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**LAW ON  
INVESTMENT IN  
PUBLIC-PRIVATE PARTNERSHIP FORM**  
- Updates and Key Consideration –  
AUGUST 2020

On 18 June 2020, with 92.75% of favourable votes, the National Assembly officially approved the promulgation of Law No. 64/2020/QH14 on Investment in Public-Private Partnership Form (the “**Law on PPP Investment**”) which clearly sets out the framework for the investment in Public-Private Partnership (PPP) sectors, through which encouraging the investors to join with the State in implementing the PPP projects. The Law on PPP Investment consolidates the relevant provisions in separate legal instruments into one, clarifies certain issues under the current prevailing provisions and makes the changes that are expected to further incentivize the PPP projects and attract more private investment in the PPP projects.

This Newsletter introduces notable amendments to the current framework governing investment activities in PPP form under the Law on PPP Investment, which will come to effect as from 1 January 2021.

### **1. Business Sectors Permitted for Investment in PPP Form**

Current Decree No. 63/2018/ND-CP dated 4 May 2018 on Investment in PPP Form provides for a list of business sectors the investment into which is “encouraged” to be made in PPP form. Contrary to Decree 63, the Law on PPP Investment clarifies the categories of business permitted, instead of “encouraged” as under Decree 63, to be implemented in PPP form, including:

- (i) Transportation;
- (ii) Power grids, power plants, except for the hydroelectric plants and the cases of monopoly by the State as prescribed by the Law on Electricity;
- (iii) Irrigation, clean water supply; water drainage and wastewater; waste treatment;
- (iv) Health; education and training; and
- (v) Information technology [IT] infrastructure works.

### **2. Minimum Investment Capital of A PPP Project**

The Law on PPP Investment for the first time sets out the minimum level of the total investment capital of a PPP project

(except for those implemented under operate-manage contract). In particular:

- a) For the PPP projects in sectors of transportation, power grids, power plants (except for the hydroelectric plants and the cases of monopoly by the State as prescribed by the Law on Electricity), irrigation, clean water supply; water drainage and wastewater; waste treatment and IT infrastructure works, the total investment capital of a project must be:
  - (i) at least VND200billion (approximately USD8.67 million); or
  - (ii) at least VND100billion (approximately USD4.34 million) in case of PPP projects in areas with difficult socio-economic conditions or areas with specially difficult socio-economic conditions.
- b) For the PPP project in sectors of health, education and training, the total investment capital of a project must be at least VND100billion (approximately USD4.3million).

### **3. PPP Contracts**

Under the Law on PPP Investment, there are seven types of PPP Contracts including:

- (i) build – operate – transfer (BOT);
- (ii) build – transfer – operate (BTO);
- (iii) build – own – operate (BOO);
- (iv) operate – manage (O&M);
- (v) build – transfer – lease (BTL);
- (vi) build – lease – transfer (BLT); and
- (vii) mixed contract (i.e. contract mixed between the above six types of contracts).

Under this new law, the build-transfer (BT) contract form is removed. The reasoning for such removal may come from the negative impacts that the BT

projects caused to the public in the past time.

#### **4. Valid Status of Investor**

The conditions of valid status of an individual or an organisational investor, are currently provided under prevailing Law No. 43/2013/QH13 dated 26 November 2013 on Tendering. Under the Law on PPP Investment, the individual investors are not allowed to invest in PPP form and consequently, that Law only sets out conditions applicable to organisational investors. Those conditions include the following:

- (i) the investor's establishment and operation registration certificate is issued by the competent authority of the country or territory where such investor is currently operating;
- (ii) the investor conducts independent cost accounting and ensures competition during the selection of investor;
- (iii) the investor is not currently in the process of dissolution or does not fall within the cases of insolvency as stipulated by the laws;
- (iv) the investor is not currently prohibited from participating in investment activities in the PPP form;
- (v) in case where the investor is a State-owned-enterprise 100% charter capital of which is held by the State, there must be a partnership with an investor in the private sector in order to participate in the tendering;
- (vi) the investor established pursuant to foreign law must satisfy the conditions on market access where applicable.

#### **5. Methods of Selecting Investor**

The open tendering method would apply to all PPP projects without limitation to the number of investors participating in the tendering, while other methods including competitive negotiation, direct appointment and selection of investors in special cases are subject to satisfaction

of certain specific conditions on number of investors and nature of the projects.

Besides, the competitive negotiation is the new method for selection of investors which is introduced for the first time by the Law on PPP Investment.



#### **6. Transfer of Shareholding, Capital Contribution Portions, and Assignment of Rights and Obligations in PPP Contracts**

Currently, Decree No. 63/2018/ND-CP allows the lender of the investor and/or the PPP project enterprise to:

- (i) receive or appoint any third party to receive partly or wholly the rights and obligations of the investor or the PPP project enterprise in case the investor or the PPP project enterprise fails to fulfil its obligations under PPP project contracts or loan contracts; and
- (ii) receive the assignment of a part or a whole of the rights and obligations of the investor (a) after completion of construction of the facility if the project has construction component or (b) upon entering into the operational phase if the project does not have construction component.

