project that will be pursued through a solicited proposal. Upon the approval of the Local Chief Executive, a feasibility study of the proposed project will be conducted.

Section 2. Formation of Technical Working Group.

If the feasibility study proves that the selected project can be carried out successfully by the Province through a joint venture arrangement, a Technical Working Group (TWG) will be formed for this purpose. The composition of the TWG will depend on the fields of expertise required for the proposed project.

ARTICLE II

Approval Stage

Section 1. Completeness and Quality of Proposed Projects Submitted to the Sangguniang Panlalawigan of Bataan.

A project shall be deemed complete for purposes of evaluation by Sangguniang Panlalawigan when it has submitted a complete set of requirements. These shall include, but are not limited to, a complete feasibility study, economic and financial models that are traceable and that contain data not older than three (3) years, and the proposed parameters, terms, and conditions and the draft contract for the proposed project.

The Sangguniang Panlalawigan of Bataan shall prescribe or revise requirements to be submitted in support of the proposed project, including the timelines, provided that the same are consistent with these guidelines.

Section 2. Parameters, Terms, and Conditions (PTCs).

- a. The Province of Bataan, through Bataan PPP-SC, shall submit to the Sangguniang Panlalawigan of Bataan, as part of the proposed project for approval, the following minimum PTCs:
 - i. Scope of the project;
 - ii. Draft Joint Venture Contract;
 - iii. Contract term;
 - iv. Obligations, undertakings, and applicable liquidated damages of the Project Proponent;
 - v. Requirement to submit performance reports by the Project Proponent to the Provincial Government of Bataan and to the Bataan PPPIC;
 - vi. Key performance indicators, targets, and measurement;

- vii. Government Undertakings;
- viii. Bid parameter that does not deter competition;
- ix. Requirement to disclose to the Province of Bataan the Project Proponent of its loan agreement with respect to the proposed project;
- x. Ceiling for debt-to-equity ratio;
- xi. Revenue share for the government;
- xii. Grounds for termination;
- xiii. Firm and contingent liabilities, risk allocation, materiality threshold amount and/or compensation cap;
- xiv. Acceptable conditions for lenders' step-in rights;
- xv. Conditions for acceptable permitted security interest;
- xvi. A condition prohibiting the incorporation of onerous and one-sided provisions in the contracts. A contract is onerous if the cost of the project outweighs the advantages the government and the public will receive from the project.

For this purpose, the Province of Bataan shall comply with the requirements set forth by the Technical Working Group of the Province for the particular project.

The Technical Working Group shall set forth the required PTCs which shall be the basis for the drafting and approval of tender documents and draft contract.

- b. In no case shall the Province of Bataan set additional PTCs in the draft contract or during negotiations that will result in any or a combination of the following:
 - i. Altering the approved risk allocation;
 - ii. Conflict or supersede the approved PTCs;
 - iii. The incremental fiscal impact being disadvantageous to the government;
 - iv. Altering the definition of contingent liabilities or expanding the types of contingent liabilities set in the draft contract; or
 - v. Worsening the approved viability indicators from the government's perspective.

Section 3. Deadline for Approval of Solicited Projects.

The Sangguniang Panlalawigan shall evaluate the proposed solicited project and may either approve or disapprove the project within a reasonable time from the receipt of a complete set of requirements for evaluation.

In the event of approval, the Provincial Government of Bataan, through the Bataan PPPIC, must publish the invitation to pre-qualify and to bid the project within six (6) months unless otherwise provided or extended by the Sangguniang Panlalawigan.

In the event of disapproval, the Sangguniang Panlalawigan shall inform, in writing, the Office of the Governor and the PPPIC of the reason/s for disapproval. The PPPIC shall be allowed to re-submit the disapproved solicited project for approval provided that the reasons for disapproval of the project are addressed accordingly. Upon resubmission, the Sangguniang Panlalawigan shall treat it as a new project and act on the project pursuant to this provision.

Changes to the PTCs of the draft contract after bid submission and prior to contract execution shall not be allowed except for changes to contract terms affected or decided by the winning bidder's bid.

Article III **PROCUREMENT STAGE**

Section 1. The PPP Selection Committee (PPP-SC).

The PPP-SC, created under Provincial Ordinance No. 11 or the Revised PPP Code of Bataan, shall approve all aspects of the pre-bidding and bidding process, including, among others, the bidding/tender documents, publication of the invitation to pre-qualify and bid, pre-qualification of prospective bidders, conduct of pre-bid conferences and issuance of supplemental notices, interpretation of the rules regarding the bidding, the conduct of bidding, evaluation of bids, resolution of disputes between bidders, and recommendation for the acceptance of the bid and/or for the award of the project. The preparation and coordination of these documents shall be the responsibility of the PPPIC.

Section 2. Quorum.

A quorum of the PPP-SC shall be composed of a simple majority of all voting members of the Committee. The Chairperson shall vote only in case of a tie.

Section 3. Selection/Tender Documents. The PPPIC shall prepare the Selection/Tender documents, subject to the approval of the PPP-SC, which shall include the following:

- (a) Instructions to PSPs;
- (b) Minimum design, performance standards/specifications, key performance indicators, and other financial and economic parameters, where applicable, among others;
- (c) Feasibility study or a business case/pre-feasibility study of the project, which, at the minimum, shall contain the following: (i) market study; (ii) technical analysis; (iii) legal analysis; (iv) environmental impact assessment (v) social impact assessment, (vi) project costs (investment costs, operation and maintenance expenses), (vii) economic analysis; (viii) financial analysis; (ix)

implementation plan: and (x) risk analysis (identification and mitigating measures);

- (d) Draft contract reflecting the terms and conditions in undertaking the Joint Venture (JV), including, among others, the contractual obligations of the contracting parties and the ownership of the JV project or property after the termination of the JV agreement;
- (e) Selection form reflecting the required information to properly evaluate the technical and financial proposal;
- (f) Forms of technical and financial proposals and performance securities; and
- (g) Other documents as may be required by the Province of Bataan and other requirements of concerned regulatory agencies as may be pertinent or applicable to the JV.

Section 4. Instructions to Private Sector Proponent (PSPs). The instructions to PSP which establish the rules of the selection process, shall be clear, comprehensive, and fair to all PSPs, and shall, as far as necessary and practicable, include the following information:

- (a) General description and objectives of the JV project;
- (b) Proposal submission procedures and requirements, which shall include information on the manner of proposal submission, the number of copies of the technical and financial proposal to be submitted, where the proposals are to be submitted, the deadline for the submission of proposals, and permissible mode of transmission of technical and financial proposals, etc.;
- (c) Cost of eligibility and bidding documents;
- (d) Amount and form of proposal security and proposal security validity period;
- (e) Milestones;
- (f) Method, parameters, and criteria for the evaluation of the proposals;
- (g) Minimum amount of equity of the PSP;
- (h) Requirements of concerned regulatory bodies/ agencies as may be pertinent or applicable to the JV Project;
- (i) Revenue sharing arrangement; and
- (j) Nationality and ownership requirements as required by law.

Section 5. Minimum Designs, Performance Standards/Specifications and Economic Parameters. Minimum design and performance standards/specifications, including key performance indicators and appropriate environmental standards by the Department of Environment and Natural Resources (DENR), and standards by the concerned regulatory agencies as may be pertinent or applicable to the JV project, shall be clearly defined and shall refer to the desired quantity and quality of the outputs of the JV project and should state that non-conformity with any of these minimum requirements shall render the proposals as non-responsive.

Likewise, for the purposes of evaluating proposals, the following economic parameters, among others, and where applicable, shall be prescribed;

- (a) Discount rate, foreign exchange rate, and inflation factor;
- (b) Maximum period of project construction;
- (c) Fixed term and price indices to be used in the adjustments of tolls/fees/rentals/charges, if applicable; and
- (d) Minimum period of repayment, if applicable.

