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LEGAL ALERT

PUBLIC PRIVATE PARTNERSHIP (PPP)

READY TO TAKE OFF

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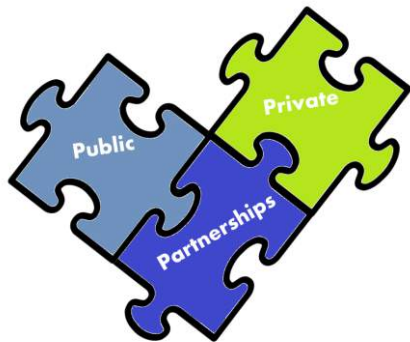


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PUBLIC PRIVATE PARTNERSHIP (PPP) READY TO TAKE OFF



In November 2010, a pilot investment scheme of public-private partnership (**PPP**) was introduced under Decision 71/2010/QĐ-TTg (Prime Minister, 9 November 2010) (**Decision 71**), which was expected to boost the PPP projects in Vietnam. As of 2014, there have been 38 PPP infrastructure development projects that have been proposed to the government; however none of them have been implemented...¹ From a legal perspective, Decision 71 appears as a half truth since it is not an official legal framework for PPP projects. Beside, Decision 71 confuses investors with government decrees on build-operate-transfer (BOT), build-transfer-operate (BTO), and build-transfer (BT), i.e., Decree No. 108/2009/NĐ-CP (Government, 27 November 2009) and its amendment from time to time (**Decree 108**). Indeed, most of the infrastructure projects in Vietnam have been carried out in accordance with Decree 108 rather than Decision 71. Now, the Government promulgates Decree 15/2015/NĐ-CP (**Decree 15**) on 14 February 2015 to introduce a comprehensive legal framework for PPP projects, replacing Decision 71 and Decree 108. Apart from regulations that remain unchanged, Decree 15 introduces salient new regulations which may drive PPP projects forward.

1. Eligible Projects for PPP

The list of the eligible projects for PPP under Decree 15 emphasizes the need of the government to develop integrated infrastructure delivery programs which have the potential to contribute to national economic development. Decree 15 sets forth that PPP is an investment arrangement between a competent authority, investor and project company to perform, manage and operate infrastructure and public service projects including:

- (i) transport infrastructure works and related services;

¹ *4 năm chưa dự án PPP nào được triển khai* (in Vietnamese only) available at <http://vnexpress.net/tin-tuc/thoi-su/giao-thong/4-nam-chua-du-an-ppp-nao-duoc-trien-khai-2971557.html>

- (ii) lighting systems; clean water supply systems; drainage system; waste and waste water collection and treatment system; social housing; resettlement housing; cemetery;
- (iii) Power plants, transmission lines;
- (iv) health, education, training, vocational training, culture, sports infrastructure works and related services; office of state agencies;
- (v) science and technology, meteorological and economic zones, industrial parks, high-tech zone, information technology park; application of information technology;
- (vi) agriculture and rural development infrastructure and services associated with processing and consumption of agricultural products; and
- (vii) Other areas as decided by the Prime Minister.

2. Financial Structure

Except operate-manage (OM) projects and projects in item 1(vi) above, a PPP project shall have a minimum total investment capital of 20 billion Vietnam dong. Decree 15 allows the investors and the State to allocate the financial resources and accordingly share the financial risks without cap, whilst each stakeholder shall be subject to statutory conditions.

Private Participation

Private participation shall comprise of the investor equity capital and other funding sources which the investor is responsible to mobilize.

The investor equity capital shall be not lower than 15% of the total investment capital. In case the total investment capital is higher than 1,500 billion Vietnam dong, the equity capital shall not be lower than 15% for the portion under 1,500 billion Vietnam dong, and for the portion above 1,500 billion Vietnam dong, it shall not be lower than 10%.

Regarding the loan capital, Decree 15 is unclear whether the investor may involve State guarantee, while previous legislation specifically set forth that loan capital shall be mobilized without increasing the public debt burden. Article 57 of Decree 15 reads that the government may mandate an agency, on and for behalf of the government, to guarantee the material supply, product and service consumption and other obligations of the investor, the project company or other companies participating in the PPP project.

