

# Legal Update

June 2018



## NEW DECREE 63/2018/ND-CP ON PUBLIC PRIVATE PARTNERSHIP (PPP)

The new Decree 63/2018/ND-CP ("Decree 63"), which will come into effect on 19 June 2018, introduces a number of major changes to encourage private investors to invest in public private partnership ("PPP") projects. Under this new decree, management and supervision of PPP projects, especially Build-Transfer contracts, is expected to be stricter.

Decree 63, which regulates PPP investments, will replace Decree 15/2015/ND-CP ("Decree 15") and a number of PPP-related articles in Decree 136/2015/ND-CP ("Decree 136"). The significant changes are highlighted below.

### Hybrid contracts recognised as a type of PPP contract

Decree 63 recognises hybrid contracts as another type of PPP contract. A hybrid contract is a combination of the following seven existing types of PPP contracts under Decree 15:

- Build – Operate – Transfer (BOT);
- Build – Transfer – Operate (BTO);
- Build – Transfer (BT);
- Build – Own – Operate (BOO);
- Build – Transfer – Lease (BTL);
- Build – Lease – Transfer (BLT); and
- Operation & Management (O&M).

The application of hybrid contracts in PPP projects is subject to the approval of relevant Ministries and provincial People's Committees; however, approval from the Prime Minister is not required.

The application of other types of contracts will require the approval of the Prime Minister, based on the proposal from relevant Ministries and provincial People's Committees.

Ministries are also tasked with providing guidelines for model PPP project contracts in their respective industries.

### Simplified procedures to implement PPP projects

Under Decree 63, investors are no longer required to obtain an investment registration certificate for a PPP project, which greatly simplifies the procedures to implement PPP projects.

In addition, Decree 63 sets out a new procedure specifically

for high-tech PPP projects which will create more flexibility for investors and reduce time and costs associated with high-tech PPP project implementation. Under this new procedure, the selection of investors will be conducted after the pre-feasibility study and project approval. As a result, the selected investors will be responsible for preparing the feasibility study, instead of the Ministries or provincial People's Committees, as is the case for other projects.

### More sources of the Government's capital to finance execution of PPP projects; increased minimum equity requirements for private investors

The Government generally finances PPP projects through the State budget, Government bonds, municipal bonds, official development assistance (ODA), and concessional loans from foreign sponsors. Under Decree 63, the Government may finance PPP projects through additional means, such as infrastructure assets, or the right to operate construction works or provide services. This amendment will grant more flexibility to the Ministries and provincial People's Committees to mobilise resources for, and to potentially boost the number of, PPP projects.

However, Decree 63 also increases the minimum equity requirement for private investors to 20% for PPP projects with total investment capital of up to VND1,500 billion (about USD66 million), up from 15% as regulated in Decree 15.

For projects with total investment capital of more than VND1,500 billion, the equity of private investors must account for at least 20% for the capital portion of up to VND1,500 billion and at least 10% equity for the remaining capital portion exceeding VND1,500 billion.

This increase in the minimum equity requirement gives further assurances on the financial capabilities of the private investors and the viability of these PPP projects, however, this may pose challenges for many private investors.

### Stricter management over Build-Transfer (BT) projects

In response to recent problems relating to implementation of BT projects, Decree 63 provides Chapter V and a number of articles specifically to govern these types of PPP projects. In particular:

- BT projects are subject to the appraisal and approval of

the State bodies of higher authority. For example, "Group A" projects under BT contracts will be subject to the approval of the Prime Minister; while "Group A" projects under other types of contract and not using the central State budget of VND300 billion or 30% of the total investment capital will be subject to the approval of the provincial People's Councils.

- In addition to the minimum equity requirement provided under Decree 63, private investors performing BT projects are required to meet the minimum equity requirements provided under the regulations on land, construction, housing and real estate (if any).
- There is an additional requirement in the BT project implementation procedures to prepare, appraise and seek approval for design and financial projections in accordance with the construction or relevant regulations.
- Under Decree 15, the land use right was used as the only method of payment for private investors under BT projects. However, this resulted in challenges for the authorities when the land fund became insufficient to fulfill such payments to investors. To address this issue, Decree 63 extends the method of payment for private investors under BT projects which includes infrastructure assets, and the right to operate construction works or provide services.

### More difficult for private investors to transfer PPP projects

Decree 63 sets out a number of more stringent requirements for private investors to assign their rights and obligations in the PPP project contracts to their lender(s) or other investors. In particular, private investors are only allowed to transfer PPP projects upon completion of construction works or commencement of the operation of such projects; and the assignee(s) must satisfy the financial and managerial capability and other requirements. Though the objectives of these new requirements are to ensure the seriousness of the investors and viability of PPP projects, it remains unclear whether this approach sufficiently addresses the challenges in project financing faced by investors at the initial stages of these projects.

### Publish key details of PPP contracts

In addition to the requirement to publish information on PPP projects on the national tender portal within seven working days from the approval of the projects as stipulated in Decree 15, Decree 63 requires that key details of the PPP project contracts (including project names, contract execution dates, identities and particulars of the State bodies and private investors as engaging parties, project location, investment capital, prices and fees of goods/services, etc.) to be published on the same portal within seven working days from the execution of such contracts.

In summary, the new provisions stipulated by Decree 63 address a number of issues currently faced by the relevant State bodies and investors in PPP projects. However, issues affecting private investors, such as complicated and lengthy procedures for appraisal and approval for PPP projects, and risk allocation between the State bodies and private investors, remain unclear and unaddressed. We suspect that these outstanding issues will be further addressed by the Law on Investment in the form of PPP, which is currently being drafted and is expected to be debated by the National Assembly in 2020 or 2021.<sup>1</sup>

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<sup>1</sup>According to Ms. Vu Quynh Le, Deputy Department of Tendering Management of the Ministry of Planning and Investment. Source: vietnambiz.vn

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