

Vietnam Issues Trial PPP Regulations

On 9 November 2010, the Prime Minister of the Vietnamese Government (PM) signed Decision No. 71/2010/QĐ-TTg issuing the Regulations on the Trial Public Private Partnership Form of Investment (Trial PPP Regulations).

The salient provisions of the Trial PPP Regulations are presented below.

Scope and applicability

The Trial 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 on a trial basis in the PPP form of investment.

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

The trial PPP form of investment will be implemented in the following sectors:

- Roads, highway bridges and tunnels, and ferry landings for road traffic
- Railways, and railway bridges and tunnels
- Traffic in urban areas
- Airports, sea ports and river ports
- Clean water supply systems
- Power plants
- Health (hospitals)
- Environment (waste treatment plants)
- Other projects for infrastructure development

and/or provision of public services as decided by the PM

The Trial PPP Regulations apply to authorised State bodies, investors, organisations and individuals involved in the management and implementation of the foregoing projects.

Criteria for selection of projects

Projects implemented in the trial PPP form of investment must meet one of the following criteria:

- The project is important and large-scale, and urgently required for development of the economy.
- The project will be able to generate a reasonable return on capital to the investor.
- The project is able to take advantage of the technology, managerial and operational experience, and effectively utilise the financial capacity of the private sector.
- Other criteria as decided by the PM.

State bodies authorised to enter into and implement project contracts

The State body authorised to enter into and implement project contracts means any ministry, ministerial equivalent body, Government body, people's committee of a province or city under central authority.

The authorised State body means the party participating in a project contract and performing the rights, obligations and responsibilities as agreed with the investor in the project contract.

State participation

State participation means a combination of the following forms of State participation, namely: State capital, investment incentives, and relevant financial policies included in the total investment amount (total investment capital) of the project to increase its feasibility. The State participation may include one or more of the above-mentioned items, depending on the nature of each project. The State participation is not an equity contribution in the project enterprise and is not associated with any right to receive profit distribution from project revenue.

The PM will make a decision on State participation on the basis of a proposal from the authorised State body and an evaluation by the Ministry of Planning and Investment. The total value of State participation must not exceed 30% of the total investment capital of a project, unless otherwise decided by the PM.

Project preparation

• Project proposals

A project proposal may originate from an authorised State body or an investor, comprising the following items:

- » proposed scale, output, location, measurements of the construction area, items of works and land use requirements
- » compliance of the project with the sectors and criteria for selection of projects
- » 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 method of the investor for organising management and commercial operation

- » preliminary determination of all types of fees and charges for goods and services proposed to be collectible from commercial operation of the facility
- » conditions and method for handing over and receiving the facility
- » estimated total investment capital, preliminary determination of the amount of the State participation and recommendations on the incentive and investment guarantee regime for the project
- » analysis of overall effectiveness of the project including its necessity, advantages and socio-economic efficiency of implementing it in the PPP form of investment rather than in the form of total investment with State capital, and the feasibility of raising investment capital

• Project portfolio and feasibility study report

Project proposals will be assessed and, if successful, developed into a “project portfolio”. This project portfolio 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, branches and provincial people’s committees, and in other mass media (where necessary).

Based on the project portfolio, an authorised State body will hold tendering to select a consultant to formulate the feasibility study report. In addition to the contents in the project proposal, the feasibility study report must include an analysis of the risks, rights and obligations of the parties.

• Selection of investors

On the basis of an approved feasibility study report, the authorised State body will formulate tender invitation documents and hold an open international tendering process to select an investor to implement the project.

Project contract

A project contract means a contract signed between an authorised State body and an investor in which the State cedes the right and grants permission to the investor to make the investment, and to operate the project works and/or to provide public services for a specified duration. Depending on the nature of each specific project, the project contract will provide for undertakings on responsibilities, obligations and powers of the investor and of the authorised State body, and the relationship between the State and the investor.

Such contract must stipulate the objectives, scope and contents of the project, and the rights and obligations of the parties in the design, construction, commercial operation and management of the project works.

- **Project step-in right and assignment of rights and obligations**

The parties may agree on the right of the lender to take over part or all of the rights and obligations of the project enterprise in a case when the project enterprise or investor fails to discharge its obligations under the project contract or loan agreement. After stepping in, the lender must discharge all of the corresponding obligations of the project enterprise or investor as prescribed in the project contract.

- **Duration of project contract**

The duration of a project contract will be as agreed by the parties, consistent with the sector, size and nature of the project, and may be extended or shortened pursuant to conditions stipulated in the project contract.

- **Termination of project contract**

A project contract will terminate on expiry of the agreed duration or on early termination due to breach by one of the parties without effective measures for remedying such breach or due to an event of force majeure or other circumstances stipulated in the project contract.

- **Applicability of foreign law governing project contract relationship**

Foreign law may apply for each specific project on condition that such application must not be inconsistent with Vietnamese law.

Issuance of investment certificate and implementation of project

Each application for issuance of an investment certificate should comprise:

- Request for issuance of an investment certificate
- Initialled project contract and any other contracts relevant to implementation of the project
- Feasibility study report
- Joint venture contract and charter of the project enterprise (if any)

Within 45 business days from receipt of a valid application, the MPI will conduct an evaluation on the following particulars:

- Rights and obligations of the parties to the project contract
- Schedule for project implementation
- Land use requirements
- Environmental solutions
- State participation, investment incentives and the regime ensuring project implementation

The investment certificate to be issued will contain the following basic items:

- Name and address of the investor
- Name of the project
- Objectives and size of the project
- Location for implementing the project and measurements of land use area
- Total investment capital of the project
- Duration and schedule for implementing the project, and schedule for raising capital under the project contract
- Investment incentives and guarantees (if any)

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; or
- the authorised State body, the investor and the project enterprise will sign an agreement permitting the project enterprise to assume and perform the rights and obligations of the investor pursuant to the provisions in the project contract.

Investment incentives

A project enterprise is entitled to corporate income tax incentives, exemption from land use fees for the area of land allocated by the State or from land rent for the whole duration of implementation of the project. Goods imported to implement projects will enjoy incentives stipulated in the Law on Import and Export Duties.

A project enterprise is permitted to pledge and/or mortgage assets and land use rights in accordance with Vietnamese law.

Effective date

The Trial PPP Regulations will take effect as from 15 January 2011 and will be implemented for 3 to 5 years until they are replaced by a Government decree on the PPP form of investment.

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