Section 6. Draft Contract. The draft contract should clearly define the basic and legal relationship between the parties and their rights and responsibilities including specific government undertakings to be provided by the Province of Bataan relative to the JV project, if any. Specifically, the draft contract shall also contain provisions on the following matters:

- (a) Clearly defined purpose and objective/s contractual/agreement mode (whether JV company /corporate JV), term and scope of the JV contract;
- (b) Estimated cost of the JV project, project specifications, and features;
- (c) Minimum designs, performance standards/ specifications, key performance indicators, and other financial and economic parameters, where applicable;
- (d) The relationship between the parties, management roles of each party in the JV project, and a statement that the parties are actually co-venturers for the project, whether or not the contract is in the name of all members;
- (e) The establishment of a fund by the parties to finance the work, together with the amount, type (cash, assets, etc.), and valuation of committed contributions of each party and when such contributions will be made, with the fund being deposited in a special bank account under dual control and all progress payments and other revenues being deposited in such account. If the equity/contribution of the PSP is to be borrowed, a statement that there shall be no government guarantee for said fund;

- (f) Procedure for additional capital infusions, if required, and a statement that there shall be no government guarantee for loans to be incurred by the PSP in case the additional contribution of the PSP is to be borrowed;
- (g) In contractual JVs, a declaration of the participation of the parties and percentage in which profits and losses are shared which can be increased or decreased depending on the agreement of the parties;
- (h) In incorporated JV, the total number of shares of stocks to be issued and its par value, the total number of directors and the number of directors each party may appoint;
- (i) Specified termination/liquidation of the JV company, buy-out provisions, and details on the transfer of ownership of the JV facility, including provisions on what happens to the JV's assets after the expiration of the JV agreement or end of the JV period. If equity other than cash is to be contributed, a statement as to how the property will be valued and the ownership of the property during and after the effectivity of the JV agreement;
- (j) Designation of specific person by the parties as general manager of the project with authority to bind the JV company/partnership/parties, or in the alternative, the constitution of a management committee, with a provision for remuneration. Management duties, other duties of the co-venturers, and procedures to be followed in dealing with unusual situations or problems that may develop should be specified;
- (k) Implementation milestones, regular meeting schedules, financial and periodic JV and progress reporting procedure;
- (l) Establishment of a JV bank account, and the appointment of a certified public accountant and lawyer;
- (m) Provide for the acquisition of licenses in the name of the JV or each co-venturer, as required;
- (n) Type of insurance carried by the JV and clearly defined liabilities to be insured against by each participant;
- (o) Definition of items which are to be considered as cost to the JV for the purpose of determining profit or loss, and a description of items which are not reimbursable to members of the JV and specified division of the projects and, risk and losses;
- (p) Confidentiality of trade information passed between the co-venturers;
- (q) Ownership or retention of patents, technology, and consultant reports;

- (r) Performance security requirements of the project and the bonding obligations of the co-venturers;
- (s) Undivided pro-rata interests held by the co-venturers on all assets of the JV;
- (t) Restriction regarding assignment of PSP's undivided pro-rata interests in assets of the JV;
- (u) Cost recovery scheme, including payment to the government of royalties/rights, the form/description and amount of earnings (cash, asset, etc.), whether it is in absolute amounts or variable, and the period and timing such earnings or payment shall be received. In case of non-cash payment or payment in form of asset, a statement/provision on how it will be valued, the minimum value of the asset, and the determination/selection of asset such as how and who will determine/select the asset;
- (v) Indemnification and liquidated damages;
- (w) Performance and warranty bonds;
- (x) Minimum insurance coverage;
- (y) Acceptance tests and procedures;
- (z) Validity of the performance security, warranty period, and procedures;
- (aa) Grounds for and effects of contract termination/default including modes for settling disputes, procedure for handling guarantees, defects and insurance after termination and threshold (in terms of amount, time/period, or both) for which non- payment or delay in payment and delay in starting the projects shall be grounds for termination/rescission of the JV contract/ agreement;
- (bb) Definition and effects of fortuitous events;
- (cc) The manner and procedures for the resolution of warranty against corruption;
- (dd) Compliance with all other laws, rules and regulations, including those related to social and environmental safeguards;
- (ee) Procedure and/or period for withdrawal by the Province of Bataan of its contribution to the JV, or exit divestment by the Province of Bataan of its interest in the JV, and substitution or addition of parties,
- (ff) Payout of funds;

- (gg) Alternative dispute resolution (ADR) mechanisms, pursuant to EO No. 78 dated 04 July 2012, to avoid management impasses that may produce deadlock or litigation;
- (hh) Provision defining how user fees, quality of public service and other matters affecting public interest shall be regulated;
- (ii) Creation of a Contract Management Unit (CMU);
- (jj) Procedures for monitoring the JV agreement; and
- (kk) Procedures for amendments to the JV project.

Section 7. Publication of Invitation to Apply for Eligibility and to Submit a Proposal (IAESP). The IAESP shall be advertised at least once in a newspaper of general nationwide circulation, and posted continuously for a period of at least fourteen (14) calendar days, starting on date of advertisement, at the following;

- (a) Website of the Province of Bataan, if available;
- (b) Website of the Province of Bataan's service provider, if any;
- (c) Website of Bataan PPPIC; and
- (d) Any conspicuous place within the premises of the Province of Bataan's procuring entity.

PSPs shall be given at least thirty (30) calendar days from the last date of publication of the IAESP in the website of the Province to apply for eligibility and to submit a proposal. Notwithstanding, the Province of Bataan may adjust said period as may be appropriate for the nature, scope, size, and complexity of the JV project, provided that the principles of transparency, competition, and accountability are observed.

Section 8. Who may participate. Any individual, partnership, corporation or firm, or consortium, whether local or foreign, may participate, subject to the requirements set below.

Section 9. Eligibility Requirements.

a. Legal Requirements

If the Project activity requires a public utility franchise, the private sector participant (PSP) must be Filipino or, in case of a corporation, duly registered with the SEC and be at least sixty percent (60%) Filipino-owned. For projects other than these, prospective private sector participant shall comply with nationality and ownership requirements under the Constitution and other applicable laws and issuances.

For project activities to be operated by the prospective PSP or a facility operator where operation of the facility does not require a public utility franchise, the PSP or facility operator or concessionaire may be Filipino or foreign-owned, as may be allowed under

applicable laws, rules, and regulations.

Legal Documents include the following:

1. Registration Certificate issued by the Department of Trade and Industry (DTI), Securities and Exchange Commission (SEC) or Cooperative Development Authority (CDA) as the case may be;
2. Articles of Incorporation and By-laws for corporations;
3. Articles of Partnership for partnerships;
4. Articles of Cooperation for Cooperatives;
5. Latest General Information Sheet filed with the SEC;
6. Joint Venture Agreement for joint venture companies;
7. Valid & Current Mayor's Permit;
8. Bureau of Internal Revenue Registration Certificate which contains TIN (BIR Form 2303);
9. Philippine Contractors Accreditation Board (PCAB) License for infrastructure projects (If foreign contractor, proof that it is licensed and accredited by the accreditation institution in the Contractor's country and once awarded, the same must register with PCAB);
10. Latest Tax Clearance Certificate issued by Bureau of Internal Revenue;
11. Notarized Sworn Declaration/Statement of the PSP that:
 - a. All documents submitted to the PPPIC are original or authentic copies of original documents from government agencies;
 - b. No government agency has blacklisted the proponent or any of its partners or member-entities in case of a consortia;
 - c. Acceptance of Criteria and Waiver of Rights to Enjoin Project Activity. All prospective private sector participants shall be required to submit, as part of their documentary qualification, a statement stipulating that the PSP: (i) has accepted the qualification criteria established by the PPP Selection Committee (PPP-SC) of the Province; and (ii) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the Province or its PPP-SC to prevent or restrain the qualification proceedings related thereto, the award of the contract to a successful private sector participant, and the carrying out of the awarded contract. Such waiver shall, however be, without prejudice to the right of a disqualified or losing PSP to question the lawfulness of its disqualification or the rejection of its proposal by appropriate administrative or judicial processes not involving the issuance of a writ of injunction or prohibition or restraining order; and
 - d. Consent is given by the PSP to the PGB through the PPPIC to share the documents submitted with other government agencies for purposes of authentication, due diligence, and study of the proposal.

b. Technical Requirements

The prospective PSP must have completed at least one project or any phase of the project that is similar or related to the project activity whose value, adjusted to current prices using the Philippine Statistics Authority (PSA) Consumer Price Index (CPI), World Bank Data, or any credible rating agency acceptable to the Province, must be at least fifty percent (50%) of the cost of the project activity subject to the selection process within the relevant period as determined by the Province.

