

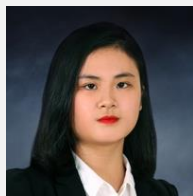
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New points of the Law on Public Private Partnerships (PPP)



Ngan Nguyen
Legal Assistant

The Law on Public-Private Partnership Investment (the “**PPP Law**”) was ratified by the National Assembly on June 18, 2020 and took effect on January 1, 2021. The PPP Law consists of 11 chapters and 101 articles, designed to attract more resources from the private sector, especially foreign investors, while also aiming for sustainable development, “PPP for people” (people-first-PPP) as recommended by the United Nations. The PPP Law clarifies some vague provisions of Decree 63/2018/ND-CP on investment in the form of public-private partnerships (“**Decree 63**”), integrates regulations of Law on Bidding, Law on Public Investment, etc. This new law is considered to create a stronger legal corridor for the implementation of PPP projects.

1. Limit permitted sectors

Number of permitted sectors reduced from 9 to 5 sectors.

The new PPP law provides 5 sectors to apply PPP form, reduced from 9 under Decree 63. The 5 applicable sectors are:

(i) Transportation (ii) Power grids and power plants (except hydro-power plants and fields restricted to the State regulated under the Electricity Law) (iii) Irrigation; clean water supply, sewage and waste treatment (iv) Health care and education; and (v) Information technology infrastructure.

Of which, the minimum investment capital required for PPP projects in health; education and training sector is 100 billion VND (approximately USD4.35 million) and the minimum investment capital required for other projects is 200 billion VND. The minimum capital required for PPP projects in difficult socio-economic areas or extremely difficult socio-economic areas in accordance with the law on investment is not lower than 100 billion VND. There is no minimum investment capital required for PPP projects implemented in the form of O&M contract.

2. New provisions on PPP contracts

Project contract form classification¹

A PPP contract is classified in either (i) project contract applying the mechanism of fee collection directly from users or underwriters of public products and services, including: BOT (build- operate-transfer) contract; BTO (build-transfer-operate) contract; BOO (build-own-operate) contract; Operate-maintain (O&M) contract; or (ii)

¹ Article 45 PPP Law

project contract in which payment is made by the State on the basis of the quality of public products and services, including: BTL (build-transfer-lease) contract and BLT (build-lease-transfer) contracts. The parties can sign mixed contract combining models of the above.

Eliminate BT (build-transfer) contract model

It is practically proved that build-transfer model (BT) has negative consequences and it is not consistent with the principle of public private partnership, the model of BT contract regulated in Decree 63 has been removed. BT projects that have not been obtained in-principal approval of the investment plan shall be ceased as of 15 August 2020 and no new BT project shall be considered going forward.

PPP contracts governing law shall be Vietnamese law

While Decree 63 allowed to apply foreign laws as governing law for PPP contracts and other related contracts and agreements in accordance with the Civil Code², the PPP Law stipulates that PPP project contract, its annexure and other relevant documents signed between a Vietnamese state authority and a PPP project investor or enterprise shall be governed by Vietnamese law. With respect to matters that are not regulated under Vietnamese law, the parties may reach specific agreements in a PPP contract on condition that such agreements are not in contrary to basic principles of Vietnamese law.

3. PPP project appraisal council

The PPP Law specifies the principles of establishment and the operation mechanism of the PPP project appraisal council. Depending on the level of agency approving investment decision, the feasibility study report, the pre-feasibility study report shall be appraised by the State appraisal council; the interdisciplinary appraisal council or the grassroots appraisal council³.

4. State investment in PPP projects

According to Article 69.2 of the PPP Law, the proportion of state capital in a PPP project shall not exceed 50% of the project's total investment. The law also details the use of state capital in PPP projects. In the absence of a decree guiding the use of state capital in PPP projects, regulations limited the uses of state capital, only for the following purposes:

- (i) support for the construction of works and infrastructure systems for a PPP project;
- (ii) payment for land clearance, compensation and resettlement, and support of the construction of temporary works;
- (iii) payment to the project company for providing public products and services (eg, by way of a tariff payment under a PPP concession contract);
- (iv) payment for revenue support in the event of revenue reduction;
- (v) expenses of the different State authorities in signing the project contracts, preparing, pre-feasibility study report and feasibility study

² Article 46 Decree 63

³ Article 6 PPP Law

- report, and their other obligations in implementing a PPP project (i.e., those obligations stemming from the “process to implementing a PPP project”); and
- (vi) expenses of the appraisal committee for evaluating the pre-feasibility study report and feasibility study report.

This could be an obstacle to the implementation of PPP projects in the near future

5. Synchronize regulations on the investor selection process

Bidding requirement on investor selection process was for the first time specifically provided under the PPP law instead of being referred to the Law on Bidding as before. Particularly, the investor selection process is as follows⁴:

- (i) Making shortlist (where applicable);
- (ii) Preparing for selection of the investor;
- (iii) Bidding;
- (iv) Evaluating bidding documents;
- (v) Submitting, assessing, approving and publishing investor selection results;
- (vi) Negotiating, finalizing and concluding PPP contract, and publishing contract information.

