

The Commercial Law Development Program *Presents* *Public-Private Partnership Webinar Series*



Project made possible through funding by:



Project Agreements In Public-Private Partnerships



Today's Presenters



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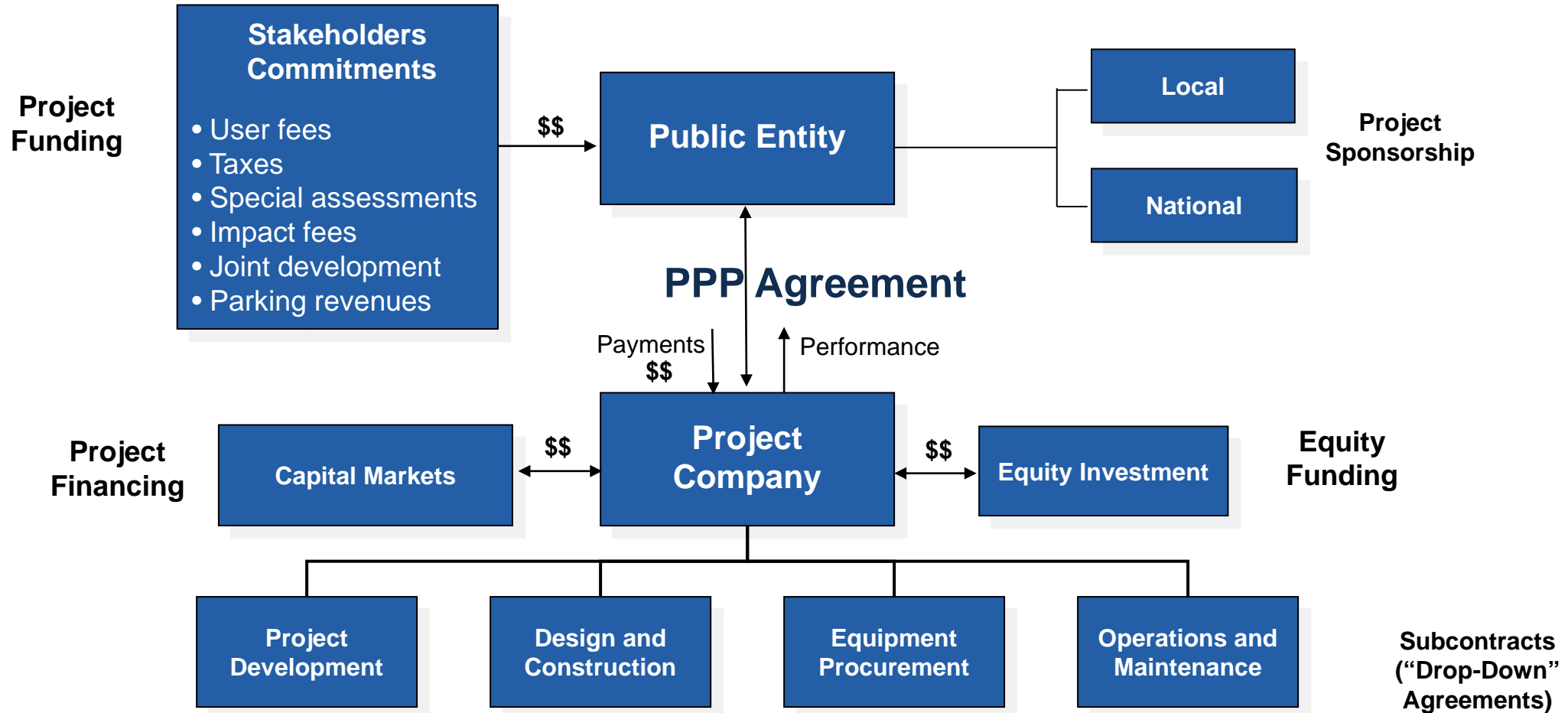


