GENERIC PREFERRED RISK ALLOCATION MATRIX

(As of 02 August 2016)

Type of Risk	Definition, Proposed Risk Allocation and Rationale	Possible Risk Mitigation Strategies / Suggested Contract Provision(s)
1.1 Existing Structure and Assets (Refurbishment/Extensions)	**Definition:** "Risk that existing structures (e.g., buildings, rail lines) and other assets (e.g., computer systems) are inadequate to support new improvements"[1] or structures/activities subject of or involved in PPP contract, resulting in additional construction, time and cost that may be necessary to replace, strengthen or improve the existing structures or assets to enable it to successfully support the project. **Preferred Allocation:** Private Partner for pre-identified matters and unidentified matters below materiality threshold Government for material unidentified risks **Rationale/Details:** Private Partner can manage known risks cost-effectively if proper due diligence of existing structure/asset is conducted. There is always the risk that major deficiencies will not be identified prior. Government is likely to obtain better value for money by sharing this risk (e.g. through bearing risks above a materiality threshold). Implementing agencies are given latitude to determine the materiality threshold per project.	**Possible Risk Mitigation Strategies:** - Specify clearly in tender documents the responsibility/ies of the government and of the Private Partner particularly stating therein that the Private Partner will assume all attendant costs, required permits and clearances; - Government should undertake necessary studies and disclose as much information as possible to bidders. Generally, it is more cost-effective for government to do studies than having each bidder do so; - Government to assign warranties provided by report consultants to the Private Partner; - Facilitate bidders' access to plans/documents relating to condition of structure. - Give Private Partner enough time to do further site studies at its expense should it wish to do so; - Provide the bidders all the necessary assistance in looking for alternative sites that will minimize its costs, and if possible, offer alternative structures that can support new improvements which the project requires; and, - Set appropriate materiality threshold. **Suggested Contract Provision(s):** - For issues disclosed to bidders and for non-material issues, bidders take risk; - Include a limited, capped, time-bound warranty from Government for unidentified (i.e. at bid phase) issues with the existing structures; materiality clause to be triggered to activate Government compensation. Since the amount of exposure to unidentified risks cannot be estimated, it is suggested that the warranty be time-bound but not capped. Capping warranty may lead to a bankability/viability issue; and, - Government prior approval required for any costs expensed by the Private Partner but which Government bears.
1.1.1 Existing Facilities: Current Service Contracts	**Definition:** Uncertainties inherent in existing contracts for the delivery, upkeep or refurbishment of the asset lead to unexpected benefits or costs for the Private Partner and/or interface issues. **Preferred Allocation:** Private Partner, for any contracts novated to it Government, for non-novated contracts **Rationale/Details:** During bidding, Government will identify the contracts to be assumed by the Private Partner. Bidders to be provided full details of these contracts in bid documents. Bidders can price in costs and risks in their bid price. Government to bear break costs of contracts not novated.	**Possible Risk Mitigation Strategies:** - Contracts which have uncertainties and can be terminated with minimal additional costs should be terminated by Government upon transfer of the asset to the Private Partner; - Time the start and end of contracts properly; - As appropriate, allow overlap provisions in the PPP agreement to allow the new Private Partner time to set up its operations while allowing the old service contracts to end; - Create a handover protocol to support handover across service contracts; and, - For contracts to be novated, bidders should be provided with full access to existing contracts (etc. maintenance) - and provided guided contact with relevant provider companies as appropriate - to allow bidders to assess and factor into their bid pricing. **Suggested Contract Provision(s):** - For contracts novated to the Private Partner, all rights, costs and liabilities are to be assumed by the Private Partner from the Novation Date; and,

[1]Risk Management Module of Public Private Partnerships Guidance Material Supporting Document. Queensland Government. 2008

		- Government to ensure that there are no encumbrances (e.g. to site access or service delivery) arising from non-novated contracts beyond the Novation Date.
1.1.2 Existing Facilities: Current Government Employees	**Definition:** Risks relating to uncertainties and costs in utility of current employees and in retrenching redundant employees. **Preferred Allocation:** Government **Rationale/Details:** The new Private Partner was not party to the engagement of these employees, their employment conditions or their training. Government should also be in a better position to manage these risks.	**Possible Risk Mitigation Strategies:** - Private Partner should be incentivized to accept transferring employees; and, - Strategies should be consistent with the PPP Governing Board Policy Circular 08-2016 on Managing Government Employees Affected by PPP Projects, including: • Government should absorb all retrenchment costs, at the level provided for by existing applicable laws, for employees who opt to retire or voluntarily separate; • Government should ensure that the PPP contract provides for the management of affected employees, including a transition plan; • Government should consult affected employees on the transition plan; • Government may give the option for permanent government employees to be redeployed or transferred to another office in the same agency or another government agency; • Employees should be given the option to transfer to the employ of the new Private Partner at no less than the existing pay levels at the time of transfer for a set period; • Private Partner has the right to change employment arrangements for transferred staff after a period of time. It is uncommercial to impose on Private Partner ongoing obligation (i.e. beyond the set period) to treat/pay transferred and new employees differently; • Moving employees receive signing bonus (level set by Government); and, • Private Partner can fire staff after at least six (6) months.
1.2 Geotechnical Site Conditions	**Definition:** Risk that unanticipated adverse geological conditions (geotechnical risk) are discovered which cause construction or maintenance costs to increase and/or cause construction delays.[2] **Preferred Allocation:** Private Partner to take pre-identified risks and unidentified matters below materiality threshold Government to take material unidentified risks **Rationale/Details:** Private Partner can price in known material geotechnical risks. There is always the risk that major deficiencies will not be identified prior. Government is likely to obtain better value for money by sharing this risk (e.g. through bearing risks above a materiality threshold).	**Possible Risk Mitigation Strategies:** - Government to conduct thorough geotechnical investigation/studies based on international standards/practice during project preparation and provide the findings/result of the studies; - In the event that unidentified risks arise, it is suggested that the Government also monitor ground conditions since it is also accountable in ensuring the safety of end users; - Post-award, a specific amount of time should be given to the Private Partner to conduct extensive geotechnical examination. After such period (recommended as for the full construction period), the Private Partner will shoulder the risks related to geo-technical site conditions, including those that are not readily observable; - Give Private Partner enough time to make site inspection and due diligence in order to validate the geotechnical findings of the government; - Set appropriate materiality threshold; and, - If risks are uninsurable and insurmountable, the project itself should not be assigned to the Private Sector. **Suggested Contract Provision(s):**

[2] Ibid.