The prospective PSP shall submit a statement of all its ongoing and completed government and private contracts similar or related to the project activity subject to the selection process, including contracts awarded but not yet started, if any. Copies of the contracts of the projects in the list should be attached thereto.

The PSP must also submit a list of names and positions of its key personnel and the latter's sufficient experience in the relevant aspect of schemes similar or related to the subject project.

c. Financial Capability

Financial capability shall be measured in terms of:

i) proof of ability of the prospective PSP to provide a minimum amount of equity to the project activity, measured in terms of:

a) latest net worth (deducting total liabilities from the total assets less equity commitments to other projects) of the company. Said net worth should be higher than the amount of equity required by the Province. The Proponent shall also warrant, through a notarized sworn statement (in case of sole proprietorship/partnership/cooperative) or a Board Resolution (in case of corporation), that the net worth shall be maintained or increased throughout the implementation of the proposed project activity; or

b) a deposit equivalent to the minimum equity required set aside or earmarked for the proposed project activity as declared and certified by the concerned bank. The earmarked deposit may only be released upon the issuance of the Notice to Proceed by the Province of Bataan to the winning bidder to start the proposed project; and

ii) a letter from a domestic universal/commercial bank, or an international bank with a subsidiary/branch in the Philippines, or any international bank recognized by the Bangko Sentral ng Pilipinas (BSP), attesting that the prospective PSP is one of its current clients and is in good financial standing and/or qualified to obtain credit accommodations from such bank to finance the project equivalent to the value of the debt requirement in the proposal.

The following documents shall also be submitted by the prospective PSP:

1. Audited financial statements for the past three (3) calendar or fiscal years counted from the date of its submission. If the prospective PSP is Filipino, the audited financial statements to be submitted must bear the stamp "received" by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions;
2. Income Tax Returns for the past three (3) calendar or fiscal years, if the PSP is Filipino; and
3. If no earmarked deposit is made by the PSP, the PSP must submit a Notarized Sworn Statement (in case of sole proprietorship/ partnership/cooperative) or Board Resolution (in case of corporation) that:
 - a. Discloses all ongoing and new projects requiring equity and the amounts of equity required by all projects; and
 - b. Discloses all ongoing and new projects requiring debt financing and the amounts

of debt to be incurred in all projects.

- d. In case of consortia or joint ventures, all member-entities of the prospective PSP shall also submit its company profile and all the above legal, technical and financial eligibility requirements or the equivalent documents in the country of origin with an apostille/authentication, if a member is a foreign entity, to determine the overall capability of the consortia for the project undertaking. A notarized Memorandum of Agreement between and among the member-entities stating, among others, that they will be solidarily liable for the proposed project, must also be submitted together with notarized Board Resolutions authorizing them to enter into a consortium or joint venture. If the parent company is the partner in the proposed project, a notarized Board Resolution should likewise be submitted.

Section 10. Eligible and Ineligible. The Province of Bataan, through its PPP-SC, shall within a period of thirty (30) calendar days after the deadline set for the submission of the eligibility documents, complete the evaluation of the eligibility documents of the PSP, and determine which among them are "eligible" and "ineligible." Accordingly, the PPP-SC shall duly inform the eligible PSPs within fifteen (15) calendar days after approval thereof. Ineligible PSP shall be similarly given notice of such ineligibility, stating therein the grounds for ineligibility within the same period.

Section 11. Issuance of Tender Documents. The Province of Bataan shall make available the related competitive selection documents to all eligible PSP as soon as practicable to provide respective PSPs ample time to examine the same and to prepare their respective proposals prior to the date of opening of the proposals. The time period from the last day of the issuance of tender documents to the date of opening of the proposal shall not exceed sixty (60) calendar days for JV facility/project costing Five Hundred Million Pesos (PhP 500 Million) and above, and thirty (30) calendar days for JV facility/project costing less than Five Hundred Million Pesos (PhP 500 million).

The proposal parameters for the JV project should be transparent and fair. It should not, in any way, be tailor-made for or meant to favor or give advantage to a particular PSP.

Section 12. Responsibility of the PSP. The PSP shall be solely responsible for having taken all the necessary steps to carefully examine and acquaint himself with the requirements and terms and conditions of the selection documents with respect to the cost, duration, and execution/operation of the project as it affects the preparation and submission of its proposal. The Province of Bataan shall not assume any responsibility regarding erroneous interpretations of conclusions by the prospective PSP out of data furnished or indicated in the competitive selection documents.

Section 13. Supplemental Notices. A PSP may submit a written request to the Province of Bataan, through the Bataan PPPIC, on or before the pre-selection conference as to the meaning of any data or requirements or any part of the selection documents. Any substantive interpretation given by the Province of Bataan shall be issued in the form of a Supplemental Notice and furnished to all PSPs. The Province of Bataan may also issue Supplemental Notices to all PSPs at any time for purposes of clarifying any provisions of the selection documents, provided that the same are issued within a reasonable period to allow a PSPs to consider the same in the preparation of their proposals. Receipt of all Supplemental Notices shall be duly acknowledged by each PSP prior to the submission of his proposal and shall be so indicated in the proposal.

Section 14. Pre-Selection Conference. For JV Activities with facility/ project cost amounting to less than Five Hundred Million Pesos (Php 500 Million), a pre-selection conference shall be conducted by the PPP-SC at least fifteen (15) calendar days before the deadline for the submission of proposals. For JV activities with facility/ project cost amounting to Five Hundred Million Pesos (Php 500 Million) and above, the pre-selection conference shall be conducted at least thirty (30) calendar days before the deadline for the submission of proposals. Notwithstanding, the Province of Bataan PPP-SC may adjust said period as may be appropriate for the nature, scope, size and complexity of the proposed JV; provided, that the principles of transparency, competition, and accountability are observed.

Section 15. Requirements for Submission of Proposals. PSPs shall be required to submit their proposals on or before the deadline stipulated in the “instructions to PSPs.” For eligible PSPs, proposals shall be submitted in two (2) separate sealed envelopes, the first being the technical proposal and the second, the financial proposal. Each envelope shall bear the name of the PSP and of the project in capital letters. It shall also be appropriately labeled as technical proposal and financial proposal.

The technical proposal shall contain the following, as applicable:

- (a) Compliance statements with regard to the technical parameters as stated in the tender documents;
- (b) Operational feasibility,
- (c) Technical soundness, including proposed project timeline;
- (d) Preliminary environmental assessment;
- (e) Cost of the JV project;
- (f) Proposal security in the form as required by the Province of Bataan which may be in cash, certified check, manager's check, letter of credit, or bank draft/guarantee issued by a reputable local/foreign bank, or a surety bond callable on demand issued by the Government Service Insurance System (GSIS) or an entity duly registered and recognized by the Office of the Insurance Commissioner, or any combination thereof payable to the Province of Bataan concerned in accordance with the following schedule:

Total Contribution of the PSP As Estimated by the LGU	Required Proposal Security
Less than PhP 5.0 Billion	2.0% of the PSP's contribution as estimated by the Province of Bataan
PhP 5.0 Billion to less than PhP 10.0 Billion	1.5% of the PSP's contribution as estimated by the Province of Bataan

PhP 10.0 Billion and more	1.0% of the PSP's contribution as estimated by the Province of Bataan
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and

- (g) Other documents to support the PSP’s technical proposal, as may be required by the Province of Bataan.

The financial proposal shall contain the following, as the case may be:

- (a) Compliance statements with regard to the financial parameters slated in the tender documents;
- (b) Proposed cost of the JV, operation and maintenance cost, the amount of equity to be infused and debt to be obtained for the project, sources of financing, and all other related costs; and
- (c) Financial proposal corresponding to the parameters set by the Province of Bataan.

The Province of Bataan is not precluded from specifying other requirements for the technical and financial proposals that are best suited for the specific JV.

Section 16. Submission of Late Proposals. Proposals submitted after the deadline for submission prescribed in the "Instructions to PSP" shall be considered late and shall be returned unopened.

