

Vietnam: Decree guiding Law on Public Private Partnership

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Vietnam released two decrees guiding Law on Public Private Partnership (**PPP Law**) with immediate effect on 26 March 2021: (1) Decree 28/2021/ND-CP on the financial management mechanism of PPP projects (**Decree 28**) and (2) Decree 35/2021/ND-CP on the implementation of the PPP Law (**Decree 35**). Decree 35 provides detailed regulations to clarify the procedures of the investment in PPP form and the selection of investor for a PPP project. This Decree 35 is the combination, with certain revisions, of two earlier draft decrees published in November 2020, on investor selection and general guidance of PPP Law. We will discuss key points of Decree 35 in this article.

I. Sectors and sizes of PPP projects

Sectors and sizes of PPP projects remain the same as the latest draft published in November 2020 and are set out as below.

Sectors	Minimum investment capital
Transport	VND1.5 trillion
Power grid, power plants	Renewable energy projects: VND500 billion Others: VND1.5 trillion
Irrigation; clean water supply; water drainage and waste water treatment; and waste disposal	VND200 billion
Health, education and training	VND100 billion
Information technology infrastructure	VND200 billion

O&M contracts are not subject to the minimum investment capital.

II. Licensing procedure for PPP project

1. Approval for making Pre-FS

A PPP project may be proposed by either the competent authority or an investor. In the case an investor proposes a PPP project to the authority and it is accepted, the authority will issue an approval for the proposing investor to make a Pre-Feasibility Study (**Pre-FS**). In accordance with Article 22.2 of Decree 35, the approval shall clearly state that the proposing investor bears all risks and costs if the proposed project is not approved (*i.e.*, IPA and/or IA (as defined below) is not issued). For hi-tech, new technology projects, the approval shall also clearly define the cost for making Pre-FS and settlement principle in the case the proposing investor is not selected to be the investor of the PPP project.

2. Pre-FS and IPA

Based on the Pre-FS, the competent authority will consider and issue an investment policy approval (**IPA**) for the PPP project. Decree 35 provides templates for Pre-FS and IPA in its Appendix II.

Notably, although the IPA is issued at this stage, the investor selection must follow a complex procedure as discussed in III below. The competent authority may include certain special provisions in the IPA. For example, for projects using high-tech, new technology, clean technology which are incentivized, the authority may set out in the IPA the investor selection method to be a competitive negotiation (as further discussed in 3.2 below). In respect of projects applying mechanism of revenue decrease sharing¹, IPA must specify the sources to pay settlement fee (whether it is from central or local budget source).

3. FS and IA

Except for hi-tech projects or new technology projects (the FS of which will be made by the selected investor), once IPA is issued, FS must be prepared by either the authority or the proposing investor so that the competent authority will evaluate and issue an investment approval (**IA**) for the PPP project. Decree 35 provides templates for FS and IA in its Appendix III. The selected investor shall reimburse costs for making Pre-FS or FS to the proposing investor in case the proposing investor is not selected.

¹ Pursuant to Article 82.2 of PPP Law, when the actual revenue falls under 75% of the financial plan attached to PPP contract, the State shall share half of the difference between revenue projected at 75% and the actual revenue with investors/project company satisfying the following conditions: (i) the project is a BOT, BTO or BOO project, (ii) revenue decrease was caused by a change in relevant laws, (iii) all methods of amending prices, costs, fees of public products/services, and amending contract term as contemplated under PPP Law have been fully implemented but the revenue cannot reach 75% of the expectation, and (iv) revenue decrease has been audited by the State Audit. Detailed mechanism of revenue decrease sharing is regulated under Decree 28.

During the course of making FS (if prepared by the authority) or upon completion of FS (if prepared by the proposing investor), the competent authority shall survey the interest of investors. The survey is not required for projects where the investor selection is conducted by way of the Prime Minister approving the investor appointment (as further discussed in 3.3 below).

III. Selection of investor for PPP project

1. Independence of investor from a legal and financial perspective

Article 30 of PPP Law stipulates that the investor must be legally and financially independent with the Consulting Contracts (as defined below), the competent authority, the signing authority and the bid solicitor. To clarify Article 30 of PPP Law, Decree 35 stipulates in details that bidders are determined as independent from a legal and financial perspective in the following circumstances:

- From the time of issuing an invitation for prequalification/bidding/negotiation (as described in 3 below), the investor must have no shares or capital interests in the following consulting contractors (**Consulting Contractors**): consultants preparing pre-FS/FS (save for projects proposed by investor); consultants appraising Pre-FS/FS; consultants preparing/appraising the dossiers to invite prequalification/bidding/negotiation or appraising prequalification/bidding/negotiation application; consultants monitoring the contract implementation or supervising the PPP project.
- From the time of issuing an invitation for prequalification/bidding/negotiation, none of the investor and Consulting Contractors shall have more than 30% of its shares or capital interests held by an entity or individual.
- For the investor being in a group of companies, the parent company, the subsidiary or the consortium among the parent company and the subsidiaries may only bid in one application. The investor must not be in the same group of companies with the Consulting Contractors.
- From the time of issuing an invitation for prequalification/bidding/negotiation, the investor, the bid solicitor and the competent authority must not hold cross-ownership of more than 50% of each other's shares or capital interests.