		- Contract clause stipulating that where unanticipated adverse site/ground conditions are discovered at the site of the PPP project, the Private Partner shall bear any additional costs required for repairing or addressing such adverse site/ground conditions up to a materiality threshold; - Government prior approval required for any Private Partner costs it bears; and, - Contract clause requiring Private Partner to provide performance bond.
1.3 Permits and Approvals/Site Preparation	**Definition:** Risk that necessary approvals "may not be obtained or may be obtained only subject to unanticipated conditions, which have adverse cost and time consequences" (e.g. prolonged delay).[3] **Preferred Allocation:** Each party is responsible for delays for which it is responsible Private Partner is responsible for risks with respect to appropriateness of its design Government is responsible for delays and lapses caused by national and local government agencies **Rationale/Details:** Private Partner should be responsible for ensuring its design is compatible with government planning requirements Government (i.e. the implementing agencies) will file an application for Environmental Compliance Certificate (ECC) pre-bid since implementing agencies prepare the Feasibility Study and design (in case of solicited), but private will have the primary responsibility of obtaining and complying with the ECC, with the help of the Government. Government is better informed and positioned so that the necessary approval, particularly in situations that are complex or sensitive, is secured.	**Possible Risk Mitigation Strategies:** - Government to obtain, on a best efforts basis, in advance of the bidder proposal submission stage the requisite project permits and approvals, which would allow the Private Partner to achieve a measure of pre-contractual certainty and an early start to the approval process. Government to provide Private Partner with relevant documents to help them ascertain what approvals have already been obtained; and, - For further approvals and permits, the Private Partner is required to seek the necessary approvals but Government may facilitate and secure assistance from relevant national and local agencies as appropriate. **Suggested Contract Provision(s):** - A time line to be provided in the contract in securing the necessary permits/approval. In case of prolonged delay without justifiable reasons, the responsible party shall bear the additional costs including any due compensation; - Contract clause stipulating the schedule to obtain permits and approval and stipulating liquidated damages payable to the Private Partner in case the delay is attributable to the government; and, - Contract clause stipulating that the Private Partner shall bear the resulting additional costs or delay arising from failure to obtain or the delay in obtaining the necessary permits or approvals (including, but not limited to, environmental license, environmental management plan or other environment-related permits) for the PPP project even due to unanticipated conditions. Any promise of the procurement or project management team of the agency or local government unit (LGU) concerned to render assistance in obtaining the required permits or approval shall not transfer the risk to the government.
1.4 Environmental Liabilities Existing Prior to the Project	**Definition:** Risk that the project site is contaminated requiring significant remediation expenses.[4] **Preferred Allocation:** Private Partner to take pre-identified risks and unidentified matters below materiality threshold Government to take material unidentified risks **Rationale/Details:** Private Partner can price in known material environmental contamination risks.	**Possible Risk Mitigation Strategies:** - Government to conduct thorough geotechnical investigation/studies based on international standards/practice during project preparation and provide to bidders; - Government should restore site, as appropriate, prior to turnover; - Give Private Partner enough time to make site inspection and due diligence in order to affirm or negate the geotechnical findings of the government; - Set appropriate materiality threshold; and, - The Government should ensure that the solutions pursued by the Private Partner do not cause further environmental damage. **Suggested Contract Provision(s):**

[3] Ibid.
[4] Ibid.

	There is always the risk that major deficiencies will not be identified prior. Government is likely to obtain better value for money by sharing this risk (i.e. through bearing risks above a materiality threshold).	- Contract clause stipulating that where unanticipated adverse site/ground conditions are discovered at the site of the PPP project, the Private Partner shall bear any additional costs required for repairing or addressing such adverse site/ground conditions up to a materiality threshold, after which relief and/or compensation may be provided by the Government; and, - Government prior approval required for any Private Partner costs it bears.
1.5 Environmental Liabilities Created During Operation	**Definition:** Risk that the use of the facility/project site over the contract term has resulted in significant environmental liabilities (clean up or rehabilitation required to make the site fit for future anticipated use).[5] **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner is able to manage the use of the asset and attend to its maintenance and refurbishment according to the environmental requirements known at the proposal stage. Where the use of the facility or project site results in the pollution or contamination of the same over the contract period, the Private Partner shall be responsible for the clean-up and rehabilitation of the site to render the same fit for continued and future use since contamination results from use of site for the project. The Government is to monitor the progress of the proposed solutions. The same is true for pollution caused by the project outside of its site.	**Possible Risk Mitigation Strategies:** - During procurement, the Private Partner must demonstrate financial capacity or support to deliver the site in the state required by government at the end of the contract; and, - Conduct of government/independent environmental audit two years from contract expiry. **Suggested Contract Provision(s):** - Contract clause defining what constitutes environmental liability and the mechanism to estimate the Private Partner's liability and pursue payment; - Contract provision stipulating that an independent environmental audit be undertaken prior to contract; - Establishment of appropriate end of term bond; - If EMB suspends Project due to non-compliance by Private Partner with environmental laws, a provision for liquidated damages must be provided for the delay caused. However, said non-compliance will have to be established by EMB after the Private Partner has exhausted all means/options (and the allowed timeframes) to comply with them; and, - Termination clause if environment liabilities are not sufficiently mitigated and addressed by the Private Partner.
1.6 Cultural Heritage	**Definition:** Risk of costs and delays associated with the discovery of archaeological and cultural heritage[6] attributable directly to the government's mandated process of conserving, protecting, regulating and disposition of said discovery. **Preferred Allocation:** Private Partner to take pre-identified risks and unidentified matters below materiality threshold Government to take material unidentified risks **Rationale/Details:** Government has a statutory duty to preserve these artifacts. Based on Sections 14, 15, 16 and 17 of Article XIV of the 1987 Constitution, and Republic Act No. (RA) 10066 otherwise known as the "National Cultural Heritage Act of 2009", the government shall conserve, protect, and regulate the disposition of historical and cultural heritage including archaeological sites.	**Possible Risk Mitigation Strategies:** - Government to research cadastral records and obtain expert advice prior to tender and include relevant material in bid documents; - The Government implementing agency to consult/coordinate with appropriate institutions/groups (both public and private) charged/concerned with archaeological and cultural heritage (e.g., the cultural agencies identified under RA 10066 during the project development stage); and, - Private Partner should be held accountable for minimizing its compensable cost and time, and also for taking due care in its non-disturbance of artefacts. **Suggested Contract Provision(s):** - Private Partner will abide with existing rules and regulations concerning handling and protection of archaeological and cultural heritage discoveries, and liability for damages in case of breach - Private Partner will bear costs incurred with treatment of known artefacts; and, - Government to bear costs beyond a materiality threshold, and any damages relating to treatment of unidentified artefacts.

[5] Ibid.
[6] Ibid.

	Government generally has a better understanding of procedures, and is usually in best position to manage this risk. However, if the cultural heritage conditions are known pre-tender and the government can clearly articulate its processes in the tender documents, this risk could be largely transferred to the Private Partner. In other cases, or for artefacts not identified in bid documents government will need to share risks.	
1.7 Availability of Site	**Definition:** Risk that tenure/access to a selected site which is not presently owned by government or Private Partner cannot be negotiated.[7] Risk of costs and delays in negotiating land acquisition. **Preferred Allocation:** Government unless site is provided by Private Partner **Rationale/Details:** For solicited projects, it is generally incumbent upon government to provide the site. Government has a better understanding of procedures, has special powers of acquisition and use of land for infrastructure and is usually in best position to manage. Government is in better position to negotiate where policy discourages use of compulsory acquisition power. In case of unsolicited projects and in Private Partner preferred site, Private Partner is in control of site selection. Government may assist in acquiring, if necessary, with no cost to government. However, the government may set a cap on the price of the land using applicable valuation methodologies in the course of the Swiss Challenge.	**Possible Risk Mitigation Strategies:** - Research cadastral records and obtain expert advice; - For solicited projects, be able to: (i) define Right-of-Way (ROW) requirements including Resettlement Action Plan at an early stage and estimate this in the Feasibility Study; (ii) demonstrate its firm commitment to acquire and deliver the site free from all structures, occupants (including informal settlers) and utilities by allocating the necessary funds; (iii) completely acquire the site prior to the bidding stage to the extent possible; and, (iv) implementing agency should prepare a realistic timeline for the acquisition of ROW for the project and structure timing of bid process accordingly. This is to be presented to ICC-CC and NEDA Board, as needed. - Private Partner to provide time extensions for government delay or compensation payable by government for each day of delay, as necessary. During procurement, bidders should be given enough time to validate correctness of project alignment and baseline status of acquired ROW. **Suggested Contract Provision(s):** - Contract clause stipulating site availability schedule and liquidated damages payable by Government in case of delays; - Contract clause stipulating that ROW delivery of site and any necessary resettlement of informal dwellers is a precondition for Construction Start Date but allow for partial delivery such that a provisional Notice to Proceed (NTP) may be given to the Private Partner once a substantial section of ROW has been delivered; and, - The Government has an option to require the Private Partner in advancing the funds covering the cost of the ROW which shall be reimbursed later by the IA or financing the ROW cost which shall be covered partly or fully by the proponent.
2.1 Design/Technical Risk	**Definition:** Risk that the design of the facility is substandard, unsafe, or incapable of delivering the services at anticipated cost and specified level of service (often resulting in long term increase in recurrent costs and long term inadequacy of service). **Preferred Allocation:**	**Possible Risk Mitigation Strategies:** - Ensure that the Feasibility Study is available well in advance of the procurement process to adequately inform the design process; - Incorporate strict construction/design experience and competency requirements in the procurement process;

[7] Ibid.