Those rights of the lender no longer exist in the Law on PPP Investment. The Law on PPP Investment only grants to any other investor who is eligible for implementing the PPP projects the right to receive the assignment of a part or a whole of the rights and obligations of the initial investor.

The new provisions of the Law on PPP Investment allow the assignment of

shareholding, capital contribution portions between the partner investors in case of a partnership PPP project enterprise provided that the assignment ensures the minimum equity ratios of each partner investor. In particular, the head investor in the partnership must have 30% of equity contribution at least, and each other member of the partnership must have a minimum of 15% of the equity contribution.

**7. Limiting State Capital for Certain Support and Assistance to PPP Projects**

The negative effect of current regulations governing the investment in PPP form is to give chance for the investors to mostly rely on the support from the State. The Law on PPP Investment sets out a limit on the participation of the State whereby the State's support in following items shall not exceed 50% of the total investment capital of the PPP project:

- (i) construction of the works/infrastructure system belonging to the PPP project's facility; and
- (ii) provision of the fund for payment of compensation, site clearance, for assistance purpose, resettlement, and building auxiliary works.

**8. Minimum Capital Contribution by Investors**

Under the current regulations, the capital to be contributed by the investors shall be from 10% to 20% of the total investment capital of the PPP project depending on the capital scale of such project.

Under the Law on PPP Investment, that ratio is 15% of the total investment amount of the PPP project regardless of its capital scale. Such total investment amount excludes the State capital for support in construction of the works/infrastructure system [facility], compensation and site clearance, for assistance purpose, support in resettlement, and construction of temporary auxiliary works. This ratio of 15% however may be low and insufficient to ensure the adequate financial capacity of the investors. This may lead to the prolongation of the duration of the project

and other adverse effects on the socio-economic condition.



**9. New Method of Financing**

The Law on PPP Investment also introduces a new method of financing PPP projects which is the private placement of bonds. Specifically, a PPP project enterprise is permitted to make a private placement of bonds (except for privately placed convertible bonds or privately placed bonds with warrants) and redeem those bonds issued by its own to raise capital for the PPP project implementation.

In that situation, the issuance of bonds must satisfy the following conditions:

- (i) the amount of capital raised by the issuance of bonds must not exceed the value of the loan portion prescribed in the PPP project contract; and
- (ii) the amount of capital raised from the issuance of bonds must not be used for any purpose rather than (a) implementing the project in accordance with the PPP project contract OR (b) restructuring debts of the PPP project enterprise; and
- (iii) the PPP project enterprise must open an escrow account to receive payments for the purchase of bonds; and
- (iv) the disbursement of capital amount from the issuance of bonds shall comply with the permitted purposes (i.e. implementing the PPP project or restructuring debts of the PPP project enterprise).

**10. Government Guarantee of Foreign Currency Balance for Important PPP Projects**

For important PPP projects, the Law on PPP Investment sets a limit for the

Government's guarantee of foreign currency balance at 30% of the project's revenue in Vietnam Dong after deducting expenses in Vietnam Dong. The Government's guarantee of foreign currency balance is only allowed if the following conditions are satisfied:

- (i) the PPP project is approved by the National Assembly or Prime Minister on its investment policy; and
- (ii) the market is unable to satisfy the lawful foreign currency requirements of the PPP project enterprise.

The above guarantee, under the Law on PPP Investment, shall be applied to the PPP project enterprise only. The investor is no longer entitled to that guarantee from the Government.



#### **11. Regime on Sharing Revenue Increase or Shortfall**

The Law on PPP Investment introduces the regime on sharing revenue increase and shortfall. In particular:

- a) When the actual turnover is higher than 125% of the level of turnover set out in the financial plan under the PPP project contract, the investor and PPP project enterprise shall share with the State 50% of the difference between the actual turnover and 125% of the level of turnover specified in the financial plan. Sharing turnover increase shall apply upon satisfaction of the following conditions:

- (i) there has been an adjustment of the costs of products or public service fees or an amendment to the PPP project contractual term; and
  - (ii) the State Audit Office has audited the turnover increase.
- b) When the actual turnover is lower than 75% of the level of turnover set out in the financial plan under the PPP project contract, the State shall share with the investor and PPP project enterprise 50% of the difference between 75% of the level of turnover set out in the financial plan and the actual turnover. Sharing turnover shortfall shall apply upon satisfaction of the following conditions:

- (i) the project implemented in the form of BOT, BTO or BOO contracts;
- (ii) the relevant master planning, policies and/or law changed resulting in a turnover shortfall;
- (iii) having taken all measures of adjustment of the costs of products or public service fees or adjustment of the term of the PPP project contract in accordance with the laws but still failing to ensure a minimum of 75% level of turnover; and
- (iv) the State Audit Office has audited the turnover shortfall.

Regime on sharing revenue shortfall must be set out in the investment policy decision. In other words, investment projects with the investment policy decisions of which are granted prior to the effective date of the Law on PPP Investment shall not be entitled to this risk allocation regime.

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