Agenda

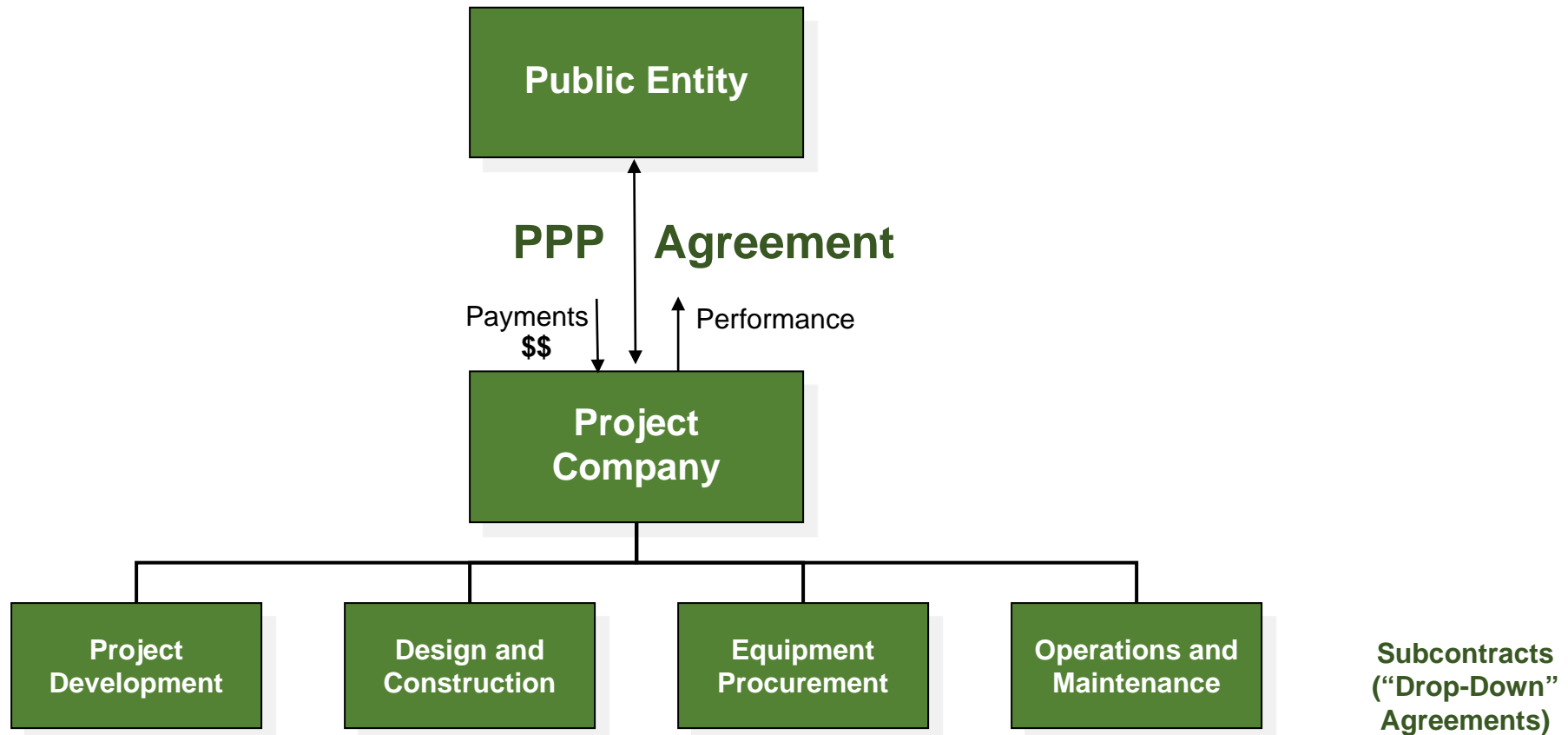
- Public Private Partnerships (PPP) Structure and Overview
- PPP Agreements
 - Basics, Content & Implementation
 - The Project Company
 - Key Terms and Conditions
- Subcontracts ("Drop-Down" Agreements)
 - Project Development
 - Design Build/EPC Agreement
 - O&M Agreement
 - Equipment Supply Agreement
 - Interface Agreement
 - Supply Agreement
 - Offtake Agreement



PPP Structure Overview



PPP Agreement and Project Co. Subcontracts



Variations in PPP Agreements

Contract Scope

- Design-Build-Finance (DBF)
- DB-Operate-Maintain (DBOM)
- DBOM-Finance (DBFOM)
- Joint Development/Lease

Payments

- Completion Payments
- Availability Payments
- Revenue Risk
- Hybrid



Basics of the PPP Agreement

- Primary Agreement between the Public Entity and the Project Co.
- Contains all Parties' Rights and Obligations
 - ✓ requirements for payment
 - ✓ scope, technical and performance obligations
 - ✓ schedule, delay and relief
 - ✓ risk allocations, incentives and disincentives
- Supports the Financing – adding complexity
 - ✓ credit worthiness of Owner and Sponsors
 - ✓ security packages from major Subcontractors
 - ✓ Lender step in rights
 - ✓ Direct Agreements



PPP Agreement

- **Contents & Implementation of PPP Agreement**

- Establishment of a Project Company
- Duration of PPP
- Financial arrangements
- Government Support
- Ownership of Assets
- Acquisition of rights related to the Project Site
- Operation of infrastructure
- Performance guarantee
- Security Interest/Substitution of the Project Co.
- Assignment of the PPP Agreement



PPP Agreement

- **Contents & Implementation of PPP Agreement (Cont.)**
 - Compensation for specific change in legislation
 - Financial reporting and audit
 - Takeover of an infrastructure project by the Public Entity
 - Compensation upon termination of the PPP Agreement
 - Governing law
 - Disputes



PPP Agreement

- **Establishment of Project Company**
 - May be required to establish a Project Company under the laws of the Host Country
 - Sole purpose is to execute & implement PPP Agreement
 - Requirements around share capital
 - Restrictions in relation to transfer of ownership
 - Public entity may be a minority shareholder in the Project Co. or its holding entity



PPP Agreement

- **Duration of PPP**
 - Shall be in the agreement
 - Determination of duration
 - Useful life of the assets of the project
 - Availability of financing
 - Standard market practice for similar projects
 - No extension except in exceptional cases
 - Delay beyond reasonable control of the parties
 - Project suspension by Public Entity
 - Increased costs required by Public Entity



PPP Agreement

- **Financial arrangements**
- The Project Co. shall receive final compensation by way of:
 - Compensation by or on behalf of Public Entity
 - Tariffs/Usage Payments
 - Milestone Payments
 - Availability Payments
 - Tariffs or fees collected from users or consumers
 - A combination of the above compensation and tariffs or fees