2. Method of investor selection

The PPP Law provides four methods of investor selection: (1) open bidding, (2) competitive negotiation, (3) appointment of investor, and (4) selection of investor in special cases. Decree 35 further clarifies that prior to the investor selection under methods (1) and (2), the competent authority must carry out a survey of investors who are interested in the PPP project and based on the results of the interest survey, the competent authority shall determine the methods of investor selection as below:

Method of investor selection	Results of interest survey
<i>2.1. Open bidding</i>	
(a) International open bidding with pre-qualification	6 interested investors or more, with at least 1 foreign investor
(b) Domestic open bidding with pre-qualification	6 interested Vietnamese investors or more
(c) International open bidding	Fewer than 6 interested investors, with at least 1 foreign investor
(d) Domestic open bidding	Fewer than 6 interested Vietnamese investors
<i>2.2. Competitive negotiation</i>	Projects applying incentivized high technology in accordance with high technology law, or new technology according to technology transfer law; or No more than 3 interested investors satisfying performance requirements of the project

The interest survey does not seem to apply for methods (3) and (4).

3. Procedure of investor selection

A set of complex procedures are provided under Decree 35 which vary depending on the method of investor selection and such procedures are briefed in the appendix V to Decree 35. Key notes of those procedures are:

3.1. Open bidding

Open bidding may include the pre-qualification stage if the project situation falls in cases 2.1(a) or (b) above. If the bidding is taken with the pre-qualification step, the investors are appraised on financial and commercial competence, key personnel competence, and operation experience. As a result of the pre-qualification, a shortlist of bidders is made and only those bidders in such shortlist may receive invitation for bid. With respect to the other cases of the open bidding, 2.1(c) and (d) above, there is no pre-qualification step, and the bidders may find the invitation for bid and relevant documents uploaded on the national tendering network.

At the bidding stage, the application includes technical proposal and financial-commercial proposal separately sealed and concurrently submitted to the bid solicitor. The applications are then opened in separate stages, with technical proposals to be opened in advance. The result of the bidding is a ranking of bidders, and the highest-ranked investor becomes the bid winner who is invited to negotiate and conclude the PPP contract.

3.2. Competitive negotiation

In this method, the pre-qualification step may be applied for high-tech projects or new technology projects. Accordingly, the investors shall be appraised on financial – commercial competence, key personnel competence, operation experience, and technical and technology use rights. As a result, a shortlist of 3 to 6 investors shall be invited for competitive negotiation. The following competitive negotiation includes two rounds occurring between the representatives of the bid solicitor and each of the shortlisted investors concurrently and separately. The first round is for the bid solicitor to request investors to adjust the bid, and the second round is for the parties to finalize the invitation for the bid and the bid application. After the competitive negotiation, investors will join the bid. A bid application includes only one proposal containing both technical factors and financial – commercial factors. When the applications are opened, the technical factors will be evaluated first, and then the technical qualified investors will be considered from a financial and commercial perspective.

3.3. Investor appointment

In the case the investor is appointed to replace the terminated investor in performing an ongoing PPP project, not only the signing authority but also lenders will determine and appraise the requirements of the appointed investor.

IV. Further guidance on PPP contracts

Decree 35 specifies the security deposit requirements that the project company must pay to the competent authority to secure the performance of the PPP projects before the contract performance. The security deposit varies from 1.5% to 3% for projects with a total investment of less than VND 300 billion, and 1% to 1.5% for projects with a total investment of VND 300 billion or more, and it shall be specified in the invitation for a bid.

As to the project contracts, Decree 35 provides guidelines for preparing a PPP contract template (a list of items to be stipulated in the PPP contract) in its Appendix IV based on which the Ministry of Planning and Investment will draft and publish a full template of the PPP contract.

Notably, Decree 35 provides that the PPP contract must include a formula or method for determination of expenses for terminating the PPP contract in the case of early termination. The PPP contract also must include the provision stipulating compensation in the case of termination due to a material breach of the signing authority, which will pay to the terminated investor from the following sources (i) public capital by making the project to be a public capital project, (ii) reserve fund of public capital, or (iii) other lawful capital sources. The termination and the compensation must be approved by the competent authority (i.e. the superior of the signing authority). Decree 35 also contemplates the possibility of acquiring the project company with expenses funded from State capital.

V. Conclusion

The release of Decree 35 gives a more thorough look at regulations on PPP investment, namely applicable scope and procedures for making Pre-FS/FS and selecting investors for a PPP project. However, several issues remain ambiguous, especially regarding terms and conditions of a PPP contract, such as any exception for applying foreign laws, or specific application of termination compensation. Updates on any future guidance may be discussed later.

End

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