Section 17. Opening the Envelope for the Technical Proposal. At the date and time of the proposal opening stipulated in the "Instructions to PSPs," the Province of Bataan PPP-SC shall open only the first envelope containing technical proposal and ascertain the following;

- (a) whether the same is complete in terms of the data/information required under Section 16 above; and
- (b) whether the same is accompanied by the required proposal security in the prescribed form, amount, and period of validity.

All PSPs, or their representatives, present at the opening of the envelopes containing the technical proposal shall sign a register of the proposal opening.

Section 18. Evaluation of the Technical Proposal. The evaluation of the first envelope containing the technical proposal shall involve the assessment of the technical, operational, environmental, and financing viability of the proposal, vis-à-vis the prescribed requirements and criteria/minimum standards, and basic parameters prescribed in the competitive selection documents.

The Province of Bataan PPP-SC shall complete the evaluation of the technical proposal within thirty (30) calendar days from the date the proposals are opened. Only those proposals that have been determined to have positively passed the evaluation of the technical proposal shall be qualified and considered for the evaluation of the financial proposal.

Section 19. Opening the Envelope for the Financial Proposal. Only the financial proposals of PSPs who passed the evaluation described in the preceding section shall be opened for further evaluation. The financial proposals tendered by PSPs who failed the technical proposal evaluation under Section 19 Article III of this Guidelines, shall not be considered further, and shall be returned unopened, together with a notice stating the reasons for disqualification from further consideration.

The Province of Bataan PPP-SC shall notify the PSP qualifying for the second stage of evaluation of the date, time, and place of the opening of the envelopes for the financial proposal. The opening thereof shall follow the same procedure prescribed for the opening of the envelopes containing technical proposals.

Section 20. Evaluation of the Financial Proposal. The evaluation of the financial proposal shall involve the assessment and comparison of the financial proposals against the financial parameters stated in the tender documents and proposal parameters set by the Province of Bataan PPP-SC. The proposed financing plan must show that the same adequately meets the costs relative to the JV. The evaluation of financial proposals shall be completed by the PPP-SC within fifteen (15) calendar days.

Section 21. Simultaneous Evaluation of the Technical and Financial Proposals. In cases where the nature of the JV project shall warrant the appreciation of both the technical and financial proposals as a whole in order to determine the best proposal, simultaneous evaluation of the technical and financial proposals may be resorted to; Provided, That said evaluation procedure is subject to the determination of the Local Chief Executive and is explicitly stated in the proposal documents. Simultaneous evaluation of the technical and financial proposals shall be completed within sixty (60) calendar days from the date the proposals are opened.

Section 22. Prescriptive Periods. The periods stated for the evaluation of the technical and financial proposals are prescriptive. The Province of Bataan PPP-SC may adjust said periods as may be appropriate for the nature, scope, size, and complexity of the proposed JV, provided that the principles of transparency, competition, and accountability are observed.

Section 23. Rejection of Proposals. Non-compliance to the information required on either the first or second envelope shall be grounds for rejection of proposals.

Section 24. Withdrawal and/or modification of proposals. Withdrawal and/or modification of proposals may be allowed upon written notice by the PSP concerned, to the Province of Bataan prior to the time and date set for the opening of the envelope containing the technical proposal as specified in the "Instructions to PSPs." No proposals shall thereafter be modified or withdrawn, proposal modifications received after said period shall be considered late and will be returned unopened. Withdrawal of proposals after the proposal opening date shall cause the forfeiture of the PSP's proposal security.

Section 25. Right to reject all proposals. The Province of Bataan reserves the right to reject any or all proposals, waive any minor defects therein and accept the offer it deems most advantageous to the government.

Section 26. Breaking tie bids. In case tie bids occur under competitive selection or competitive challenge, the procedure for breaking tie bids shall be done through drawing of lots or similar

methods that is non-discretionary and non-discriminatory such that it is based on sheer luck or chance.

Section 27. Simultaneous or Single-stage Qualification and Bidding. In the exigency of service, the Province of Bataan may opt to do a simultaneous qualification instead of a pre-qualification of the proponents. In case of simultaneous qualification, the publication of the invitation shall be for the submission of qualification in three (3) sealed envelopes; the first envelope - the qualification documents corresponding to the requirements so stated in Section 10 of Article III; the second envelope – the technical proposal; and the third envelope - the financial proposal. The requirements for bid submission are covered under Section 16 of Article III. The period for the preparation of the qualification documents shall be submitted under the time allotted for bid preparation.

Each envelope shall bear the name of the PSP and the project name for which it is submitted. It shall also be appropriately marked as qualification requirements, technical proposal and financial proposal.

Section 28. Recommendation to Award. Within seven (7) calendar days from the date the evaluation procedure adopted is completed, the Province of Bataan PPP-SC shall submit the recommendation to award to the Local Chief Executive, the PPP-SC shall include as part of its recommendation, a detailed evaluation/assessment report on its decision regarding the evaluation of the proposals, and explain in clear terms the basis of its recommendations.

Section 29. Decision to Award. Within seven (7) calendar days from the submission by the Province of Bataan PPP-SC of the recommendation to award, the Local Chief Executive shall approve or reject the same. The approval shall be manifested by signing and issuing the "Notice of Award" to the winning PSP within seven (7) calendar days from approval thereof.

All participating PSPs shall be informed of the award in writing. Such decision shall be made available to the public upon request.

Section 30. Notice of Award. The "Notice of Award" to be issued by the Local Chief Executive shall contain, among others, an instruction to the winning PSP to comply with conditions precedent for the execution of the JV agreement and to submit compliance statements with regard thereto, within thirty (30) calendar days from receipt of the "Notice of Award", unless otherwise specified or extended by the Local Chief Executive.

Conditions precedent for the execution of the contract shall include, among others, the posting of a performance security in favor of the Province of Bataan, proof of commitment of the required equity contribution, and proof of firm commitments from reputable financial institution to provide sufficient credit lines to cover the total estimated cost of the project. The Province of Bataan shall determine which form of performance security it will require, which may be in the form of cash, bank draft, or guarantee confirmed by a local bank (in the case of foreign bidders bonded by a foreign bank), letter of credit issued by a reputable bank, surety bond callable on demand issued by Government Service Insurance System (GSIS), or by a surety or insurance companies duly accredited by the Office of the Insurance Commissioner, or a combination thereof, in accordance with the following schedules:

- (a) Cash, managers check, irrevocable letter of credit, bank draft - a minimum of two percent (2%) of the PSP's contribution to the JV.

- (b) Bank Guarantee - a minimum of five percent (5%) of the PSP's contribution to the JV.
- (c) Surety Bond - a minimum of ten percent (10%) of the PSP's contribution to the JV.

Failure to comply with the conditions precedent for the execution of the contract within the prescribed thirty (30) calendar day period or as specified or extended by the PPP-SC will result in confiscation of the proposal security. Within fifteen (15) calendar days from receipt of the compliance statements from the winning PSP, the PPP-SC shall determine the sufficiency of the same and notify the winning PSP accordingly.

Section 31. Validity and Return of Proposal and Performance Securities. The execution of the JV agreement shall be made within the period of the validity of the proposal security. The required proposal security shall be valid for a reasonable period, but in no case beyond one hundred eighty (180) calendar days following the opening of the proposals. Proposal securities shall be returned to the winning PSP and unsuccessful PSPs upon signing of the JV agreement by the winning PSP.

The performance security shall be valid within the period of one (1) year after the expiration of the JV agreement and/or of the JV period, or as may be stipulated in the JV agreement. Upon certification by the Local Chief Executive that there are no claims filed against the winning PSP after the expiration of the JV agreement or end of the JV period, the performance security shall be released by the former. As may be agreed upon in the JV agreement, a portion of the performance security shall be released upon compliance with corresponding milestones.

Section 32. Extension of Validity of Proposals. When an extension of validity of proposals is considered necessary, those who submitted proposals shall be requested in writing, to extend the validity of their proposals before the expiration date of the same. However, PSP shall not be allowed to modify or revise the price or other substantial aspect of their proposals.

PSPs shall have the right to refuse such an extension without forfeiting their proposal security. As a condition of the extension of the validity of their proposals, participating PSPs must correspondingly extend the validity of their proposal security.