State Funding

Before Decree 15, State participation in a PPP projects is capped at 30% under Decision 71 and 49% under Decree 108. These caps had the effect of rendering PPP projects less attractive to investors, as they will have to retain a greater risk burden than the state; Decree 15 removes these caps. Yet the State funding is limited within following purposes:

- (i) capital contribution for construction works of project with business and fee collection from end-users, yet the collection is not sufficient for return on investment and profit;
- (ii) payment for investor providing services in accordance with build-transfer-lease (BTL), build-lease-transfer (BLT), and similar contracts; and
- (iii) support for construction of auxiliary works, site clearance, compensation, and resettlement.

State funding shall include funds from the State budget, central government bonds, local government bond, official development assistance and incentive loans from foreign sponsor.

3. Legal Perspective

Forms of PPP contract

Decree 15 expands on the number of PPP forms available, laying the legal foundation for contracts of build-operate-transfer (BOT); build-operate-transfer (BTO); build-transfer (BT); build-operate-own (BOO); build-transfer-lease (BTL); build-lease-transfer (BLT); and operate-manage (O&M). Subject to these forms of contract, authority who has power to sign and implement PPP contract may propose other similar contract for the review and approval of the Prime Minister. Previously, Decree 108 only governed BOT, BTO, and BT while Decision 71 was silent on the forms of PPP contract.

Governing Law

Decree 15 allows parties to choose applicable foreign laws to govern project contracts and contracts guaranteed by the government. Under either scenario, the choice of foreign governing law will not have jurisdiction over Vietnamese regulations on the application of foreign law.

From this perspective, it is possibly the first time that domestic legislation refers to a specific regulations rather than the general term “*fundamental principle of Vietnamese laws*” which has no definition under the law.

Dispute Resolution

Dispute in a PPP project may be resolved by court or arbitration subject to the parties’ agreement. Decree 15 makes it clear that disputes which are resolved by arbitration in accordance with project contract and related contracts are commercial disputes. Vietnamese laws only have regulations on commercial arbitration, thus, if the dispute is not commercial, the choice of arbitration would be null and void. Under Decree 15, the resolution schemes are different between the dispute of the State agency with local and foreign investors.

	State Agency	Local Investor / Project Company / Other Company	Foreign Investor / Project Company / Other Company
State Agency	x	*	**
Local Investor / Local Project Company	*	x	***
Foreign Investor / Foreign Project Company	**	***	x

* Amicable negotiation and settlement is required before the dispute shall be resolved by Vietnamese court or arbitration in accordance with Vietnamese laws.

** Dispute shall be resolved by Vietnamese court or arbitration or arbitral tribunal agreed by the parties. Amicable negotiation and settlement is not required.

*** Disputes shall be resolved in accordance with laws on investment. According to the new Law on Investment, which shall take effect as of 1 July 2015, any dispute between investors when at least one party is a foreign investor or economic organization with foreign owned capital prescribed shall be resolved by Vietnamese court, Vietnamese arbitration body, foreign arbitration body, international arbitration body, and an arbitration tribunal established in accordance with the agreement of the disputing parties.

4. Protection of Lender

Decree 15 provides the lender with the authority to designate a capable organization to take over all or part of rights and obligations of the investor or the project company in case the investor or the project company fails to perform on its obligations under the PPP project contract or loan agreement. An agreement on such a takeover shall be made between lender and competent authority or parties of the PPP project contract. Decree 15 also allows the investor to assign all or part of its rights and obligations under the PPP project contract to the lender or another investor. In this case, an assignment agreement shall also be made between the assignee and the parties to the PPP project contract.

5. PPP Flow Chart

Below is a general flow chart showing the process from initiative to execution of the PPP project contract. It is still a lengthy process for investor to pursue a PPP project. Decree 15 allows a conversion of a public project into a PPP project provided that it satisfies requirements under Decree 15. However, further guidance is expected since it is not clear whether such conversion would require stakeholders to perform all the processes below.



This Legal Alert is not a Legal Advice.

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