

client alert

PROJECTS (FINANCE AND INFRASTRUCTURE) | VIETNAM |

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NEW PPP LEGAL FRAMEWORK ISSUED

On 14 February 2015, the Government of Vietnam (the "**Government**") issued the long-awaited Decree No. 15/2015/ND-CP on Investment in the Public Private Partnership Form (the "**PPP Decree**"), which came into effect on 10 April 2015. It was shortly after followed by Decree No. 30/2015/ND-CP dated 17 March 2015 on the implementation of the Law on Tendering regarding selection of investors, which is due to enter into force on 5 May 2015 (the "**Investors Selection Decree**" and, together with the PPP Decree, the "**New PPP Legal Framework**").

The New PPP Legal Framework will replace the existing Public Private Partnership ("**PPP**") regulations in Vietnam, which comprises Decree No. 108/2009/ND-CP on Build-Operate-Transfer Projects (as amended) ("**Decree 108**") and Decision No. 71/2010/QD-TTg on Pilot PPP Projects ("**Decision 71**").

Whilst the New PPP Legal Framework does not fundamentally overhaul the existing PPP regime, it represents a conscious move by the Government to create a robust PPP program in Vietnam by strengthening the bridge of cooperation between State authorities and private investors, by introducing core mechanisms, such as viability gap funding, and PPP-structured feasibility studies to better reflect international practices, introducing additional contract forms, ensuring fairness, competition and transparency in investor selection and broadening the range of projects open to private investment, to include areas such as infrastructure facilities for trade, industrial zones, science and technology and economic zones. Under the existing regime, investment is limited to areas such as transportation infrastructure, electricity, water, health and the environment. As well as the new areas listed above, the Vietnamese Prime Minister can allow private investment in other areas.

The introduction of the New PPP Legal Framework is part of the Government's strategy to attract direct foreign investment into Vietnam to bolster the country's infrastructure development.

This Client Alert highlights the key aspects and changes introduced by the New PPP Legal Framework from an international investor perspective.

KEY REFORMS

Clarification of the institutional framework

The new PPP Decree clarifies the institutional framework for the management of PPPs:

- at the national level, a State Steering Committee for PPPs has been created by the Prime Minister, Nguyễn Tấn Dũng; and
- at the entity level, State agencies authorised to enter into PPP projects must designate or create a "project coordinating unit for PPP activities" as well as a "project management unit".

The new PPP Decree also sets out a more comprehensive framework for the conditions, content and approval of project proposals and feasibility studies. Not only in respect of projects proposed by the Ministries, Branches and Provincial People's Committees but also Investor-Proposed projects (or "**Unsolicited Projects**"). This fits squarely with the new responsibilities of inter alia the Ministry of Planning and Investment, Ministry of Finance, Ministry of Justice, State Bank of Vietnam, Ministry of Construction and various other State ministries and branches, which will all be required to focus on achieving viable and beneficial PPP projects in Vietnam, for both the State and private investors.

Framework for Unsolicited Projects and the introduction of small-scale projects

Unsolicited Projects will be covered by the New PPP Legal Framework, with an express provision enabling investors to propose projects that are not on the Government's approved list of projects. Unsolicited Projects are still open to competitive bidding, however, the investor proposing the project will be responsible for conducting the feasibility study pursuant to a written agreement with the authorised State agency and in return that investor will be entitled to a "5% preference" over the other bidders at the financial assessment stage during the bidding process: that is 5% will be added to the financial proposal of the other bidders, therefore giving a competitive advantage to the investor proposing the project.

The concept of small-scale projects (classified as "Group C Projects" under the Law on Public Investment No. 49/2014/QH13 dated 18 June 2014) has been codified in the New PPP Legal Framework, and the procedures for implementing these projects have been simplified. Unlike Unsolicited Projects, small-scale projects do not require investors to conduct a feasibility study or to create a project enterprise. Therefore, investors will not be required to obtain an Investment Registration Certificate ("**IRC**"). Small-scale projects are generally expected to be subject to domestic bidding only.

Introduction of varied and innovative project structures

Investors will now have the opportunity to cooperate with State authorities under additional contract forms such as BOO, BTL, BLT and O&M contracts (the current regulations only provide for Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO) and Build-Transfer (BT) contracts). This will enable private investors to recover their investment from various sources. For instance, in the case of BT projects, capital recovery will come by granting land in order to implement "other projects" (rather than through the provision of State capital), thereby implementing PPP projects that will not create an additional burden on the State budget.

Removal of the cap on State investment

The State's investment capital in a project will no longer be capped and the estimated maximum level of State capital will be determined at the approval of the feasibility study phase. Under the new PPP Decree, investors may bear less risk than under the old regime because State investment will no longer be capped at 49% (under Decree 108) or 30% (under Decision 71).

The use and purpose of State capital has also been clarified, giving more certainty to the structure of a project. However, with the exception of BTL and BLT projects, the provisions on the use and disbursement of State capital suggest it can only be disbursed as a grant to support infrastructure projects during the construction stage and not as a service fee during the operation phase of a project.