Section 33. Single Responsive Bid. A single and responsive bid shall be considered for award if it falls under any of the following circumstances:

- (a) If after advertisement, only a single PSP submits eligibility documents within the deadline stipulated in the IAESP, and it meets the eligibility requirements, after which it submits a bid which is responsive to the technical and financial requirements;
- (b) If after advertisement, more than one PSP submits eligibility documents in accordance with the Section 10, Article III, but only one PSP meets the eligibility requirements, after which it submits a bid which is responsive to the technical and financial requirements;
- (c) If after the eligibility check, more than one PSP meets the eligibility requirements but only one PSP submits a bid, and its bid is found to be responsive to the technical and financial requirements; or

- (d) If after qualification/evaluation of proposals, only one PSP meets the technical requirements but is not able to comply with financial requirements, after which a negotiation on the financial terms/ proposal in accordance with Section 36 hereof is conducted and is successful.

Section 34. Prospective Bidders Compliant with the Technical Requirements. In case of a single technically qualified PSP but is not able to comply with the financial requirements or, in case of technically qualified PSPs but are not able to comply with financial requirements, the Province of Bataan may conduct negotiation on the financial terms/ proposal in accordance with the next Section.

Section 35. Negotiation on the Financial Terms/Proposal under the Competitive Selection Process. In case the PSPs, whose technical proposals are rated "passed", are not able to comply with the financial requirements, the Province of Bataan PPP-SC shall request said PSPs to submit their new financial proposals. Thereafter, the Province of Bataan shall notify and negotiate with the PSP on the financial proposal/ terms with the most advantageous financial proposal. The technical proposal shall remain valid and binding. In the event the Province of Bataan fails to successfully negotiate with said PSP within thirty (30) calendar days reckoned from the date of notice, the Province of Bataan shall negotiate with the next ranked most advantageous financial proposal, and so on and so forth, until a successful negotiation has been concluded.

In case of a single technically qualified PSP, the Province of Bataan may conduct negotiation on the financial terms or on the financial proposal and shall conclude said negotiation within thirty (30) calendar days. The technical proposal shall remain valid and binding.

In the event that there is no successful negotiation, the Province of Bataan shall conduct another competitive selection.

Section 36. Failure of Competitive Selection. There shall be a failure of competitive selection in any of the following instances:

- (a) No prospective PSP's is/are eligible;
- (b) No bids or proposals are received;
- (c) No prospective PSP/s is/are able to comply with technical requirements; or
- (d) No successful negotiation on the financial terms/proposal.

In the event of a failed competitive selection brought about by instances stipulated above, the Province of Bataan shall review the Terms of Reference (TOR /bidding documents and conduct another competitive selection.

Section 37. Execution/Approval of the JV Agreement The authorized signatory/ies of the winning PSP and the Province of Bataan, shall execute and sign the JV agreement, within seven (7) calendar days after the Local Chief Executive notifies the winning PSP of its compliance to the conditions or requirements precedent to the execution of the contract.

Consistent with Article 1159 at the New Civil Code, said JV agreement is considered the law between the parties, and the parties shall perform their respective representations, obligations, and undertakings thereunder with utmost good faith, with a view to attaining the objective thereof.

In the event of refusal, inability or failure of the winning PSP to enter into contract with the Province of Bataan within the time provided therefore, the Province of Bataan shall forfeit its proposal security. In such event, the Province of Bataan shall consider the PSP with the next-ranked complying proposal as the winning PSP, and notify said PSP accordingly. If the next ranked complying PSP shall likewise refuse or fail to enter into contract with the Province of Bataan, its proposal security shall likewise be forfeited and the Province of Bataan shall consider the next ranked complying proposal, and so on, until a contract shall have been entered into. In the event that the Province of Bataan is unable to execute the contract with any of the complying PSPs, a failure of competitive selection will be declared and the JV may be subjected to a competitive selection again.

Section 38. Other Approvals for Contract. The entity tasked under the JV agreement shall, as may be required under existing laws, rules, and regulations, secure any and all other approvals for the contract, or the implementation thereof, from government agencies or bodies including the regulator, in the case of public utility projects. This includes securing the necessary and appropriate environmental clearances from the DENR prior to actual project implementation. The DENR shall act on the environmental clearance of the JV within the timeframe prescribed and following the guidelines of the DENR Administrative Order No. 96-37 and subsequent guidelines as may be issued from time to time. The Province of Bataan may provide the necessary assistance to its JV partner in securing all the required clearances. The contract shall provide milestones in securing such other approvals required for the implementation of the contract.

Prior to the execution of the JV agreement, the Provincial Legal Office, as the chief legal counsel of the Province of Bataan, shall review the contract.

Section 39. Presidential Approval, When Required. Subject to the charter of the Province of Bataan no further higher approval is necessary, unless the same is required by law to be acted upon by the President of the Philippines. In which case, as deemed applicable, the provisions of existing laws, guidelines, rules and regulations shall be followed and adhered to by the Province of Bataan.

ARTICLE IV IMPLEMENTATION STAGE

Section 1. Creation of Project Management Team and Contract Management Plan. The Province of Bataan and the winning Proponent must set up a Project Management Team and the Contract Management Plan to ensure that both parties comply with their contractual responsibilities as stated in the PPP contract.

This shall include the major activities in the Pre-construction phase that should be accomplished before the construction phase which includes but not limited to the following:

- i. financial close;
- ii. submission of the Detailed Engineering Design;
- iii. acquiring appropriate Right-of-Way;
- iv. securing the right permits and approvals; and

- v. appointing an independent consultant, if needed

Section 2. Notice to Commence. The Province of Bataan shall issue the “Notice to Commence Implementation” of the project to the Project Proponent within a reasonable period to be determined by the Province and stated in the contract.

Section 3. Preparation and Approval of Detailed Engineering Design.

Where the project involves design, the Project Proponent shall be responsible for the preparation of the detailed engineering designs and plans based on the prescribed key performance indicators and targets and shall submit the same to the Province of Bataan pursuant to the timeline stipulated in the contract.

The Province of Bataan shall review the detailed engineering designs and plans prepared by the Project Proponent in terms of its compliance with the prescribed standards and specifications, and if found acceptable, shall approve the same for incorporation in the contract. This approval notwithstanding, the Project Proponent shall be solely responsible for the integrity of its detailed engineering designs and plans. The approval thereof by the Province of Bataan does not diminish this responsibility, nor does it transfer any part of such responsibility to the Province.

The Province of Bataan shall ensure that the technical designs, plans, specifications, and related aspects necessary for the project’s construction, operation and maintenance shall be based on relevant local and national policies, standards and guidelines.

Section 4. Project Construction.

The Project Proponent shall build the facility in accordance with the design and performance standards and specifications prescribed in the approved detailed engineering design. For this Construction stage, the Project Proponent may engage the services of foreign and/or Filipino Contractors that comply with the requirements as prescribed herein. In the case of foreign Contractors, Filipino labor shall be employed in the different phases of the Construction works where Filipino skills are available. Preference shall be given to the hiring of Filipino construction workforce in the Province. Hiring of labor shall be subject to existing labor laws, rules and regulations.

Section 5. Performance Security for Pre-Construction and Construction Works.

To guarantee the faithful performance by the Project Proponent of its obligations after the signing of the contract until the acceptance of the facility under the contract, including the prosecution of the Construction works related to the project, the Project Proponent shall post a performance security in favor of the Province of Bataan, within the period and in the form and amount stipulated in the Notice of Award.

The form of performance security shall be in accordance with the PTCs approved by the Sangguniang Panlalawigan of Bataan which may be in cash, bank draft or guarantee confirmed by a local bank (in the case of foreign bidders bonded by a foreign bank), letter of credit issued by a reputable bank, surety bond callable on demand issued by the GSIS or by surety or insurance companies duly accredited by the office of the Insurance Commissioner, or a combination thereof. The amount of security to be set by the Province of Bataan shall be in accordance with the following schedules:

- a. Cash, irrevocable letter of credit, bank draft - a minimum of two percent (2%) of the total Project Cost;
- b. Bank Guarantee - a minimum of five percent (5%) of the total Project Cost; and
- c. Surety Bond - a minimum of ten percent (10%) of the total Project Cost. The performance guarantee shall be valid up to acceptance of the facility by the Province of Bataan.