	Private Partner (contractor design fault) Government, if it is a government – initiated change in design or change in the agreed service standards leading to additional costs and/or delays in starting service delivery **Rationale/Details:** A feature of PPPs is that the Private Partner takes design risk. Private Partner has more experience, knowledge and control over the variables that determine the quality of the design (i.e., experience, competent staff, etc.). Private Partner prepares the detailed engineering design and assumed to have conducted its due diligence.	- Private Partner may pass risk to builder/architects and other subcontractors while maintaining primary liability; - Government has the right to apply service payment performance deductions where the risk eventuates and results in a lack of service – it may ultimately result in termination where the problem cannot be suitably remedied;[8] - Where the design of the project or facility turns out to be defective or incapable of delivering the intended services at anticipated cost and specified level of service, the Private Partner shall be responsible for any additional costs required to remedy the defective design and/or shall be liable for the resulting damages; and, - Whenever applicable, appoint an Independent Consultant (IC) to provide independent advice to the Parties concerning design. **Suggested Contract Provision(s):** - Contract clause stipulating liquidated damages for late construction or not capable of providing services to the contracted standards; and - Government security over payment of liquidated damages through either requirement of performance bond or, in availability PPPs where government makes regular service payments, through right to apply performance deductions; - Government ability to review draft designs and provide comment; and, - Use of independent reviewer.
2.1.1 Interconnectivity Risk	**Definition:** Interconnectivity refers to the physical linkage of a project to another or to part of a network. **Preferred Allocation:** Shared Government to ensure setting of appropriate interconnectivity requirements and necessary actions by 3rd party owners/operators Private Partner must ensure its design meets interconnection requirements **Rationale/Details:** This risk must be fully considered by Government during project development as it will affect the design and output specifications of the project and land requirements. Government has right or option to decide on projects which might have interconnectivity and inter-operability aspects to proposed PPP projects. Government is best placed to require necessary complementary actions by owners/operators of related projects and network components.	**Possible Risk Mitigation Strategies:** - Government obtaining a "no objection" from the proponent/s of the other project/s prior to bidding or as early as possible (e.g., feasibility study phase). Appropriate consultation mechanisms should be provided in the process of obtaining the above response, as needed; - Government should assume a facilitative role and ensure that the all contracts will have the obligation to accept interconnectivity arrangements at no or minimal costs; - Government should facilitate reasonable division of costs and revenues and ensure that the other project owner/operator adheres to these arrangements; - Government should enforce these obligations by requiring timelines and, as appropriate, levying liquidated damages for delays; and, - If any rights are assigned or transferred, the corresponding costs, obligations, and liabilities should be assigned and transferred as well. **Suggested Contract Provision(s):** - Include provisions which require government and Private Partner to work positively/achieve mutually agreeable solutions and measures regarding resolution processes to address any concerns; - Provide for stipulations wherein the specifics of how interconnectivity is achieved are laid out. (A mere undertaking on the part of the government is not sufficient as there is also a risk that the other proponent will not agree on the current framework.) There should be timelines, mechanics and compensation

[8] Ibid.

		mechanism provided as compulsion to government and the third party to achieve interconnectivity with the Private Partner. - Private Partner must ensure that its design facilitates planned physical interconnections as required; - Private Partner to co-operate with inter-connectivity with future projects, as required; and, - Private Partner shall comply with all the technical aspect of the interconnectivity requirements of the government and the third party operator. The government to facilitate an agreement on operational standards and procedures between the operators.
2.1.2 Inter-Operability Risk	**Definition:** Interoperability risk refers to the risks associated with achieving clear and efficient operational arrangements with other facility operator/s. This will have to be considered in the project design and operation system requirements. **Preferred Allocation:** Shared Government, as a matter of public policy, shall pursue inter-operability with related public infrastructure including those privately owned or operated Private Partner will ensure operational aspect of inter-operability of the project	**Possible Risk Mitigation Strategies:** - The government to ensure that all affected facility operators are consulted as to their operational requirements as early as possible during Feasibility Study stage; - Government should assume a facilitative role and ensure that the all contracts will have the obligation to accept interconnectivity arrangements at no or minimal costs; - Government should facilitate reasonable division of costs and revenues. The Concessionaires should adhere to these arrangements; - The Government should enforce these obligations by requiring timelines and levying liquidated damages for delays; and, - If any rights are assigned or transferred, the corresponding costs, obligations, and liabilities should be assigned and transferred as well. **Suggested Contract Provision(s):** - Include provisions which require government and Private Partner to work positively/achieve mutually agreeable solutions and measures regarding resolution processes to address any concerns; - Stipulations wherein the specifics of how inter-operability is achieved is laid out. (A mere undertaking on the part of the government is not sufficient as there is also that risk that the other proponent will not agree on the current framework.) There should be timelines, mechanics and compensation mechanism provided as compulsion to government and the third party to achieve inter-operability with the Private Partner; - Private Partner must ensure that its design facilitates physical inter-operability as required; and, - Contract clause stipulating a policy that requires Private Partner to cooperate with future projects. The Private Partner shall comply with all the technical aspect of the interconnectivity requirements of the government and the third party operator. The government to facilitate an agreement on operational standards and procedures between the operators.
2.2. Construction	**Definition:** Risk that events occur during construction that prevent the facility from being delivered on time and on cost.[9]	**Possible Risk Mitigation Strategies:** - Incorporate strict experience, technical competency and financial standing requirements for the Private Partner and building sub-contractor in the procurement process;

[9] Ibid.

	Preferred Allocation: Private Partner (except for delay caused by the government, including government-initiated variations in the construction) **Rationale/Details:** Private Partner is best placed to manage the construction process variables over which it has control (i.e., schedule, equipment, materials and technology, etc.). Government to bear risk of delays caused by government agencies	- Ensure that the implementing agency produce a Feasibility Study well in advance of the procurement process; - Ensure ROW issues resolved before contract execution; - Provision of regular construction progress reports by Private Partner; - Allowance for inspections by government and/or independent third party; - Deadlines to be enforced through liquidated damages and a performance bond. Construction Performance Security should be provided prior to contract signing; - A high warranty security may be necessary unless the Private Partner also has an obligation to operate and maintain the asset; and, - Termination payments should include mechanisms to cap compensation to exclude cost overruns. **Suggested Contract Provision(s):** - Clear construction timelines with clear long-stop dates and, if needed, other milestones; - Requirement for a performance bond of suitable size from Private Partner; and, - Liquidated damages or forms of compensation in the contract to be payable by party causing delay.
2.3 Commissioning	**Definition:** Risk that either the physical or the operational commissioning tests which are required to be completed for the provision of services to commence, cannot be successfully completed.[10] **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner is in control of the design and construction process and its inputs, and therefore better positioned to manage this risk. Private Partner shall be responsible for liquidated damages if the physical or operational commissioning tests which are required for the provision of services to commence cannot be successfully completed, except when the delay is due to the failure of the government to facilitate the prompt public sector attendance to the commissioning tests.	**Possible Risk Mitigation Strategies:** - Incorporate strict experience and competency requirements on the procurement process; - Whenever applicable, appoint an Independent Consultant (IC) to provide independent advice to the parties concerning construction and certify completion of work, as applicable. The Private Partner cannot commence operation without the concurrence from the implementing agency on the recommendation of the IC (based on the inspections to be conducted by the IC) that the project is complete and in compliance to the standards prescribed in the Minimum Performance Standards and Specifications (MPSS). Cost associated to the hiring of an IC should be shared by government and Private Partner; and, - Whenever applicable, the IC should be appointed already during the design phase and should ideally be the same from design up to commissioning. **Suggested Contract Provision(s):** - Require a performance bond; - Stipulate liquidated damages (until all physical and operational commissioning tests passed); and, - Provide clear, specific and time-bound conditions for commissioning.