Selection of investors

The Investors Selection Decree provides that the main form of investors' selection shall be international open bidding. The basic bidding process follows international best practices:

- Pre-qualification of potential investors on eligibility, capacity and experience criteria on a "point-based" system (a 60% minimum score is required to pass the pre-qualification stage);
- Submission of proposals submitted by pre-qualified bidders:
 - Assessment of technical proposals on criteria such as volume and quantity, operation, management, business, preservation and maintenance as well as environmental and safety criteria on a "point-based" system (a 70% minimum score is required to consider that the technical proposal satisfies the technical requirements); and
 - Assessment of financial proposals of investors satisfying technical requirements only (using one of the following criteria: service price, State contributed capital, social benefits and State benefits, or a combined method of those criteria).

However, exceptions to international open bidding are allowed under the Investors Selection Decree:

- **Domestic bidding** will apply in the following cases: (i) in restricted sectors as provided by national and international law; (ii) no foreign investor has participated in or passed the pre-qualification stage; and (iii) for small-scale projects (domestic bidders can, however, partner with international investors if it is necessary to use progressive technology and techniques and/or international managerial experience); and
- **Direct appointment** of investors will apply if: (i) only one investor registers; (ii) only one investor is capable to perform due to intellectual property, commercial secret or funding arrangements; and (iii) Unsolicited Projects that meet requirements on feasibility and efficiency and which aim at protecting national sovereignty, national border or islands following a Prime Minister's decision (this latter requirement regarding national sovereignty, national borders or islands seems to have been added in the Investors Selection Decree while, as mentioned in one of our previous [client alerts](#), the provisions of the Law on Tendering on direct appointment apply to all PPP projects in general - implementing regulations are expected to clarify this issue).

Project contracts

The completion of a project contract will now comprise of at least two agreements:

- an investor agreement: which will set out the rights and obligations of each party in order to obtain an IRC and to establish the project enterprise; and
- a project contract to be signed with the State authority following the issuance of the IRC (as mentioned, small-scale project are exempted from this procedure as no IRC will be needed).

It is hoped that State authorities will provide assistance prior to the execution of the project contract, and in particular that they will provide assistance in obtaining the IRC. We anticipate that the issuance of the IRC will be smoother now that the new Law on Investment expressly lists the PPP investment form as a form of investment.

Under the New PPP Legal Framework there will be room to negotiate project contracts; the authorised State entity will be required to arrange negotiations on project contracts with investors both prior to signing the investor agreement as well as prior to signing the project contract. The provisions of the Investors Selection Decree are quite vague on the items to be discussed and we hope that this will not be an opportunity for either party to re-negotiate commercial points of the offer.

Choice of applicable law and dispute resolution for projects with foreign investors

Government guarantees and international project contracts (where one of the parties to a project is a foreign investor) may be subject to foreign law.

Such contracts will still be subject to the restriction that the applicability of a foreign law should "not be contrary to the provisions of the law of Vietnam on the selection and applicability of foreign law". However, we consider that this might create a risk that provisions of the Vietnamese Civil Code concerning the application of "fundamental principles of the law of Vietnam" would apply. The lack of clarity on the issue, coupled with a lack of published case law, may act as a deterrent for foreign investors. The expected reform of the Civil Code currently undertaken by the Government will hopefully resolve this issue.

Regarding enforcement, the PPP Decree maintains the principles as in Decree 108: a dispute between an authorised State agency and a foreign investor (or the project enterprise established by the foreign investor) can be resolved by a Vietnamese court, by the Vietnam International Arbitration Centre or by an arbitral tribunal the parties agree to establish. This means that international arbitration is possible. The major change of the PPP Decree in this aspect is to qualify such disputes as commercial disputes that will be enforceable in accordance with the law on recognition and enforcement of awards of foreign arbitrators.

Incentives and guarantees

Other general provisions on contract duration, assignment of rights and obligations as well as provisions on investment incentives (including exemptions of land use fees) and on the mortgage of assets are similar to those contained in Decree 108 and are generally in line with international best practices.

There is a notable improvement regarding lenders' step-in rights. The PPP Decree introduces an option for lenders to appoint another entity to take over a project in cases where an investor has failed to fulfill its obligations, instead of lenders being required to take over the project directly. This is an important breakthrough for the bankability of projects, as lenders tend to lack the requisite experience and human resources to enable them to efficiently take over projects in such instances.

Despite numerous demands from the private sector, the PPP Decree does not contain a general assurance of foreign currency balance for all PPP projects. Instead, such assurance will be granted on an individual basis and managed by a separate agency appointed by the Prime Minister.

CONCLUSION

Whilst the New PPP Legal Framework does not revolutionise the existing legal framework for PPP projects, the PPP Decree and the Investors Selection Decree have clarified the general PPP framework and provide better legal certainty for private investors. The New PPP Legal Framework emphasises the Government's commitment to continue the development of infrastructure in Vietnam.

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