

Draft PPP Regulations

Vietnam has an urgent need to upgrade and develop its infrastructure. However, having attained middle income status, the nation is likely to receive less official development assistance in the coming years. The Government is now turning to public private partnerships (“PPP”) to bridge a funding gap for public projects, recognising that the existing BOT legislation designed to attract private funding should be supplemented by PPP legislation. After years of preparation, the Ministry of Planning and Investment (“MPI”) has finally drafted regulations on pilot infrastructure development PPP projects (“Draft PPP Regulations”) to submit to the Government for approval and issuance. These Draft PPP Regulations will be implemented for a trial period until replaced by the Government’s official regulations on the PPP form of investment.

The PPP model implies a collaboration between the State and the private sector in carrying out a project with social benefits with both parties sharing the responsibilities and risks.

The Draft PPP Regulations set out a new process and some new principles and closely adhere to Decree No. 108/2009/ND-CP dated 27 November 2009 on infrastructure projects built under BOT, BTO and BT contracts (“Decree 108”). For information about Decree 108, see Mayer Brown JSM’s Legal Update on “[New Decree on BOT, BTO and BT Contracts](#)” of 9 December 2009.

We discuss below some salient provisions of the Draft PPP Regulations.

Scope and applicability

The Draft PPP Regulations stipulate the conditions, procedures and principles applicable to a number of projects for infrastructure development and/or the provision of public services to be implemented as a trial PPP form of investment. The Draft PPP Regulations apply to competent State bodies, investors, organisations and individuals involved in the management and implementation of the foregoing projects.

The PPP form of investment involves co-ordination between the State and an investor to implement a project for infrastructure development and/or the provision of public services on the basis of a project contract.

The competent State body means a party participating in the project contract and implementing rights, obligations and responsibilities as negotiated with the investor in the project contract.

A project contract means a contract signed between a competent State body and an investor in which the State cedes the right and grants permission to the private sector investor to make the investment, operate the project works and/or provide public services for a specified duration.

Applicable principles

The pilot PPP scheme has been formulated based on the following principles:

- to attract private and foreign investment for infrastructure development and the provision of public services;

- to raise capital from the domestic and international commercial capital markets and minimise the use of public debt or State capital; and
- selection of an investor to implement the project based on a fair, competitive, transparent and economically efficient basis and in compliance with international customs and practice.

Applicable sectors

A pilot PPP project may be used in any one of the following sectors:

- roads, highway bridges and tunnels, and ferry landings for road traffic;
- railways, and railway bridges and tunnels;
- public transport services;
- airports, sea ports and river ports;
- clean water supply systems;
- power plants; and
- other projects for infrastructure development and/or the provision of public services as decided by the Prime Minister (“PM”).

Criteria for selection of projects

In selecting pilot PPP projects, preference will be given to those projects which, in addition to addressing an urgent demand, can demonstrate

- an ability to repay the investment capital from operational revenues;
- an ability to utilise technological, managerial and operational expertise; and
- an ability to mobilise and efficiently use private sector capital.

Structuring of a PPP project

All PPP projects will be eligible to receive “State participation” and the benefits of “special mechanisms”.

State participation means a combination of the

following forms of State participation: State capital, investment incentives and investment assistance as stipulated by law, and relevant financial policies included in the total investment capital of the project to ensure that the investment is effective and to make the project sufficiently attractive so that it can attract capital from the private sector. The State participation may include one or more of the above items, depending on the nature of each project.

The PM will make a decision on the State participation on the basis of a proposal from the competent State body and an evaluation by the MPI. The State participation may not exceed 30% of the total project investment capital (unless otherwise decided by the PM) and above. The State participation in the project can in no way be considered equity capital of the project enterprise, not attaching to the dividend right from the revenue of the project.

Special mechanisms to support the PPP form of investment may include State undertakings based on negotiations and agreement with the investor to ensure the project is a success and include undertakings on foreign currency guarantee levels, foreign exchange balance and other undertakings on handling risks which are outside the control of the investor.

Project proposals from competent State bodies

Based on the approved master plan, plans and programs for investment in infrastructure development, the competent State bodies will formulate project proposals based on the following:

- proposed scale, output, location, construction area, items of works and land use requirements;
- analysis and preliminary selection of technology and technical aspects; terms applicable to the supply of raw materials, materials and equipment, energy, services and technical infrastructure; preliminary plan on site clearance

and re-settlement (if any); and preliminary assessment of project impact on the ecological and social environment;

- proposed schedule for construction of the works (commencement and completion, testing and commissioning the works for commercial operation); duration of operation of the works, and the method for organising management and commercial operation of the investor;
- preliminary determination of all types of fees and charges for goods and services expected to be collectible from commercial operation of the works;
- conditions and method for handing over and receiving the works;
- estimated total investment capital, fixing the preliminary amount of the State participation and recommendations on the special mechanisms used to support the project;
- analysis of overall effectiveness of the project including its necessity, and the advantages and socio-economic efficiency of implementing the project in the PPP form of investment rather than in the form of total investment from the State budget.