[10] Ibid.

3.1 Interest Rates Prior to Construction Completion	**Definition:** Risk that prior to completion, interest rates may move adversely.[11] **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner has the ability to enter into arrangements that fix interest rates for the construction period and can price this into its bid.	**Possible Risk Mitigation Strategies:** - Financial markets provide hedging arrangements to fix interest rates for the construction period. **Suggested Contract Provision(s):** - Clear allocation of this risk to the Private Partner.
3.2 Interest Rates Post-Completion of Construction	**Definition:** Risk that after completion, interest rates may move adversely. **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner is in control of selecting and arranging long-term financing and should be able to manage this risks by entering into long-term financing and hedging agreements.	**Possible Risk Mitigation Strategies:** - Private Partner can utilize long-term hedging arrangements offered by financial markets. **Suggested Contract Provision(s):** - Clear allocation of this risk to the Private Partner; and, - Contract clause to explicitly stipulate conditions/provisions related to unforeseen and/or extraordinary cases
3.3 Exchange Rate	**Definition:** Risk that during operation, exchange rates may move adversely, affecting the Private Partner's ability to service foreign denominated debt and obtain its expected profit. **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner is in control of selecting and arranging local and foreign currency mix for long-term financing, and since this is part of parametric formula. Where exchange rates move adversely, affecting the Private Partner's ability to service foreign denominated debt and obtain its expected profit, the government shall incur no further liability to the Private Partner other than the payment due the latter under the contract.	**Possible Risk Mitigation Strategies:** - Private Partner to source funding in locally-nominated currency; - Where major materials and/or equipment need to be sourced from overseas, Private Partner may be able to access hedging markets; - Where Private Partner needs to source funding internationally, hedging instruments may be available; and, - Government to consider support only in very dire economic situations specified in the contract. **Suggested Contract Provision(s):** - Clear allocation of risk to Private Partner.
3.4 Inflation	**Definition:** Risk that value of payments received during the term is eroded by inflation.[12] **Preferred Allocation:** Government and/or users to shoulder inflation risk through indexation of government payments for operations and maintenance services to inflation	**Possible Risk Mitigation Strategy:** - Construction of tariff system and/or other payment mechanism that includes appropriate provision for payment increases relevant to cost rises in accordance with inflation index (e.g. CPI) - in an availability PPP, disaggregation of payment mechanism. Escalation may be appropriate for payment components where costs rise over time but less so for payment components that relate to capital component of Private Partner's costs.

[11] Ibid.
[12] Ibid.

	Users to shoulder inflation through indexation of user fees, tolls/tariff levels to inflation Private partner shoulders risks that its costs increase faster than government payments and user fees. **Rationale/Details:** Where services are provided directly to private users, toll/tariff levels should adjust with inflation as appropriate. This enables a lower initial toll/tariff and provides for a more equitable sharing of the cost burden between current and future users. Where services are provided to government, payments for operations and maintenance services should index with inflation. This is more efficient and equitable than having the Private Partner factor in long-term inflation estimates into their bids. Private Partner to bear full consequences for movements in costs not reflected in the contractual payment mechanism.	**Suggested Contract Provision:** - Payment mechanism that includes component(s) that escalates with inflation to reflect the general rise in costs experienced by Private Partner; and, - Government to pay compensation should economic regulator not allow tariff/toll increases in line with contractual provisions.
3.5 Financing Unavailable	**Definition:** Risk that when debt and/or equity is required by the private firm for the project, it is not available then and in the amounts and on the conditions anticipated.[13] **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner is responsible for arranging finance. The Private Partner shall be responsible for the non-availability of the required financing for the project. If the Private Partner fails to secure such required financing and the same results in delays and/or non-completion of the project, it shall be liable for damages in accordance with the terms of contract. The government may also be entitled to collect the sum due to it under the Private Partner's performance bond. To ensure a successful and viable project management team, the agency or LGU concerned shall ensure that the potential Private Partner meets the financial capability requirement under Section 5.4 (c) of the Implementing Rules and Regulations (IRR) of RA 6957[14], as amended, to determine creditworthiness.	**Possible Risk Mitigation Strategy:** - Include rigorous financial capability requirements in the selection criteria and assess bids robustly; - Financial close should be a condition precedent to start of construction; - Government to hold bid bond until financing in place; - Tranche out concession/premium payments to limit Private Partner's upfront financing requirement; and, - During dire economic situations for projects which are very big, government might consider financing the project itself (e.g. do as a BTO PPP). **Suggested Contract Provision(s):** - Contract clause requiring this as an event of default as government or the Project cannot be held hostage in the event that the Private Partner cannot secure the required financing within the required period of time.
3.6 Sponsor Risk	**Definition:** Risk that the Private Partner "is unable to provide the required services or becomes insolvent".[15] Risk that the Private Partner "is later found to be an improper person for involvement in the provision of these services".[16]	**Possible Risk Mitigation Strategies:** - Conduct of proper assessment/eligibility of Private Partner by government (specifically the Pre-qualification, Bids and Awards Committee); - Require prior government approval over the life of the contract for changes in control and key sub-contractors (e.g. operator); - Requirement of a performance security;

[13] Ibid.

[14] Referring to the Implementing Rules and Regulations effective on 13 April 2006 of the Republic Act (R.A). No. 6957 as amended by R.A. 7718 or Build-Operate-Transfer (BOT) Law
[15] Risk Management Module of Public Private Partnerships Guidance Material Supporting Document. Queensland Government. 2008
[16] Ibid.

	Risk that financial demands on the Private Partner exceed its financial capacity causing corporate failure.[17] **Preferred Allocation:** Government **Rationale/Details:** This is a risk borne by government inherently as a consequence of it contracting with the private sector. Government can seek to mitigate the risk but cannot transfer it.	- Appropriate contract termination provisions for Private Partner default; - Seek regular (e.g. annual) statement of ownership; - Leverage restrictions; and, - Allow step-in rights for lenders. **Suggested Contract Provision(s):** - Contract clause requiring a performance security; - Contract clause outlining range of events that trigger a Private Partner default; - Contract clause requiring government's prior approval for a change in control or of a key sub-contractor, with failure to do so triggering an Event of Default, Government approval not to be unreasonably withheld; - Cure periods with appropriate step-in rights for lenders; and, - Disallow any liens over the core assets.
3.7 Change in Ownership	**Definition:** Risk that a change in ownership or control of the Private Partner results in a weakening in its financial standing or support or other detriment to the project.[18] **Preferred Allocation:** Shared Government bears by nature of it entering into a contract with Private Partner Private Partner bears by virtue of limitations placed on its changing of ownership or control arrangements **Rationale/Details:** As for Sponsor Risk, Government bears the risk that the Private Partner remains suitable despite any ownership or control changes. Where there is a change in ownership or control of the Private Partner resulting in a weakening in its financial standing or support or other detriment to the project, the Private Partner shall be liable for damages on account thereof. As a condition for pre-qualification, the law requires that a project proponent must have the ability to sustain the financing requirements of a development or project [RA 7718, sec. 2(k); and IRR of RA 6957, sec. 5.4][19]. This essential requirement should therefore be a continuing one on the Private Partner regardless of any subsequent change in the corporate or ownership structure of the Private Partner project proponent.	**Possible Risk Mitigation Strategies:** - Equity lock-up rules during construction and early operations period; and, - Prior Government consent must be secured if there is change in ownership or control of the Private Partner. **Suggested Contract Provision(s):** - Contract clause requiring government consent prior to any change in control, and providing ability to influence or prevent change only in specific circumstances; and, - Government to be advised of material changes in ownership (without change in control) within 30 days and also receive an annual statement of ownership.
3.8 Tax Changes	**Definition:** Risk that before or after completion, the tax impost on the Private Partner, its assets or on the project, will change.[20]	**Possible Risk Mitigation Strategies:** - Private Partner to incorporate in project due diligence with respect to current taxes and any announced tax changes; and,