Should the performance security fall below the amount as required in the contract, the Project Proponent shall provide for an additional performance security to meet such required amount within fifteen (15) days from the occurrence thereof.

The performance security shall be proportionately increased in the case of government approved variations causing an increase in the Project Cost. The Project Proponent shall provide for the necessary additional performance security within fifteen (15) days from the approval of the variation.

The Province of Bataan shall strictly monitor compliance by the Project Proponent of the requirements for performance security and the sufficiency thereof.

Section 6. Performance Security for Operations.

For projects where the Project Proponent or other third parties shall operate the facility, the Province of Bataan shall require the Project Proponent to post a performance security for operations, simultaneously with the acceptance of the facility. The performance security for operations will be issued to guarantee the proper operation of the facility in accordance with the operating parameters and specifications under the contract.

The Province of Bataan shall determine the amount but the form shall be in accordance with the preceding section. This performance security for operations shall be valid during the entire operations period.

Should the performance security fall below the amount as required in the contract, the Project Proponent shall provide for an additional performance security to meet such required amount within fifteen (15) days from the occurrence thereof.

The performance security shall be proportionately increased in the case of government approved variations causing an increase in the Project Cost. The Project Proponent shall provide for the necessary additional performance security within fifteen (15) days from the approval of the variation.

The Province of Bataan shall strictly monitor compliance by the Project Proponent of the requirements for performance security and the sufficiency thereof.

Section 7. Review of Project Construction, Operation and Maintenance.

The Province of Bataan, through the Bataan PPPIC, and a panel of government offices designated by the PPP-SC, if any, may individually or jointly inspect and check, at any time, the project to

determine whether the project is constructed, operated and maintained in accordance with the approved plans, specifications, standards and costs under the contract.

In the event that the Province of Bataan shall find any deviation from or noncompliance with the approved plans, specifications and standards, the Province of Bataan, through the Bataan PPPIC, shall bring the same to the attention of the Project Proponent for the necessary corrective actions. Failure of the Project Proponent to correct the deviation within the time prescribed by the Province of Bataan may be a ground for the rescission/termination of the contract. Such technical supervision by the Province of Bataan shall not diminish the singular responsibility of the Project Proponent for the proper construction, operation, and maintenance of the facility, nor does it transfer any part of that responsibility to the Province of Bataan.

Section 8. Contract Variation. A contract variation may be approved by the Province of Bataan, provided, that:

- a. There is no impact on the PTCs as approved by the Sangguniang Panlalawigan of Bataan; or
- b. There is no increase in the agreed fees, tolls and charges or a decrease in the Province of Bataan's revenue or profit share derived from the project, except as may be allowed under a formula as approved by the Sangguniang Panlalawigan of Bataan; or
- c. There is no reduction in the scope of works or performance standards, or fundamental change in the contractual arrangement nor extension in the contract term; or
- d. There is no additional government undertaking, or increase in the financial exposure of the Province of Bataan under the project.

Upon due diligence and recommendation of the Local Chief Executive, contract variations not covered by above shall undergo approval by the Sangguniang Panlalawigan of Bataan in terms of the impacts on government undertakings/exposure, performance standards and service charges.

The Sangguniang Panlalawigan of Bataan shall set, as part of the approval of the project, a cap on the allowable variation during the entire contract, which cap shall not exceed ten percent (10%) of the original Project Cost.

In case of contract variation, any extension of the contract term shall not serve as a substitute to compensate the Project Proponent, in any manner whatsoever, without the written approval of the Sangguniang Panlalawigan of Bataan. Further, for variations allowed, the performance security shall be proportionately increased in the case of any government approved variation.

Failure to secure clearance/approval of the Sangguniang Panlalawigan of Bataan, as provided in this section, prior to the implementation of the variation, shall render the contract variation void. No variation shall be implemented before the variation is approved.

Section 9. Milestones.

The Project Proponent shall execute the project in accordance with pre-determined milestones. Failure by or delay on the part of the Project Proponent to comply with these milestones may result to imposition of liquidated damages, contract rescission, and/or forfeiture of the performance security of the Project Proponent, as the case may be, in accordance with Section 10 and/or Section 11 hereof.

Section 10. Release of Performance Security.

a. Performance Security for Construction Works

Upon completion of construction works, the Province of Bataan shall issue a "Certificate of Completion." Within a period of not more than one (1) year after its issuance, the Province of Bataan shall issue a "Certificate of Acceptance" upon final acceptance that the project had been completed in accordance with the agreed standards and specifications.

The Performance Security for Construction Works shall be released by the Province of Bataan after the issuance of the "Certificate of Acceptance" of the Construction works provided that there are no claims filed against the Project Proponent or its Contractor.

As may be agreed upon in the contract, a portion of the Performance Security shall be released upon compliance with corresponding milestones.

b. Performance Security for Operations

The Performance Security for Operations shall be released by the Province of Bataan on the transfer date of the facility, provided that there are no claims filed against the Project Proponent and its Contractor.

Section 11. Liquidated Damages.

Where the Project Proponent fails to satisfactorily complete the work on or before completion date, including any extension or grace period duly granted, or fails to meet the operating performance standard as prescribed in the contract, or fails to perform any of its obligations and undertakings as stipulated in the contract, the Project Proponent shall pay the Province of Bataan liquidated damages, as specified in the contract as an indemnity and not by way of penalty. The performance security for construction works or for operations, as the case may be, may be applied to answer for any liquidated damages due to the Province of Bataan.

During the Construction Period, the amount of liquidated damages due for every calendar day of delay beyond the completion date will be determined by the Province of Bataan based on the formula in the contract. During the operation period, the amount of liquidated damages, which will be determined by the Province of Bataan shall be based on the principle of fair compensation for damages which the Province of Bataan will sustain as a result of the Project Proponent's failure to meet its obligations.

Persistent breach of obligations by the Project Proponent and a limit to the amount of consequent liquidated damages shall be defined in the contract. Should the limit be reached, such shall be considered a Project Proponent event of default. Persistent breach of obligations by the Project Proponent shall be defined in the contract by using the following parameters:

- a.** an accumulation of a significant number of breaches over a stated period of time; and/or
- b.** an accumulation of payment deductions from the performance security or of payment of liquidated damages above a certain threshold.

The imposition and collection of liquidated damages shall be without prejudice to the right of the Province of Bataan to rescind or terminate the contract and proceed with the procedures prescribed under Section 16 hereof.

Section 12. Repair and Maintenance Costs.

The Project Proponent shall, within the contract term and the warranty period, undertake the necessary and appropriate repair and maintenance of the project, in accordance with the design and performance standards, and other terms prescribed in the approved contract, in order to ensure that the facility operates at the desired level of service. For this purpose, and where applicable, a portion of the project's revenues equivalent to the cost of the project's repair and maintenance, as indicated in the Project Proponent's bid proposal shall be set aside and reserved exclusively for repair and maintenance costs of the project. For facility, an escrow account may be established for the purpose.

Section 13. Revenue Sharing.

The Province of Bataan share in the revenue from the operation of the Project Proponent and can only be in the form of either a set fee or a percentage of the gross revenue or a combination of both, which may be increased during the term of the contract subject to agreed parameters, provided that the same is indicated in the bidding documents and included in the contract. The payment of the revenue share shall not be dependent on the project ROR.

Section 14. Audit of Collections.

All revenues, share and/or receipts pertaining to or accruing to the Province of Bataan derived from any proposed project, including expenditures or uses of funds and property, owned or held in trust by, or pertaining to the Government, shall be subject to examination/audit by the Commission on Audit (COA), including a) ensuring that such revenues, share and/or receipts are fully and properly accounted for and remitted to the Province of Bataan; and b) determining if the mandated return on rate base is complied with, in the case of negotiated contracts and Public Utility Projects which are natural monopolies.

All revenues and receipts pertaining to or accruing to the Project Proponent may be remitted directly to the Project Proponent, as may be stipulated in the contract.

Pursuant to the provisions of the Government Auditing Code of the Philippines, revenues, shares, and/or receipts from projects shall be subject to the COA accounting and auditing rules and regulations.