Project proposals from investors

Though not encouraged by the Government, in a number of cases, investors may initiate the formulation of project proposals based on the criteria mentioned above.

Project portfolio and its announcement

As mentioned above, a project proposal may originate from a competent State body or an investor. An approved project proposal will be assessed and, if successful, developed into a “project portfolio”.

This list of projects will be announced in the Tendering Newsletter and on the website of the MPI, and may also be published on the websites of other ministries, ministerial equivalent bodies and

provincial people’s committees and on other mass media in order to facilitate access to information by interested entities.

Feasibility study reports

A competent State body will be responsible, based on the approved project portfolio, to organise the formulation of the feasibility study report in respect of a project.

The feasibility study report must be formulated in accordance with current provisions of law and international customs in order to ensure that the project is able to raise investment capital from the domestic and international capital markets.

Such a report must contain the following main particulars:

- scale, output, location, construction area, items of works and land use requirements;
- analysis and selection of technology and technical aspects; terms applicable to the supply of raw materials, materials and equipment, energy, services and technical infrastructure; plan on site clearance and re-settlement; and assessment of project impact on the ecological and social environment;
- schedule for construction of the works (commencement and completion, testing and commissioning the works for commercial operation); duration of operation of the works, and method for organising management and commercial operation of the investor;
- total investment capital;
- amount of fees users will pay for public goods and services expected to be collectible from commercial operation of the works;
- conditions and method for handing over and receiving the works;
- proposed amount of the State participation in the project and proposed special mechanisms of the project;

- analysis of overall effectiveness of the project including its necessity, and advantages and socio-economic efficiency of implementing the project in the PPP form of investment rather than in the form of total investment from the State budget.

Formulation, evaluation and approval of feasibility study report

Based on the List of Projects prescribed in these Regulations, the competent State body will hold international open tendering process to select consultants to formulate the feasibility study report. The PM or the person authorised by him will approve the results of this selection process based on an evaluation by the MPI.

Within 30 days from approval of the selected consultants, the competent State body or its subsidiary, delegated with authority, will sign and commence performance of a contract with the selected consultants to formulate the feasibility study report.

The MPI will conduct an evaluation of the feasibility study report, including such items as total investment capital, State participation, special mechanisms of the project and other relevant items, and submit same to the PM for approval.

Tendering to select investors

On the basis of an approved feasibility study report, the competent State body will formulate tender invitation documents and hold an open international tendering process to select an investor to implement the project in accordance with the guidelines of the MPI and which is consistent with international customs and practice.

The tender invitation documents must comprise the approved feasibility study report, the proposed amount of the State participation in the project, the proposed special mechanisms of the project, a draft project contract, and the method for assessing tenders and the order and procedures for tendering.

The MPI will evaluate the results of the investor selected to implement the project and submit same to the PM for approval.

Finalisation and signing of project contract

Within 30 days from approval of the selected investor, the competent State body will coordinate with the relevant bodies to finalise and initial a project contract with the selected investor.

After an investment certificate has been issued for the project, the investor and the competent State body will officially sign the project contract.

Issuance of investment certificate and implementation of project

The MPI will be the investment certificate-issuing body for trial PPP projects. The application file and procedures for issuing investment certificates for trial PPP projects, and the contents of investment certificates must comply with the corresponding provisions of the Law on Investment and Article 25 (File, order and procedures for evaluation and issuance of investment certificate) and Article 26 (Contents of investment certificate) of Decree 108.

After the issue of an investment certificate, the investor will conduct business registration to establish the project enterprise to implement the project.

The rights and obligations of the project enterprise during implementation of the project will be agreed by either of the following methods:

- after its establishment, the project enterprise will associate with the investor to form a party to sign the project contract;
- the competent State body, the investor and the project enterprise will sign an agreement permitting the project enterprise to assume and exercise the rights and discharge the obligations of the investor pursuant to the provisions in the project contract. This agreement will form an integral part of the project contract.

The key State actors in the application process and the implementation of the project will be the MPI, the Ministry of Finance, the Ministry of Justice, the State Bank of Vietnam, other ministries, other ministerial equivalent bodies and provincial people's committees and the competent State body.

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