[17] Ibid.
[18] Ibid.
[19] Referring to the Implementing Rules and Regulations effective on 13 April 2006 of the Republic Act (R.A). No. 6957 as amended by R.A. 7718 or Build-Operate-Transfer (BOT) Law
[20] Risk Management Module of Public Private Partnerships Guidance Material Supporting Document. Queensland Government. 2008

	Preferred Allocation: Private Partner for general changes in taxation Government for tax increases or new taxes (from national and local governments) arising from discriminatory changes in tax law or changes in real property tax **Rationale/Details:** General changes in tax law affect all businesses in the country. Changes in company tax affect all firms and do not impact the Private Partner's costs – as they are a tax on profits – and should be borne by the Private Partner. The government is in better position to influence specific discriminatory tax law changes affecting the project (note: discriminatory if only a specific company/sector/field is affected). Where before or after the completion of the project, taxes imposed on the Private Partner, its assets or on the project are amended, the government shall incur no liability to the Private Partner, unless such change in taxes affecting the latter or the project is declared as discriminatory by a court of law. In such a case, the Private Partner shall be entitled to compensation. The terms of said compensation shall be provided in the contract. Whilst real property tax is a general tax, changes are best borne by government because its impacts are outside the control of the Private Partner and can be significant.	- Financial returns of the Private Partner should be sufficient to withstand general tax law changes.[21] **Suggested Contract Provision(s):** - Clear definition as to meaning of 'discriminatory' tax; - Clarification of treatment of local taxes; - Contract clause providing compensation terms for discriminatory changes in tax law; and, - Contract clause providing a buy-out (put) option or termination with compensation for Private Partner when no other compensation mechanism is available.
3.9 Lessee Risk	**Definition:** Risk that the major critical assets necessary for the operational stage of the project are acquired through leases and that the Private Partner defaults on those lease obligations. This leads to the assets being foreclosed and the operations of the project being interrupted. **Preferred Allocation:** Private Partner **Rationale/Details:** Government cannot allow crucial operations to be interrupted because of mismanagement on the part of the Private Partner.	**Possible Risk Mitigation Strategies:** - Specification in bid documents of restrictions on the Private Partner's use of leased assets post construction; - For assets able to be leased, novation option provisions to government upon government step-in, contract termination or contract expiry; and, - If reasonable novation rates cannot be assured, then the lease contracts should provide that the assets can only be confiscated a year or so after the PPP contract is terminated. **Suggested Contract Provision(s):** - Contract clause prohibiting the procurement via leases of any pre-identified major asset deemed to be critical for the operations of the project, with the exception of pre-agreed asset leases such as: • where a government entity is the lessor (e.g. a GOCC such as a port owner); or, • where the control of the assets reverts to government on contract expiry or termination (e.g. some tailored software).
4.1	**Definition:**	**Possible Risk Mitigation Strategies:**

[21] Ibid.

Inputs/Operating Cost Overrun	Risk that required inputs during the operations stage cost more than anticipated, are of inadequate quality or are unavailable in required quantities.[22] **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner is in control of the selection of inputs. Where the required inputs or supplies cost more than the anticipated amount are of inadequate quality or are unavailable in the required quantities, the Private Partner shall be liable for additional costs needed to procure these inputs or supplies. If the Private Partner fails to obtain the required inputs or supplies to ensure the successful completion of the project, it shall be liable for damages for breach of specific performance and quality specifications as defined in the contract. These are normal business risks that are already embedded in the rate of return that the Private Partner has bid.	- Include escalation provisions for input cost components (as per Item 3.4 'Inflation Risk'); - Private Partner may manage through long term supply contracts where quality/quantity can be assured;[23] and - Private Partner can address to some extent in its facility design.[24] **Suggested Contract Provision(s):** - Contract clause imposing performance deductions for breach of specific and well defined performance and quality specifications; - Contract clause on compensation to Private Partner for issues attributable to government-supplied inputs; and, - As needed, require operations performance bond/security from Private Partner.
4.2 Maintenance and Refurbishment	**Definition:** Risk that design and/or construction quality is inadequate resulting in higher than anticipated maintenance and refurbishment costs.[25] **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner is in control of design and construction processes. If the design and/or construction quality is inadequate resulting in higher than anticipated maintenance and refurbishment costs, the Private Partner shall be liable for such additional costs and for damages for not meeting specific performance, level of service, and quality specifications as stipulated in the contract.	**Possible Risk Mitigation Strategies:** - Tight specification of operator technical and financial criteria in bid documents and robust assessment of bids; - Government to ensure detailed and clear output specifications and conduct rigorous auditing of maintenance work; - Performance deduction regime if MPSS targets not met, supported by requiring the Private Partner to lodge a performance bond, as appropriate; and, - As necessary, include input approach to major refurbishments (e.g. replacement of security systems in a prison every x years). **Suggested Contract Provision(s):** - Clear government Minimum Performance Standards and Specifications; - Contract clause imposing performance deductions (and possible termination) for not meeting specific and well defined performance, level of service, and quality specifications; and, - Contract clause requiring performance bond from Private Partner in concession contracts (i.e. where Government cannot readily apply performance deductions from its regular service payments).
4.3 Changes in Output Specification Outside Agreed Specification	**Definition:** Risk that government's output requirements are changed after contract signing whether pre or post commissioning.[26]	**Possible Risk Mitigation Strategies:** - Government to minimize the chance of its specifications changing and, to the extent they must change through taking considerable time and effort in specifying the outputs up front and planning likely output requirements over the term;[28]

[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[28] Risk Management Module of Public Private Partnerships Guidance Material Supporting Document. Queensland Government. 2008