PPP Agreement

- **Government Support**
 - Issuance of guarantee and economic support by the Host Government
 - The economic support may take the form of direct payments, contributions in-kind, payment guarantees, securities, undertaking or binding letters of comfort, guarantees for the performance of obligations
- **Ownership of assets**
 - Shall specify which assets are public property/private property
- **Acquisition of rights related to the Project Site**
 - Public Entity shall assist the Project Co. to obtain any right related to the project site



PPP Agreement

- **Operation of infrastructure**
 - Shall specify obligations of Project Co. to ensure:
 - Modification of service to meet the demand
 - Continuity of service
 - Provision of the service under same conditions for all users
 - Non-discriminatory access of other service providers to any public infrastructure network operated by the Project Co.
 - Project Co. - right to issue and enforce rules in relation to the facility subject to the approval of Public Entity



PPP Agreement

- **Security Interests**
- Right of Project Co. to create any security interests to secure financing needed for the project, over its assets such as:
 - Security over its movable/immovable properties
 - Pledge over receivables/proceeds
- No security over Public Property
- **Substitution of the Project Co.**
 - Possibility of substitution of the Project Co. by a new entity in case of serious breach or any event that justify termination.



PPP Agreement

- **Assignment of the PPP Agreement**

- Rights of the Project Co. may not be assigned to third parties without written consent of the Public Entity
- Agreement shall set out conditions under which Public Entity shall give its consent to any assignment of rights or obligations (including acceptance by the new Project Co. and its technical and financial capability)

- **Compensation for specific changes in legislation**

- Compensation in event costs of the Project Co.'s for performance of its obligations have substantially increased/decreased as the result of change in legislation
- Value that the Project Co.'s receives for his performance has substantially diminished/increased as a result of the change in legislation



PPP Agreement

Financial Reporting and audit

Project Company shall:

- keep proper books and records
- be open for scrutiny by Public Entity
- Submit its duly audited financial accounts to Public Entity

Takeover of an infrastructure project by the Public Entity

- Public Entity can take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of a serious failure of the Project Co.
- Collect and pay revenues
- Develop and operate the project
- May solicit proposals for the construction, maintenance or operation of the project



PPP Agreement

- **Compensation upon Termination of the PPP Agreement**

- Agreement shall stipulate:

- events that may/shall trigger its termination including material breach, force majeure event, payment default.
- how compensation is calculated in the event of termination