Section 15. Accession/Divestiture.

Subject to the approval of the Sangguniang Panlalawigan, upon due diligence and recommendation by the Local Chief Executive, a Project Proponent may divest or accede its ownership and/or rights to a project provided that, the divestiture or accession shall be after the holding or lock-in period which shall be determined by the Province of Bataan and indicated in the contract, and provided that, the new Project Proponent has equal or better qualifications as with the previous Project Proponent.

A divestment/accession made in violation of this section shall be a ground for disqualification of the Project Proponent or cancellation of the contract, as the case may be, and forfeiture of the Project Proponent's bid or performance security.

Section 16. Contract Termination or Rescission.

Failure to comply with any obligation prescribed in the contract, and such failure is not remediable or if remediable shall remain unremedied beyond the agreed curing period, will result in contract termination or rescission as provided under the following rules:

a. Grounds for Termination or Rescission

All contracts shall define all events that may lead to its termination, including but not limited to:

- i. Government event of default;
- ii. Project Proponent event of default;
- iii. Force majeure and other no-fault termination events;
- iv. Other termination events, as may be agreed upon by the parties.

For such events that may lead to contract termination, the contract shall provide remedies, curing periods, lender step-in rights, and written notice requirements agreed upon by both parties. The contract shall likewise provide that termination shall take place only upon failure to remedy or cure the default in accordance with the contract.

For avoidance of doubt, the project shall not be terminated for an event of default without exhausting the corresponding remedy or curing period.

Persistent breach of obligations by the Project Proponent, as defined in the contract, shall be considered as a Project Proponent event of default.

In cases of Project Proponent event of default, the government may choose to terminate or rescind the contract.

b. Termination Payment

In cases of termination for failure to remedy an event of default, the amount of termination payment shall be determined by the parties pursuant to the contract.

The determination of the amount of termination payment shall be done in accordance with relevant rules and regulations as well as the following guiding principles:

- i. Debt guarantees shall not be allowed;
- ii. Payment for expected returns of the Project Proponent exceeding the contract term shall not be allowed;

- iii. Payment of profits of commercial business units shall not be allowed;
- iv. In the case of termination from Project Proponent default, the compensation for the usable core assets, if any, shall be up to (a) the amount of outstanding senior debt borrowed to fund such core assets; (b) the appraised value of the assets, or (c) the depreciated book value of the assets, whichever is lower;
- v. In the case of government default, the government shall pay the outstanding senior debt, subject to applicable government-mandated caps, incurred by the Project Proponent and shall allow the latter to realize a reasonable rate of return, to be determined by the Sangguniang Panlalawigan; provided such return shall not exceed that stated in the contract;
- vi. In the case of termination that is neither the fault of the government nor the Project Proponent, the compensation for the usable core asset shall be (a) the appraised value of the assets at their condition, at the time of termination, or (b) the depreciated value of the assets, whichever is lower.

An independent appraiser shall be required under the contract and chosen by mutual consent of the parties. The cost of hiring the independent appraiser shall be borne by the party at fault, except in cases of termination that is neither the fault of the government nor the Project Proponent, in which case, the cost shall be divided equally.

The amount determined by the independent appraiser shall be binding to both the Project Proponent and the Province of Bataan.

The Project Proponent shall be precluded from using non-delivery of the termination payment as a reason for failure or refusal to handover the asset.

c. Temporary or Permanent Takeover by the Government

In cases of emergency or when public interest so requires, as determined by the President, the Province of Bataan may, by written notice to the Project Proponent, immediately takeover the Infrastructure or Development Facility or any part thereof.

Under a temporary takeover, except for the collection of tolls/fees/charges by the Province of Bataan held in trust for the Project Proponent less the actual operating costs incurred by the Province of Bataan, under no circumstance shall the Project Proponent claim compensation for the duration of such temporary takeover. During such takeover, the concession or cooperation period shall be suspended until the facility or operation thereof is returned to the Project Proponent.

In case of permanent takeover, the Project Proponent shall be entitled to claim compensation computed according to the termination payment stated in item (b) of this Section.

If necessary, the Province of Bataan shall immediately enact the relevant rules, regulations, or ordinance to facilitate the emergency takeover.

Section 17. Resolution of Disputes between the Contracting Parties.

Resolution of disputes between the contracting parties, whether through arbitration or litigation, shall be as mutually agreed upon by the parties to the contract, subject to applicable laws, rules, and regulations.

In default thereof, the venue shall be in the Philippines. Acts and decisions of Regulators shall not be subject to arbitration.

Section 18. Expiring Contracts and Transfer of and Warranty Over the Facility.

Under Contractual Arrangements involving transfer of the facility to the Province of Bataan, the transfer or turnover will necessarily include the transfer of full legal ownership over the project, all documents, property rights, source codes, equipment, among others, which are related to the project in favor of the Province of Bataan, subject to any existing liens as may be agreed upon in the contract. The facility, upon transfer to the Province of Bataan, shall be operable and in good condition. The performance indicators for the project/facility and frequency of monitoring the indicators shall be stipulated in the contract. A third-party shall be commissioned to assess the residual value of the facility upon transfer or turnover of the facility to the Province of Bataan.

a. Transfer Security

To guarantee the faithful performance by the Project Proponent of its obligations during the transfer of the facility, the Project Proponent shall post an asset transfer security in favor of the Province of Bataan, in the form, amount, and period stipulated in the contract.

The Province of Bataan shall determine the amount but the form shall be in accordance with Section 5 Article IV. The asset transfer security shall be valid until the Province of Bataan determines that the facility complies with the transfer requirements as stipulated in the contract and issues an acceptance certificate.

b. Warranty Security

The Project Proponent shall provide warranty that the facility meets the key performance indicators and targets in connection therewith for a period not less than one (1) year from the transfer of the facility. The Project Proponent shall put up a warranty security in the form in accordance with Section 5 Article IV, and the amount of which shall be determined by the Province of Bataan and shall be stipulated in the contract. The warranty security shall be made effective immediately upon transfer of full legal ownership over the project in favor of the Province of Bataan, as described above.

Section 19. Government Undertakings.

Subject to existing laws, policies, rules and regulations, the Province of Bataan may provide form of support or contribution to solicited projects, such as, but not limited, to the following:

- a. Credit Enhancements - This shall refer to support to an infrastructure or development facility by the Project Proponent and/or the Province of Bataan, the provision of which is contingent upon the occurrence of certain events and/or risks, as stipulated in the contract. Credit enhancements are allocated to the party that is best able to manage and assume the consequences of the risk involved. Credit enhancements may include, but are not limited to,

government guarantees on the performance, or the obligation of the Province of Bataan under its contract with the Project Proponent;

b. Direct Government Subsidy - This shall refer to an agreement whereby the Province of Bataan will:

- i. defray, pay for or shoulder a portion of the Project Cost;
- ii. bear a portion of capital expenses associated with the establishment of an Infrastructure or Development Facility and/or any partial financing of the project, or components thereof;
- iii. defray, pay for or shoulder a portion of the expenses and costs in operating or maintaining the project;
- iv. contribute any property or assets to the project such as, the provision of access infrastructure, right-of-way, transfer of ownership over, or usufruct, or possession of land, building or any other real or personal property for direct use in the project;
- v. waive or grant special rates on real property taxes on the project during the term of the Contractual Arrangement; or
- vi. waive charges or fees relative to business permits or licenses that are to be obtained for the Construction of the project,

All without receiving appropriate compensation from the Project Proponent and/or Facility Operator.

All direct government subsidy shall not exceed fifty (50%) of the total Project Cost. In the case of O&M projects with zero Project Costs, it shall not exceed fifty (50%) of the total O&M cost.

The above undertakings may be financed from direct government appropriations and/or from official development assistance (ODA) of foreign government or institutions. Sunk costs, which are costs incurred prior to the preparation of the feasibility study, shall not be included in the computation of the direct government subsidy and the total Project Cost. In case of contribution of assets or property, the value of the direct government subsidy shall be determined by a government financial institution before the project is submitted to the Sangguniang Panlalawigan of Bataan.