Range (Including Modifications and Augmentations)	Change prior to commissioning may require a design change with capital cost consequences depending on the significance of the change and its proximity to completion. Change after completion may have a capital cost consequence or a change in recurrent cost only (for example, where an increase in output requirements can be accommodated within existing facility capacity). **Preferred Allocation:** Private Partner, if it initiated the change Government, if the government initiates the change **Rationale/Details:** Where such change in output specification is required by the government, the government shall compensate the Private Partner for the cost of implementation of such changes. Any changes initiated by the Private Partner are subject to approval by government but the Private Partner bears the costs. Moreover, any change in output specification should satisfy the conditions enumerated in Section 12.11 of the IRR of RA 6957[27] since any such change necessarily requires a change in the terms of the contract.	- Government to require the approval of the Approving Body for contract variations that will have impacts on government undertakings/exposure, performance standards and service charges, and Parties must strictly comply with the provisions on contract variation under the BOT Law and its implementing rules; - Government to ensure that change/s (whether or not cumulative amount of change/s exceeds 10% of the original contract) should not have negative implication to financial, cost recovery, tariff, revenue, etc. exceeding the allowed range based on sensitivity analysis, otherwise, approval by Approving Body (i.e., Investment Coordination Committee [ICC]) should be secured; - Include mechanisms to ensure that the Private Partner undertakes any Government-initiated variations efficiently; and, - As variations in output specifications in concession PPPs initiated by the Private Partner may provide the scope for windfall gains to the Private Partner, prior to providing approval government should ensure that changes are beneficial to users and that they and/or government are to share benefits appropriately. **Suggested Contract Provision(s):** - Process for undertaking variation; - Process for determination, as appropriate, compensation for Private Partner. This may include increases in user charges or grantor service payments and/or a lump sum payment(s) by the government during the term or at contract expiry; - Contract clauses for changes are to be in accordance with the provisions of BOT Law and its IRR; - For Government-initiated changes: • Contract clause reflecting best endeavors obligation by Private Partner to fund with option on government to compensate via fee increase or capital contribution; • Contract clause providing a buy-out (put) option or termination with compensation for the Private Partner should finance not be obtained and change makes project unviable; • Contract clause requiring Private Partner to provide evidence that its approach minimizes the costs (capital and operational) of implementing the change - disputes to be resolved by independent expert; and, • Process for consideration, approval and undertaking of output change. - For changes initiated by the Private Partner: • Contract clause stipulating that any change initiated by the Private Partner that has negative implication to cost recovery, tariff, etc. which exceeds the allowed amount as computed in sensitivity analysis should secure approval from Approving Body.
4.4 Operator Failure/Short Fall in Service Quality	**Definition:** Risk that a subcontract operator may fail financially or may fail to provide contracted services to specification".[29] (Failure may lead to service unavailability and a need to make alternate delivery arrangements with corresponding cost consequences.)	**Possible Risk Mitigation Strategies:** - Government to carry out due diligence on principal subcontractors for probity, technical competence and financial capacity, and commission a legal review of the major subcontracts including the guarantees or other assurances taken by

[27] Referring to the Implementing Rules and Regulations (IRR) effective on 13 April 2006 of the Republic Act R.A. No. 6957 as amended by R.A. 7718 or Build-Operate-Transfer (BOT) Law
[29] Risk Management Module of Public Private Partnerships Guidance Material Supporting Document. Queensland Government. 2008

	Preferred Allocation: Private Partner **Rationale/Details:** Private Partner is fully and primarily liable for all obligations to government irrespective of whether it has passed the risk to a subcontractor. If the Private Partner fails to meet specific performance, level of service and quality specifications, it shall be liable for liquidated damages in accordance with the provisions of the PPP contract.	the Private Partner. If failure does occur, the Private Partner may replace the operator or government may require operator replacement[30]; - Government approval for replacement key operator or subcontractor personnel, should they become unavailable; - Government to develop detailed and clear output specifications – i.e. Minimum Performance Standards and Specifications; - Government to conduct performance monitoring and to ensure adequate Operations and Maintenance (O&M) contract; and, - Include categorical provision in the contract stating therein that in case of failure/short fall in service quality of the subcontractor/operator, the Private Partner will be liable for performance deductions and, for major or prolonged service failures, will be subject to for default. **Suggested Contract Provision(s):** - Contract clause imposing performance deductions or Liquidated Damages to the Private Partner for not meeting or complying with specific and well defined performance standards, required levels of service, and quality specifications; - In concession PPPs (i.e. where government cannot readily deduct performance deductions from service payments) contract clause requiring performance bond from Private Partner; - Major or prolonged service failures will lead to Private Partner default; and, - Private Partner default after a certain number/degree of failures.
4.5 Technical Obsolescence or Innovation	**Definition:** Risk that the nature of the contracted service or its method of delivery is not keeping pace, from a technological perspective, with competition and/or public requirements.[31] Private Partner's revenue may fall below projections either via loss of demand (user pays model) to competing services and/or operating costs increasing. Government may wish to change specifications of contracted service (see Item 4.3). **Preferred Allocation:** Private Partner Government, only if it wishes to 'update' output specifications (see Item 4.3 change in output specifications). **Rationale/Details:** Private Partner contracts to meet the MPSS over the full contract term and needs to maintain or replace ageing equipment as necessary to achieve this. Generally, the Private Partner is able to use its expertise and know-how to minimize this risk.	**Possible Risk Mitigation Strategies:** - Government to develop detailed, well-researched output specifications;[32] - Private Partner to develop detailed, well-researched design solution; - Government should plan properly and not engage in long-term contracts for services with quickly evolving technologies or have contractual provisions within contracts for review of performance of such assets e.g. security systems in a prison (typically upgraded every 7 to 10 years); - If government wishes to enter into PPPs where there is rapidly changing technology it will either need to have short-term contracts for all or some services, if latter it will get better value for money through sharing the risk; and, - At the end of contract period, where government seeks to ensure that service level efficiency and to ensure that the operation is at par and current with prevailing industry standards, the government should not impose contractual upgrade requirements on Private Partner upon asset transfer but rather either (1) re-tender the contract with upgraded output specifications or (2) undertake such upgrades at its own cost upon contract expiry ensure to include in the provision of the contract. **Suggested Contract Provision(s):** - Contract clause imposing performance deductions for not meeting contractual service and quality specifications; - Major or prolonged service failures will lead to default;

[30] Ibid.
[31] Ibid.
[32] Ibid.

	Where technical obsolescence or innovation affects, among others, the contracted service and the method of delivery thereof such that the required service or output meets the MPSS but falls below well-defined contemporary standards, (1) in concession PPPs the Private Partner shall assume the cost of upgrading the service or output to meet changes in user tastes, (2) in availability PPPs government bears the risk of costs in changing the contractual output specifications to a new standard.	- Contract clauses as per item 4.3 should either party seek to change contractual output specifications because of changes in output or input markets; and, - In concession PPPs, contract clause requiring performance bond from Private Partner.
4.6 Third party liability	**Definition:** Risk that third parties file suits or claim damages against government for faults of the Private Partner and vice versa. **Preferred Allocation:** Party at fault **Rationale/Details:** Innocent party should not suffer because of the faults of its counterparty. Whilst PPP contracts are commercial agreements which place service delivery and other obligations on the Private Partner, users and other community members may see the government as being ultimately responsible for these obligations. It is appropriate that the Private Partner indemnify government, or provide full compensation should such third parties sue the government.	**Possible Mitigating Strategies:** - To minimize the risk of having third party claims for damages, measures should be identified on how to establish which party is at fault; - Government should also address major implementation issues prior to contract signing. After which, it shall coordinate with the Private Partner and other stakeholders to come up with possible solutions when such instances arise; and, - The clearer and more comprehensive is the risk allocation in the contract, the clearer it should be which party is at fault should a suit eventuate. **Suggested Contract Provision(s):** - Require mutual full re-compensation for or indemnification against third party liability costs and damages.
5.1 Demand Risk	**Definition:** Risk that operating revenues fall below forecast as a result of decrease service volume (i.e., traffic volume, water or power consumption) attributable to an economic downturn, competition in the relevant market tariff increases or change in consumer habits. For changes in tariffs and user charges, 8.3 should be referred to. **Preferred Allocation:** Private Partner, in concession PPPs Government, in availability PPPs **Rationale/Details:** In Concession PPPs: - Private Partner has the expertise and experience in validating forecasted demand or rate of return (ROR); - When demand can be estimated with relative certainty, the Private Partner is in a better position to mitigate risk through commercial management practices; - When a minimum, guaranteed demand which both parties agreed upon is attained, government has no liability in terms of decrease in revenue regardless a competing facility is put up by government; and, - Where operating revenues fall below forecasted levels as a result of decrease in volume attributable to an economic downturn, or change in consumer habits, the government shall not be liable for additional payment to cover losses incurred by the Private Partner in view of such decrease in revenues. The Private Partner	**Possible Mitigating Strategies:** - Where Government is best placed to manage demand, it should assume demand risk; - Government undertakes robust traffic/patronage studies in Feasibility Study and includes it in bid documents; - Bidders undertake their own independent market demand analyses commensurate with project scale and characteristics; - Government to set appropriate gearing ratio for initial period; - Financiers to Private Partner can be expected to ensure robust financial structure and financier support: • Adequate debt coverage • Adequate reserves • Credit enhancement • Insurance - In concession PPPs which are economically viable but not financially viable, government may assume some (capped) demand risk; and, - Government may wish to share ‘super-profits’ in concession PPPs. **Suggested Contract Provision(s):** - In concession PPPs, clarity that full demand risk lies with Private Partner; and, - Where Government takes – or assumes some – demand risk, insert (1) contract clause stipulating the availability payment or mechanism to establish minimum revenue payments, and (2) contract clause stipulating specific period or expiration and coverage for take-or-pay condition (e.g., limiting to the term of senior debt), with Department of Finance (DOF) charging guarantee fee.