- **Governing Law**

- PPP Agreement usually governed by the laws of Host Country

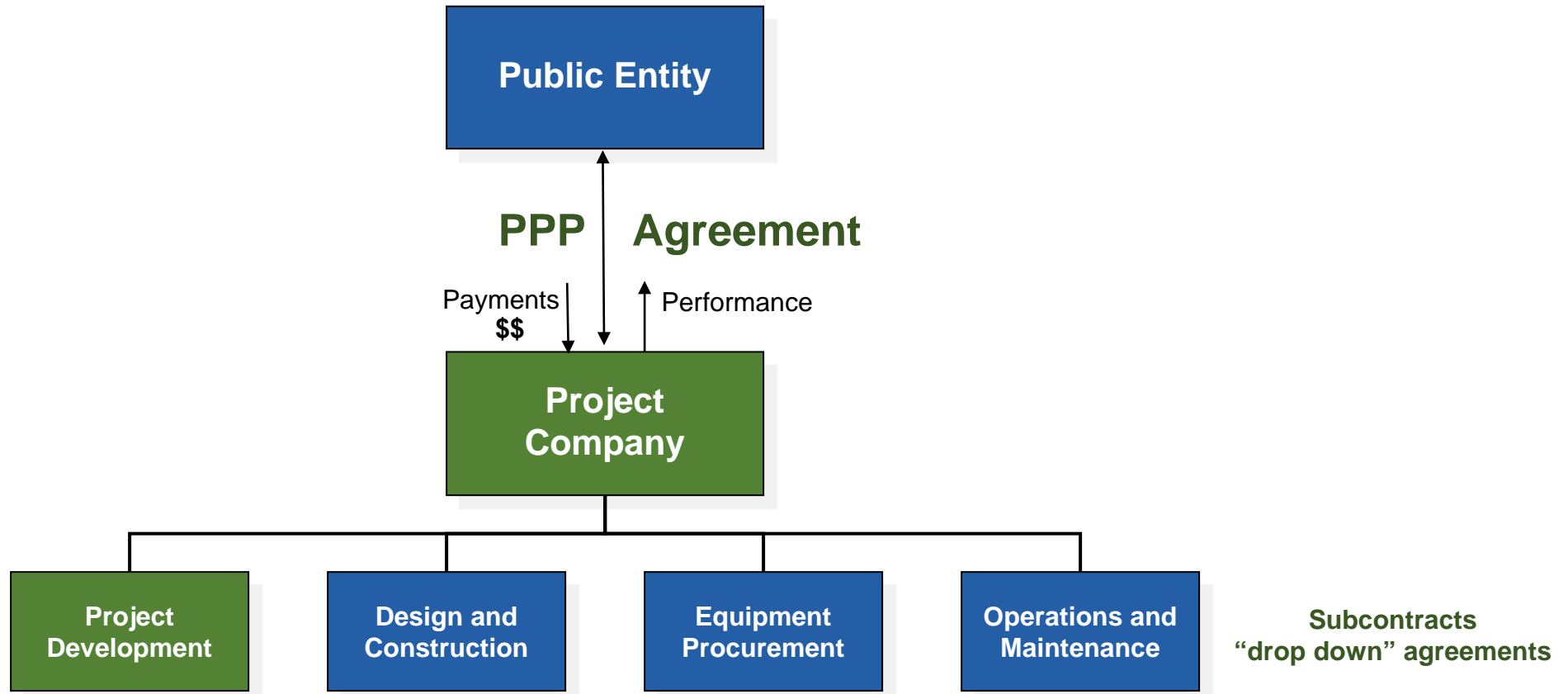


PPP Agreement

- **Disputes between the Public Entity and Project Co.**
 - Dispute settlement mechanism agreed by the Parties in the Agreement
 - May include international arbitration
- **Disputes involving Customers or Users of the Infrastructure Facility**
 - Public Entity may require the Project Co. to establish simplified and efficient mechanisms for handling claims submitted by customers or users
- **Other disputes**
 - Project Co. free to choose appropriate mechanisms to settle dispute between itself, shareholders, lenders, contractors, suppliers and business partners



Project Development



Project Development Services

- Could be performed by Project Co consultants or made part of the DB/EPC Contract
- This may be a single or series of consulting services agreements for preliminary preparation work
- In a “progressive” PPP Agreement it could be done in the first phase while engineering and pricing is being prepared.
- It may involve the financial advisory services to develop the financial plan and modeling
- Permitting, utilities work, right of way, could be performed by Project Co outside of DB Contract



Subcontract (“Drop-Down”) Agreements

- Typically required to be “**back-to-back**” with the PPP Agreement
- No gaps, requires “**interface agreement**” between Subcontractors
 - ✓ Design Build/EPC Contract
 - ✓ O&M Contract
 - ✓ Equipment/Vehicle Supply



Key Terms and Conditions for Subcontracts

Delays & Supervening Events

- Compensation Events
- Relief Events
- Force Majeure Events
- Change In Law
- Project Co Changes And Directive Letters
- Contractor Changes

Termination and Step-In

- Termination For Convenience
- Termination For Project Co Default
- Termination For Contractor Default
- Termination For Extended Force Majeure
- Termination For Uninsurability
- Obligations On Termination



Key Terms and Conditions for Subcontracts

- **Subcontracting and Key Personnel**
- **Indemnities, Insurance and Reinstatement**
- **Noncompliance and Payments**
 - ✓ Noncompliance Events
 - ✓ Milestone Payments
 - ✓ Availability Payments
 - ✓ Disputed Amounts
- **Equivalent Project Relief**