In case of contribution of assets or property, compensation shall be considered as appropriate if the value of the compensation is at least equal to the value of the contribution or undertaking as determined by a government financial institution. Payment of the compensation shall be made not later than the start of operations. Nonpayment of compensation on the said date shall incur interest on the compensation. The interest rate to be applied shall be the rate stated in the contract, taking into consideration relevant rules and regulations on interest. In case the parties fail to agree on the applicable interest rate, or in default thereof, the prevailing risk-free rate shall apply.

- c. Direct Government Equity - This shall refer to the subscription by the Province of Bataan of shares of stock or other securities convertible to shares of stock of the project company, whether such subscription will be paid by the money or assets.
- d. Performance Undertaking - This shall refer to an undertaking of the Province of Bataan in assuming responsibility for the performance of the Province's obligations under the contractual arrangement including the payment of monetary obligations, in case of default. These undertakings may be subject to payment of risk premium to the Province of Bataan, or any other authorized agency.
- e. Legal Assistance - This shall refer to the extension of representation by government lawyers to a Project Proponent but only in cases, hearings, or inquiries where the Province of Bataan and Project Proponent are party-defendants/respondents therein including the adoption by such government lawyers of positions and strategies consistent with upholding the validity of the approved contractual arrangement.
- f. Security Assistance - This shall refer to the deployment of government security forces in the vicinity of the project site to provide security during the implementation of the project up to completion.

The Province of Bataan may offer any one or more Government Undertakings relative to a project, which shall be pre-cleared in principle, in writing, by the Sangguniang Panlalawigan of Bataan; provided that the total government undertakings shall not exceed fifty percent (50%) of the total project cost or the debt of the Project Proponent incurred for the project, whichever is lower.

Section 20. Disclosure and Consent on Loan Agreement.

Prior to signing a loan agreement to finance a project, the Project Proponent shall obtain the consent of the Province of Bataan on the following stipulations in the loan agreement:

- a. Proposed conditions precedent and the events of default that will be included therein;
- b. Any proposed termination, amendment, waiver of rights or any action regarding the loan agreement that may reasonably be expected to have a materially adverse effect on the ability of the Project Proponent to perform its obligations under the contract or the loan agreement;
- c. Any proposed cure agreed with the lender/creditor/bank that may increase the Province of Bataan's liabilities or impede the operations of the project; and
- d. Any agreement to refinance the loan entered into for the project.

If any of the foregoing stipulation will result to an increase in Government Undertakings or a change in the approved risk allocation, the Province of Bataan shall obtain the consent or clearance of the Sangguniang Panlalawigan of Bataan prior to giving its consent to the Project Proponent.

In the event the Project Proponent enters into a loan agreement without obtaining the necessary consent required above, such will be considered a Project Proponent event of default, and the Project Proponent shall be prohibited from holding the Province of Bataan liable for any obligations arising from the loan agreement.

Under no circumstance shall the Province of Bataan withhold its consent on the above enumerated conditions, unless such conditions are grossly disadvantageous to the provincial government.

During the implementation of the loan agreement, the Project Proponent shall periodically report and submit to the Province of Bataan, through the Bataan PPPIC, the necessary documents on the following:

- a. status of the fulfillment of its obligations under the loan agreement; and
- b. status of an agreed cure for a default committed by the Project Proponent under the loan agreement.

Section 21. Conflict of Interest.

All relevant parties shall, at all times, avoid conflicts of interest, as defined in Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees. To ensure avoidance of conflict of interest, regulatory agencies or bodies implementing a project shall prepare a conflict mitigation plan.

In case a conflict of interest arises, the concerned parties shall inhibit themselves from the performance of their duties in connection to the project. In the case of a PPP-SC member with a conflict of interest, the concerned member shall not actively participate in the project involved.

Section 22. Firm and Contingent Liabilities.

Government liabilities in contracts consist of firm liabilities and contingent liabilities. Firm liabilities are foreseeable and definite liabilities, as described in the provisions of a contract. These include, but are not limited to, milestone payments, amortization payments, availability payments, viability gap funding, variation payments, and payment for settlement of undisputed claims.

Contingent liabilities are liabilities that may be incurred from events specified in a contract, the occurrence, timing, or amount of which are uncertain. These include, but are not limited to MAGA, force majeure, breach of government warranties, and failure to deliver contractual obligations.

Section 23. Rules for Government Firm Liabilities in Contracts.

- a. Projects that would result in a government firm liability shall meet the following additional criteria for approval:
 - i. The project passes the criteria for technical viability, economic feasibility, social acceptability, and climate change resiliency set by the PPP-SC and approved by the Sangguniang Panlalawigan;
 - ii. The project offers value for money and that the proposed firm liabilities are supported by a financial model showing that the project is not financially viable unless the firm payments are included;
 - iii. The fiscal impact of the firm liabilities is sustainable based on the assessment of the Provincial Treasurer's Office;

- iv. The Province of Bataan must commit to bidding the project competitively and with the goal to keep firm payments to a minimum;
 - v. Payments are in local currency;
 - vi. Payments are conditional, subject to the Project Proponent achieving availability targets or other applicable performance targets.
- b. The amounts to be paid and schedule of payments shall be reflected in the approved financial model.
- c. The PTCs related to firm liabilities, which must be approved by the Sangguniang Panlalawigan of Bataan, shall consist of:
- i. the amounts to be paid; and
 - ii. the schedule of payments.
- d. The Province of Bataan shall ensure that sources of funds necessary for the payment of firm liabilities are identified and secured pursuant to existing laws, rules, and regulations.

Section 24. Rules on Contingent Liabilities.

- a. Contingent liabilities shall be set only for risks that the Provincial Government of Bataan is best able to control.
- b. The Province of Bataan shall submit a risk mitigation plan for approval by the Sangguniang Panlalawigan. Such plan shall include a list of all risks assumed by the government under the contract, risks assumed by the Province of Bataan, risk mitigating measures, estimated costs to be incurred, target dates to have each measure in place, and the appropriate action plan by the Province of Bataan to manage each type of risk.
- c. Both the draft and the final contract shall be consistent with the approved PTCs related to contingent liabilities.
- d. All contingent liabilities to be assumed by the Province of Bataan shall be transparent in terms of specific risk events that would trigger such liabilities; the probability or likelihood that such risks will occur; the manner of compensation for the economic impact on the Project Proponent, if compensation is financial; the method or principle of calculation of financial compensation; the materiality threshold; and the cap on compensation.
- e. For force majeure risks, contingent liabilities above the insurance proceeds shall be shared equally between parties to the contract.
- f. The PTCs related to contingent liabilities shall consist of:
 - i. A condition to negotiate a remedy or cure for a risk event ;
 - ii. A term for curing period;
 - iii. The parameters for compensation for damages or losses, including caps on compensation from Province of Bataan;

- iv. A condition to include step-in rights; and
- v. Parameters for payments if terminated
- g. The Province of Bataan shall conduct monitoring of contingent liabilities.

Section 25. Accounting for Liabilities.

The identification and reporting of firm and contingent liabilities in contracts shall be based on the applicable accounting rules and regulations.

**ARTICLE V
GENERAL PROVISIONS**

Section 1. Separability Clause.

In the event any of the provisions of this Guideline is declared void or unenforceable by final judgment of a court of competent jurisdiction, the other provisions unaffected thereby shall remain in full force and effect.


Section 2. Rules of Interpretation.

Unless expressly provided to the contrary, references to any statute, law, decree, regulation, document, or agreement made in this Order shall be deemed to include references to such statute, law, decree, regulation, document, or agreement, as amended, supplemented, novated, varied or replaced from time to time, provided, that there is no impairment of the obligation of contract.

Section 3. Effectivity.

This Detailed Guideline for the Development, Approval, Procurement, and Implementation of Joint Venture Agreement for Public-Private Partnership Projects (PPP) Solicited Proposals shall take effect immediately and shall be posted in the Capitol Compound for a period not less than thirty (30) days. All previously approved Guidelines inconsistent with the provisions of this Executive Order are hereby deemed superseded, repealed and/or amended accordingly.

DONE in the City of Balanga, Province of Bataan this 6th day of September 2022.


JOSE ENRIQUE S. GARCIA III
Governor 