	shall be deemed to have assumed such risk. As a project proponent, the Private Partner is expected to have conducted its own market demand analysis for the PPP project and devised means of mitigating the risk that the demand or revenue could fall below projected levels. In availability PPP, government is best placed to control/manage demand (e.g. prisons, public hospitals) and the availability payment is made irrespective of facility usage.	
6.1 Changes in Competitive Network	**Definition:** Risk that an existing network is extended/changed/re-priced so as to increase competition for the facility.[33] **Preferred Allocation:** Private Partner **Rationale/Details:** Government must remain free to manage the network allowing it to influence the materialization of network risk and its consequences. The risk that changes in the competitive network or industry of the project/facility could result in increased competition or lower revenues – or increased patronage and higher revenues - for the Private Partner shall be allocated to the Private Partner. The government shall incur no additional liability to the Private Partner on account thereof.	**Possible Risk Mitigation Strategies:** - Government to set minimum service/performance parameters; - Government to conduct thorough network planning when developing project concept; - Private Partner to review likely competition for service and barriers to entry prior to entering agreement; and, - Only as necessary, non-compete guarantees may be provided when franchising out natural monopolies, for so long as legal and only if bid would fail otherwise. Government should avoid providing non-compete guarantees it cannot enforce. **Suggested Contract Provision(s):** - That Government is free to change the broader network and will bear no liability to the Private Partner for such change; and, - Only as necessary, contract clause to provide Private Partner with non-compete protections and compensation.
6.2 Ancillary Commercial Businesses	**Definition:** Risk that ancillary commercial business operations adversely impact the Private Partner's fulfilment of PPP contractual obligations and/or pose additional exposures for government. **Preferred Allocation:** Private Partner **Rationale/Details:** The operation of ancillary commercial businesses is generally an option for the Private Partner rather than a requirement of government. The Private Partner should be liable for profitability of these ventures and the risks associated with them (e.g., force majeure, material adverse government action), as is the case for private businesses generally are completely optional.	**Possible Risk Mitigation Strategies:** - Government tender documents to offer opportunity for Private Partner to run ancillary commercial businesses, rather than require their operation; - Require Private Partner to operate any ancillary commercial businesses as completely separate businesses to their PPP project business and not allow any liens or securities over the PPP business; - Clarity as to treatment of ancillary commercial operations and assets should a force majeure event occur; and, - Termination provisions to identify whether any compensation is payable by government with respect to the Private Partner's ancillary commercial businesses upon early termination of PPP contract. **Suggested Contract Provision(s):** - That Private Partner operates any such businesses at their risk; - Requirement of complete separation of ancillary commercial businesses from PPP business with no recourse to PPP business or assets; and, - Use of PPP facilities for operation of ancillary commercial businesses ceases upon contract expiry or contract termination.

[33] Ibid.

	To extent that facility from which ancillary commercial businesses operate is intrinsic to PPP facilities, Private Partner must cease operation of ancillary businesses at that site and vacate premises at contract expiry or termination.	
7.1 Industrial Relations	**Definition:** Risk of strikes or industrial action causing delay and cost to the project.[34] **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner has better information about and control over its employees and the causes of industrial action. The Private Partner shall shoulder the additional cost and effects of protracted delay caused to the project by industrial or labor-related actions.	**Possible Risk Mitigation Strategies:** - Private Partner (directly or through its sub-contractors) manage project delivery and operations;[35] - Government to have the Private Partner liable for any delay in the delivery of the project and any additional cost caused by the improper management of its own staff and/or its subcontractors; and, - In specific and limited circumstances, government may provide assistance to help resolve industrial relations disputes (e.g., dispute resolution). **Suggested Contract Provision(s):** - Contract clause requiring payment of liquidated damages to government for delays in construction or failures in service delivery.
8.1 Approvals	**Definition:** Risk that additional necessary approvals required during the course of the project cannot be obtained.[36] **Preferred Allocation:** Each party is responsible for delays for which it is responsible: Private Partner is responsible for risks with respect to appropriateness of its submissions to Approving Authority Government is responsible for delays and lapses caused by national and local government agencies where Private Partner has met all necessary requirements **Rationale/Details:** Government is better informed and positioned to influence the speed of the approval process, particularly in situations that are complex or sensitive. Private Partner has better understanding of rationale requiring such approvals unless new government approvals are required during implementation which are not specified in tender documents. In which case, it should be clear as to which of the parties would bear the cost. In the case of regulatory approvals or issues, the government shall assist the Private Partner in obtaining regulatory approvals or in complying with regulatory requirements but shall not be liable for the non-issuance thereof by the concerned agencies, except where Private Partner has met all necessary requirements and delays are caused by government agencies.	**Possible Risk Mitigation Strategies:** - Government to obtain in advance of the bidder proposal submission stage the requisite project permits and approvals, which would allow the Private Partner to achieve a measure of pre-contractual certainty and an early start to the approval process; - For further approvals and permits, the Private Partner is required to seek the necessary approvals but government may facilitate and secure assistance from relevant national and local agencies as appropriate; and, - Government to monitor and limit (where possible) changes by government agencies which may have effects or consequence on the project. **Suggested Contract Provision(s):** - The PPP contract could clearly state the obligations of the agency or LGU concerned and the Private Partner with respect to the approvals and permits required for the project; - A timeline to be provided in the contract in securing the necessary permits/approval. In case of prolonged delay without justifiable reasons, the responsible party shall bear the additional costs including any due compensation; - Where new approvals are required (which could not reasonably have been foreseen by the Private Partner), Private Partner must address diligently but government liable for cost of delays; and, - Contract clause to specify compensation mechanism for payment of liquidated damages to the other party.

[34] Ibid.
[35] Ibid.
[36] Ibid.