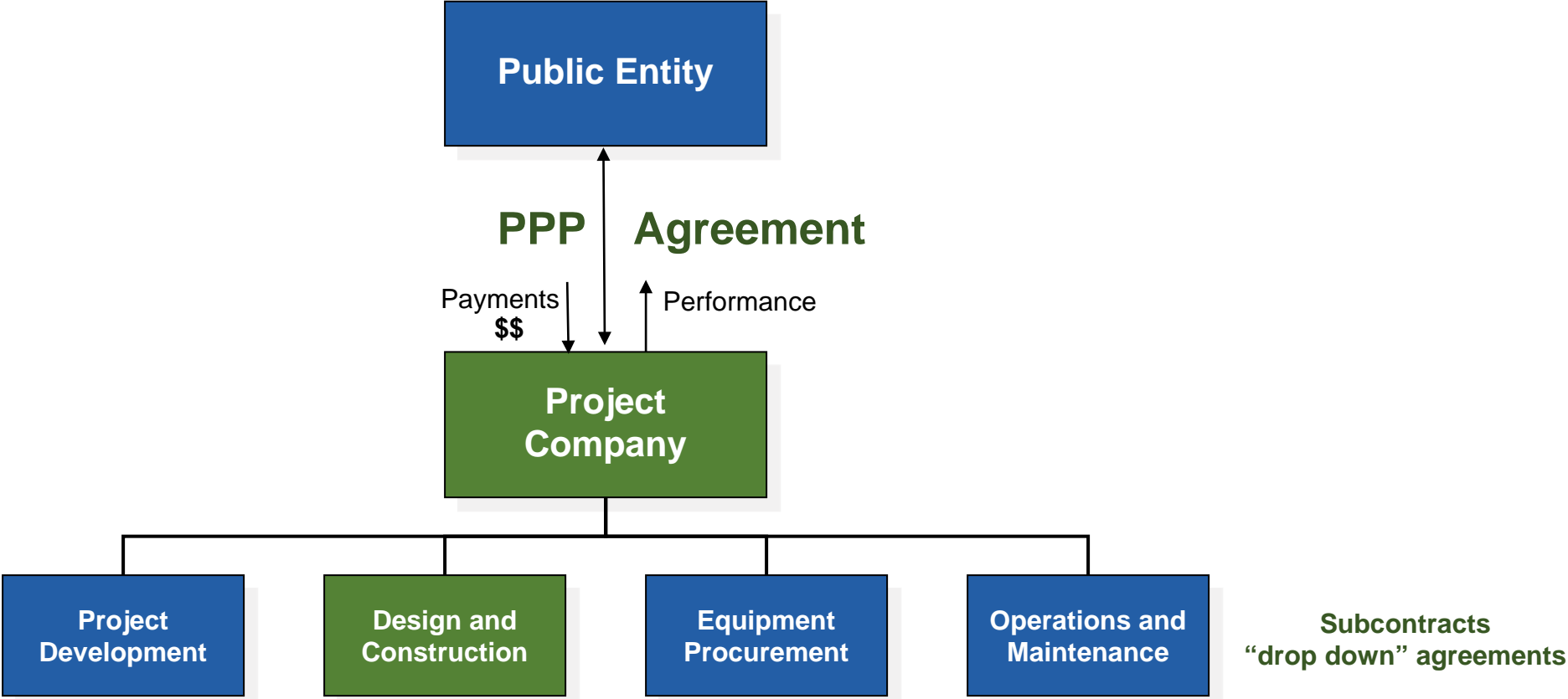


Typical Special Conditions to Subcontracts

- Designated Representatives
- Notice and Timing of Notices
- Dispute Resolution
- Assignment
- Step-in Rights
- Amendment
- Entire Agreement
- Survival
- Choice of Law
- Counterparts



Design-Build (DB) Subcontract



Design-Build (DB) Subcontract

- Project Co. contracting with substantial **construction joint venture (CJV)** with major design entity
- Joint and several liability between CJV partners to Project Co
- **Parent Company Guarantees (PCG)** provided by the CJV to secure performance
- The DB Contract and the **security package** (bonds, LOCs, PCGs) are critical for the financing



Sample Language - DB Subcontract Intent

- that the terms and conditions of the **Project Agreement**, to the extent applicable to the Construction Work, **are incorporated by reference** into and form part of this **DB Subcontract**,
 - with the changes necessary to give full effect **to the intent of the parties**,
 - and **subject to** the express terms and conditions set out in this **DB Subcontract**.
- In the event of any inconsistency or conflict between the terms of this **DB Subcontract** and those of the **Project Agreement**, this **DB Subcontract will have precedence**.



Sample DB Subcontract Articles

ARTICLE 1 DEFINITIONS

ARTICLE 2 CONSTRUCTION CONTRACT OBLIGATION

ARTICLE 3 PRICE AND PAYMENT TERMS

ARTICLE 4 CHANGES IN THE CONSTRUCTION CONTRACT

ARTICLE 5 INSURANCE AND SECURITY

ARTICLE 6 WARRANTY

ARTICLE 7 SCHEDULED SUBSTANTIAL COMPLETION DATE

ARTICLE 8 TERMINATION



DB Subcontract Special Conditions

TYPICAL SAMPLE CONDITIONS PROVISIONS

- Joint and Several
- Compliance with Credit Agreements
- Limitation on Liability
- Contractor's Representations
- Continuing Accuracy of Contractor Representations
- Financial Statements
- Relationship
- Access to Information
- Approvals, etc. Do Not Relieve Contractor



DB Subcontract Issues

Disclosed Information

- No right to rely
- Risk of site conditions

Governmental Approvals

- Contractor responsibility

Warranty

- Extended periods?

Non-Compliance Points

- Payment deductions

Delay Liquidated Damages

- Typically cost of financing
- 10-15% cap

Pay “if” Paid

Limitation of Liability

- Typically 35% to 50% of price (with exclusions)

Waiver of Consequential Damages (with exclusions)