8.2 Changes in Law/Policy	**Definition:** Risk of a change in law/policy of government only, which could not be anticipated at contract signing and which has adverse effects on revenues, capital expenditure or operating cost of the Private Partner.[37] **Preferred Allocation:** Private Partner, for all changes in law and/or policy up to a materiality threshold, beyond which government bears; **Rationale/Details:** It is appropriate that the Private Partner receive protection against material consequences of changes in law or policy as these matters are outside its control and ability to mitigate.	**Possible Risk Mitigation Strategies:** - Government to define jurisdictions of LGU and national government to a project (such as national project within one or several LGUs); - Government to monitor and limit (where possible) changes which may have these effects or consequence on the project; - Government to only pay compensation upon Private Partner demonstrating a direct material adverse effect (i.e. above a threshold level); - Government to require the Private Partner to effect the change in a way that the cost and financial effect on government is minimized (for example, pay on a progressive scale); and, - In concession PPPs, government to seek pass through of cost of risks it bears to end users. **Suggested Contract Provision(s):** - Contract clause clearly specifying what is meant by 'change in law or policy'; - Contract clause specifying process for Private Partner to seek compensation for change in law/policy; and, - Contract clause to allow pass of costs of risk borne by government through to end users.
8.3 Economic Regulation	**Definition:** Risk that where there is a statutory economic regulator involved there are pricing or other changes imposed on the private firm which do not reflect its investment expectations.[38] **Preferred Allocation:** Government **Rationale/Details:** Government to absorb risk of actions by economic regulators that are inconsistent with contractual provisions. The government will protect the Private Partner from particular regulatory risks such as court orders or decisions by regulatory agencies that prevent investors from adjusting tariffs to contractually agreed levels. The details of such additional protection or incentive for private sector partners shall be included in the PPP contract. However, the government and the Private Partner shall enter into negotiations to address any relevant pricing or regulatory changes that bear on the PPP contract concerned and affect the Private Partner's investment expectations.	**Possible Risk Mitigation Strategies:** - The way in which tariffs/tolls can rise over time, and the timings for adjustments, will be clearly set out in the contract; - Private Partner to make appropriate representations to the economic regulator supporting the tariff/toll increase, just as Government-Owned and Controlled Corporations (GOCCs) would need to; and, - The government to ensure that the following will be part of the contract terms of PPP contract: (1) specifics of the type of protection to be offered by the government; and (2) mechanisms through which such protection will be offered. . **Suggested Contract Provision(s):** - Contract clause to specify whether payment will be subject to regulatory approval or not, and if not, specify mechanism to set and adjust tariffs; - Contract clause stipulating the timing and mechanism for tariff adjustments; and, - Contract clause to clearly set out the protections offered by government and how they will be provided.
8.4 Availability of Government Appropriations	**Definition:** Risk in delays in government contractual payments to the Private Partner arising from unavailability of government budgetary appropriations.	**Possible Risk Mitigation Strategies:** - When applicable, proposed multi-year appropriations (i.e. Multi-Year Obligation Authority or MYOA) should be obtained before contract signing; and, - Establish government PPP contingent liability fund.

[37] Ibid.
[38] Ibid.

	Preferred Allocation: Government **Rationale/Details:** This is a matter entirely under the government's control.	**Suggested Contract Provision(s):** - Establishment of penalty interest regime payable by government should its payments be delayed; and, - Continued failure to pay by government triggers a government default
8.5 Changes in Statutory Rates of General Application	**Definition**: Risk of changes in minimum wages and other regulated rates of general application affecting the Private Partner. **Preferred Allocation**: Private Partner **Rationale/Details:** These are risks that businesses generally, including PPP businesses, should be able to weather. Typically, PPP contracts will allow for payment increases over time to the Private Partner in line with relevant cost or price escalation indices, such mechanisms generally should provide suitable compensation.	**Possible Risk Mitigation Strategies:** - Inclusion of appropriate cost/price escalation provisions in the PPP contract; and, - As necessary in availability PPPs, include as a MAGA event, to cover major changes which the Private Partner cannot accommodate. **Suggested Contract Provision(s):** - Risk to be clearly allocated to Private Partner; and, - Payment escalation regime in line with changes in accepted cost/price escalators.
9.1 Force Majeure Risk	**Definition:** Risk that inability to meet contracted service delivery (pre or post completion) is caused by reason of force majeure events.[39] **Preferred Allocation:** Shared **Rationale/Details:** Since none of the parties is at fault here, the consequences should be shared. If the force majeure event directly impacts the construction timeline or prevents the Private Partner from meeting its service delivery requirements, it is unrealistic and uncommercial to hold the Private Partner to these obligations during the period of the force majeure event. Similarly, the government should not be expected to pay for services not received as a result of a force majeure event. For availability PPPs, government is better positioned to manage uninsurable risks.	**Possible Risk Mitigation Strategies:** - Private Partner to purchase insurance for insurable risks, level of 'property' insurances should be sufficient to cover reinstatement of facility. Private Partner annually to provide government with insurance policy details;[40] - Where relevant 'property' risks become uninsurable during the term, contract needs to clearly outline actions and which party bears risk; - Tender specification requirements, and resultant Private Partner design specifications, to take account of foreseeable risks related to site selection (e.g. flooding, earthquake tolerance); and, - Private Partner to maintain clear separation of its PPP project from its ancillary commercial business activities. **Suggested Contract Provision(s):** - Contract clause to expressly define events that will constitute force majeure events; - Contract clause to relieve Private Partner from consequences of service discontinuity if force majeure event is uninsurable; - Contract clause that Private Partner must obtain required insurances and retain at a level that will allow full reinstatement of facilities; - Contract clause to require that "if insurable, private must ensure availability of insurance proceeds towards asset repair and service resumption and government is to be given the benefit of insurance for service disruption costs";[41]

[39] Ibid.
[40] Ibid.
[41] Ibid.

		- Contract to clearly outline whether insurance proceeds to be directed toward re-instatement of facilities (i.e. could be at government discretion or dependent upon 'economic viability' test); - Contract to clearly indicate any compensation payable to the Private Partner during the period of the force majeure event – may be applicable to availability PPPs; - Contract clause to provide responsibilities of both parties in event of a force majeure event and processes and timelines for actions and decisions; and, - Contract clause to include terms and conditions for payment for work performed up to the date of construction or development of the project ceased on account of force majeure events.
10.1 Default and Termination	**Definition:** Risk of 'loss' of provision by the Private Partner of contracted services upon the premature termination of project contract. **Preferred Allocation:** Dependent upon cause of default and termination, i.e. whether: - Private Partner - Government - Force Majeure See Policy Circular No 6 – 2015 for details.	
10.2 Residual Value on Transfer to Government	**Definition:** Risk that on expiry or earlier termination of the services contract the asset is not in the required condition term. **Preferred Allocation:** Private Partner **Rationale/Details:** Private Partner can incorporate lifecycle maintenance, refurbishment, and performance requirements into the design facility, and can manage these processes during the term of the contract. The Private Partner shall properly manage and/or operate the project so that the assets are maintained or brought up to the agreed condition by the end of the contract, except when the project or facility is transferred immediately to the government upon completion of the construction or development of such project or facility.	**Possible Risk Mitigation Strategies:** - Government to set clear requirements on asset condition (e.g. remaining asset life) at contract expiry; - As appropriate, government to impose on the Private Partner limited prescriptive maintenance and refurbishment obligations;[42] - Government to "ensure an acceptable maintenance contractor is responsible for the work, commission regular surveys and inspections";[43] - Government obtain performance bonds to ensure the liability is satisfied. - Government to commission independent asset survey no less than 2 years from contract expiry and, as necessary, begin withholding service payments (availability PPPs) until upgrades made; - Government to seek transition bond 2 to 3 years from contract expiry; - For augmentations during the term contract to be varied to include changed payment arrangements provisions and, as necessary, mechanism for determination of any residual value payment to the Private Partner; and, - Government regularly monitor the condition of the assets to ensure that these are functional and of quality before the Private Partner transfers ownership of the project. **Suggested Contract Provision(s):**

[42] Ibid.
[43] Ibid.

	If the asset/facility is to be transferred to the government at the end of the PPP contract, there may need to be incentives placed on the Private Partner to continue maintenance during the final years of operation.	- Contract should have provisions that independent third party shall conduct evaluation of facility on its asset condition/residual value around 2 years from contract expiry; - Contract to stipulate that capital gains tax to be shouldered by private partner prior to transfer to government; - Contract clause specifying the conditions in which assets are to be transferred to the government at the end of the term; - Contract clauses stipulating the asset and service performance indicators and frequency of monitoring of these indicators; - Contract clause requiring transfer of building plans, operating information, manuals, etc.; and, - Contract clause with option for Government to seek a transition bond and/or withhold service payments should third party study indicate that material work required to bring asset up to standard.