Compensable events

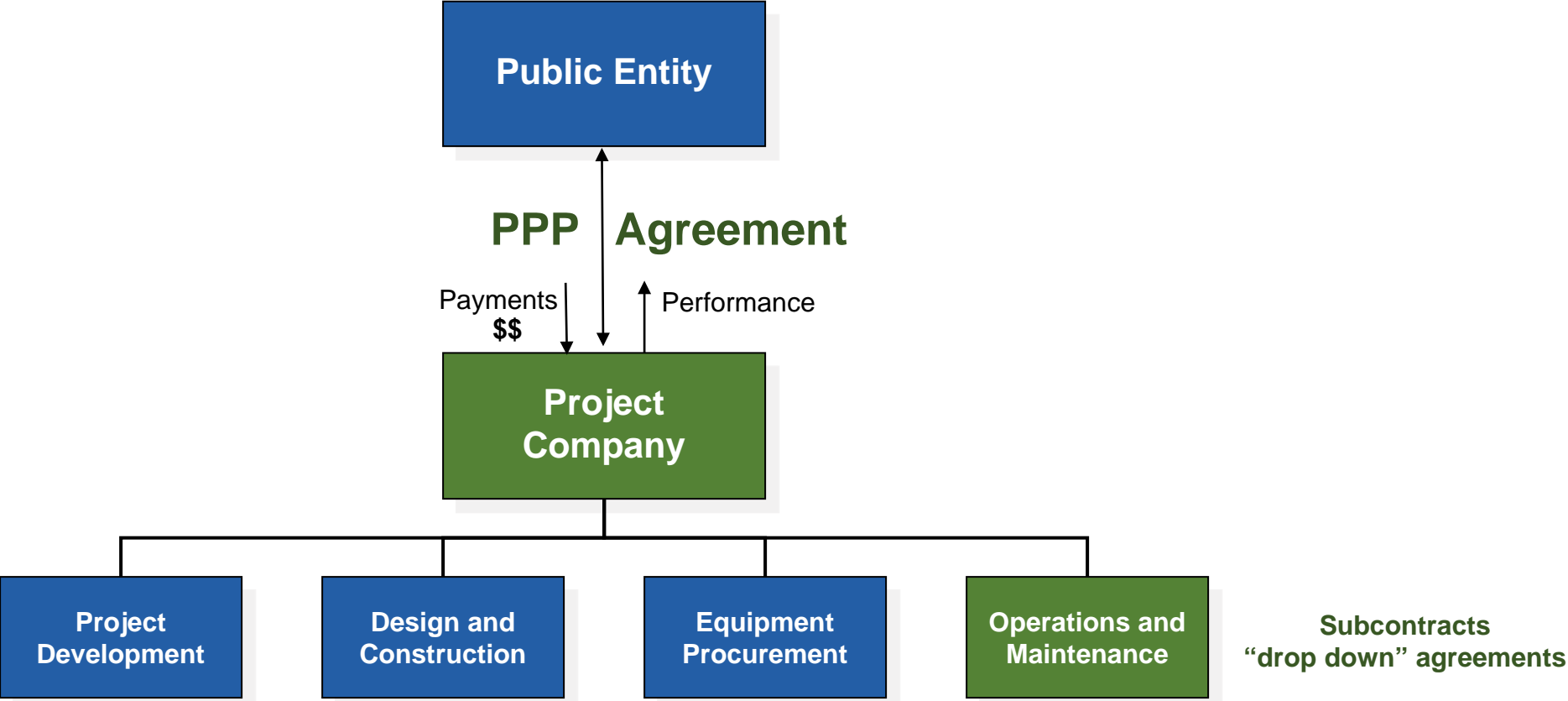
- Relief Event,
- Force majeure flow down

Dispute Resolution

- Arbitration
- Applicable Law
- DRBs
- Mediation
- Neutral experts



Operations & Maintenance Subcontract

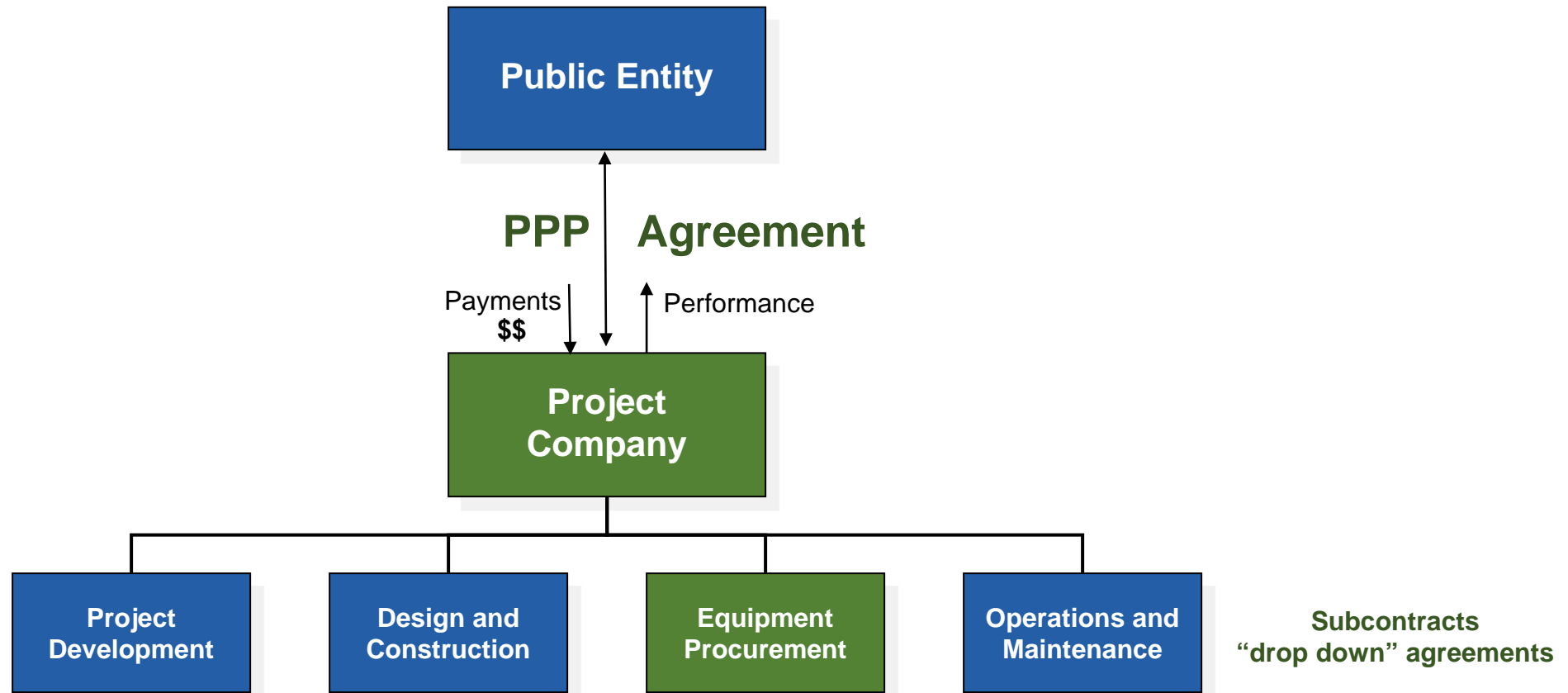


O&M Subcontract

- Operations requirements
- Maintenance requirements
- Compensation for O&M services and performance penalties
- Transition and Hand Back at end of O&M term
- Labor provisions
- Environmental laws
- Foreign content restrictions and Cargo preferences
- Energy conservation and efficiency
- Safety standards
- Patent rights and rights in data
- Access for people with disabilities
- Maintenance of, access to and audit of records



Equipment Supply Subcontract



Equipment Supply Subcontract

(Using Transit Vehicle Procurement as an example)

Better risk and dispute mitigation practice to combine Vehicle Supply and O&M
Subcontract should have "performance" based and not "design" based spec.

Basic Requirements:

- ✓ Environmental conditions
 - ✓ Temperatures, rain, ice and snow, number of doors
- ✓ Route, Service requirements
 - ✓ Daily boardings, peak hour passenger load, desired headway, number of seats, etc.
 - .
- ✓ Vehicle template
 - ✓ Maximum length, width, height, track gauge, maximum weight and axle load, minimum turning radius, crashworthiness
- ✓ Power supply
 - ✓ Voltage supplied to vehicle; ability to connect cars for multiple unit operation
- ✓ Transport Specifications
 - ✓ Vehicle top speed, acceleration and braking; train control and signal systems?
- ✓ Specific special items
 - ✓ Fire retardant materials, lights, horns, bells, destination signage, passenger information, etc.
- ✓ Passenger comfort requirements
 - ✓ Ride quality, heating & air conditioning, interior noise level, seats, tinted windows, interior lighting, internet



Provisions for Dispute Resolution

Alternative A

- Negotiations
 - Project Negotiations
 - Senior Executives
 - Independent Expert
- Certified Claim
- Mediation
- Litigation

Alternative B

- Negotiations
 - Project Negotiations
 - Senior Executives
- Certified Claim
- Dispute Review Panel
 - Technical
 - Financial
- Arbitration/Litigation

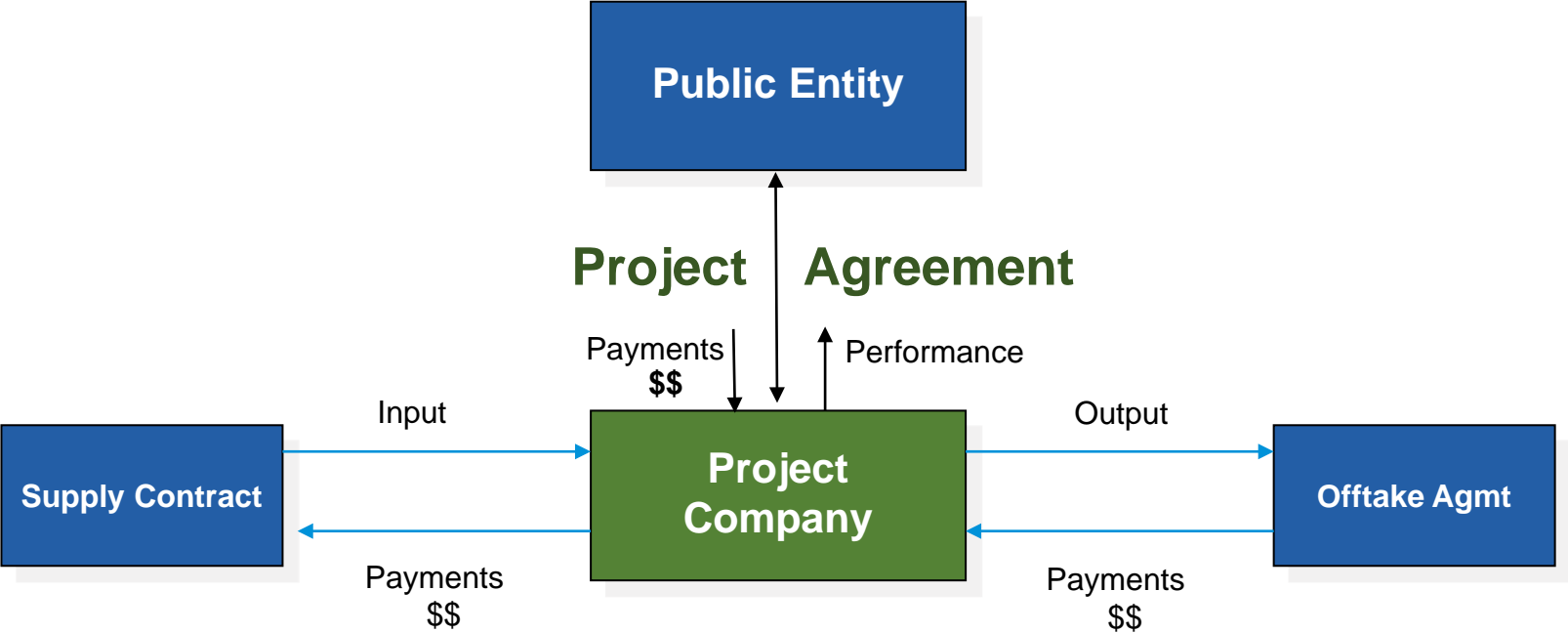


Other Ancillary Agreements

- Interface Agreement
- Supply Contract
- Offtake Agreement
- Others



Supply and Offtake Agreements



Supply Contract

1. Product specifications
2. Term
3. Price (fixed?)
4. Penalties for delivery/quality failure
5. Delays/Force Majeure
6. Termination
7. Dispute Resolution
8. Transfer of Ownership/Liability



Offtake Agreement

1. Product specifications
2. Term
3. Price (e.g. take-or-pay)
4. Underperformance
5. Completion Delays
6. Other Delays/Force Majeure
7. Material Adverse Government Action
8. Termination
9. Dispute Resolution
10. Testing and Maintenance
11. Interconnection

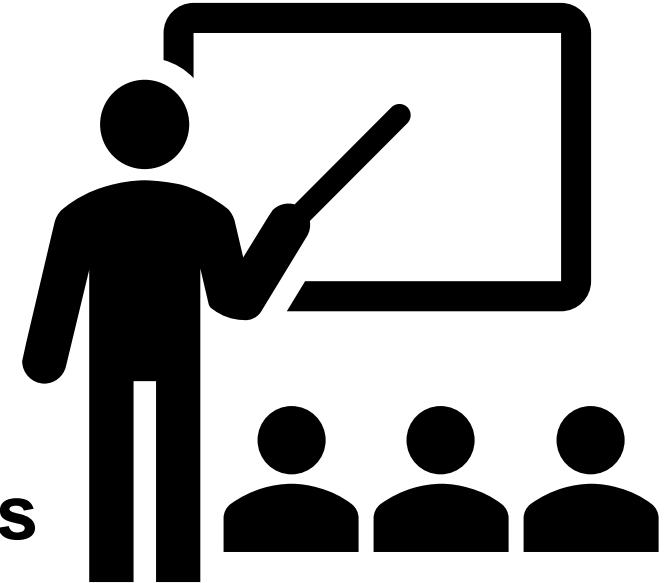


Thank you!



Previous Webinars

- Project Finance
- Screening Tools
- Pre-Feasibility Studies
- Pre-Qualification and Evaluation
- **Sector Specific: Pre-Feasibility Studies**
- Business Case Development
- Unsolicited Proposals
- Financial Modeling



Access Previous Recordings

Go to:

www.cldp.doc.gov/PPP

Register

Watch

The screenshot shows the CLDP website's 'Public Private Partnerships (PPP) Series' page. The header includes the CLDP logo and navigation tabs for 'ABOUT CLDP', 'AREAS OF EXPERTISE', 'COUNTRIES & REGIONS', 'WHO WE SERVE', 'PROGRAMS', and 'RESOURCES'. The main content area features an 'Introduction to the Webinar Series' section with a video player thumbnail and a 'PPP: Project Finance' section. A sidebar on the left contains a 'Results' menu with links to 'Asia and South Asia', 'Europe & Eurasia', 'Global Challenge', 'Latin America and the Caribbean', 'Middle East and North Africa', and 'Sub-Saharan Africa'. A 'Public Private Partnerships (PPP) Series' section is also visible at the top right of the main content area.

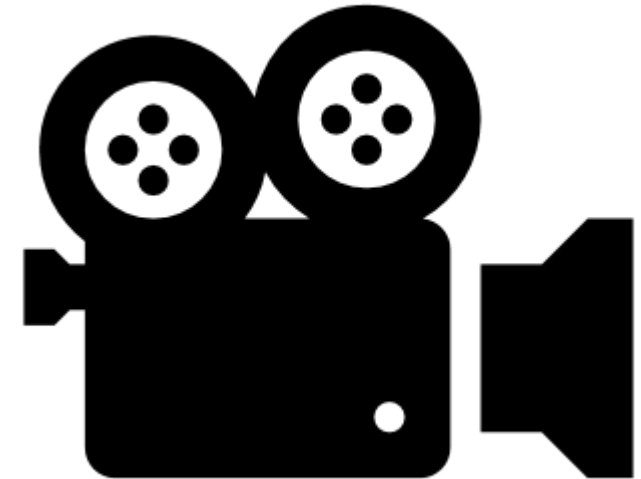
The screenshot shows a registration form titled 'PPP: Project Finance Registration'. The form has a blue header and contains four required fields: '1. Name *', '2. Organization *', '3. Country *', and '4. Email address *'. Each field has a text input box with the placeholder text 'Enter your answer'. A red asterisk indicates that all fields are required.

The screenshot shows a YouTube video player for a recording titled 'PPP: Unsolicited Proposals'. The video player includes a search bar, a play button, and a progress bar showing 3:30 / 54:22. The video content displays a 'Today's Agenda' slide with two bullet points: 'Lessons Learned From Global Survey of Unsolicited Proposals (USPs)' and 'Colorado's High Performance Transportation Enterprise's Experience with USPs'. The video player interface includes standard YouTube controls like like, dislike, share, and save buttons.



Upcoming Webinars

- **Debt financing risk**
- **Commercial Contracts**
- **Contract Management**
- **Social PPPs**





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