6. Bid guarantee

Based on the size and nature of each project, the bid guarantee value is specified in the tender invitation documents for selection of

investors at a determined rate ranging from 0.5% to 1.5% of the total investment of the project. The bid security shall not be refunded in the event that the Investor withdraws the bid during the time the bid is valid or the Investor violates the law on bidding leading to cancellation of the bid or the Investor fail to conduct or refuse to negotiate or finalize the contract within 30 days from the date of receipt of the bid-winning notice from the bid solicitor or to negotiate and finalize the contract but refuse to sign the contract, except in case of force majeure or the PPP project enterprise established by the investor fails to ensure the performance of the contract as prescribed⁵.

7. State guarantee mechanism

Revenue increase/decrease sharing

According to Article 82 of the PPP Law, when the annual revenues reach more than 125% of the revenue in the Financial Plan in a PPP project contract, the investor and the PPP project enterprise shall share 50% with the State the difference between the actual revenue and the 125% of revenue in the financial plan. On the contrary, for projects applying BOT, BTO, BOO contracts, in case the actual annual project revenues fall below 75% of projected revenue in the Financial Plan, subject to certain regulatory conditions, the State shares with the investor, the PPP project enterprise 50% of the difference between the 75% of the revenue in the financial plan and the actual revenue.

The sharing of this increase or decrease in revenue by the State will be applied after adjusting the prices, fees for public products

⁴ Article 28.1 PPP Law

⁵ Article 33 PPP Law

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and services, adjusting the duration of the PPP project contract and the increased/decreased revenue shall be audited by the State Audit.

Foreign currency assurance mechanism for PPP projects

According to Article 81 of the PPP Law, only projects that fall under the authority to decide on investment policies of the National Assembly or the Prime Minister shall be eligible to apply the foreign currency assurance mechanism in pursuant to foreign exchange management policy and the ability to balance foreign currencies from time to time.

Partners / Luật Sư Thành Viên



Nguyen Anh Tuan
M: +84 903404242
tuanna@bizconsult.vn



Nguyen Dang Viet
M: +84 913028222
vietnd@bizconsult.vn



Le Hong Phong
M: +84 915453128
phonglh@bizconsult.vn



Nguyen Trong Nghia
M: +84 936334499
nghiant@bizconsult.vn



Nguyen Bich Van
M: +84 913231019
vannb@bizconsult.vn



Trinh Hoang Lien
M: +84 904242684
lienth@bizconsult.vn



Nguyen Thu Huyen
M: +84 912908579
huyennt@bizconsult.vn



Ha Thi Hai
M: +84 963718558
haiht@bizconsult.vn



Tran Cong Quoc
M: +84 934778119
quoctc@bizconsult.vn

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Bản tin này cùng với các nội dung trong bản tin chỉ nhằm mục đích cung cấp thông tin chung. Chúng tôi không cam kết hoặc bảo đảm về tính chính xác, tính thời sự hoặc sự đầy đủ của các thông tin cung cấp trong bản tin này. Bản tin này thể hiện quan điểm, ý kiến chính thức hay tư vấn pháp luật của chúng tôi. Bạn không nên sử dụng những thông tin trong bản tin này để thay thế cho việc tham khảo ý kiến tư vấn pháp luật của chúng tôi hoặc của luật sư của bạn. Việc bạn sử dụng các thông tin trong bản tin này không hình thành mối quan hệ “luật sư – khách hàng” giữa bạn và chúng tôi, trừ khi và cho đến khi một thoả thuận được ký kết giữa bạn và chúng tôi theo đó chúng tôi được yêu cầu tư vấn về vấn đề cụ thể của bạn.

Chúng tôi giữ quyền sửa đổi, tạm ngừng hoặc ngừng vĩnh viễn hoạt động của bản tin này hoặc bất kỳ phần nào của bản tin mà không thông báo trước. Chúng tôi không chịu bất kỳ trách nhiệm nào về các sửa đổi, tạm ngừng hoặc ngừng vĩnh viễn hoạt động của bản tin này.

Nếu bạn có vấn đề nào cần tư vấn, hãy liên hệ với chúng tôi hoặc yêu cầu luật sư của bạn tư vấn về vấn đề đó cho bạn.

Tất cả các quyền, bao gồm cả quyền sở hữu, quyền tác giả, quyền liên quan và các quyền sở hữu công nghiệp đối với nội dung thông tin, thiết kế, trình bày mỹ thuật của bản tin này thuộc chúng tôi và được bảo vệ theo Luật Sở hữu Trí tuệ Việt nam, các hiệp định, hiệp ước quốc tế mà Việt nam đã ký kết.

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For receiving our LegalNews, kindly contact us / Để nhận các Bản tin Pháp lý, vui lòng liên hệ với chúng tôi:



Trang Vu

Mobile: +84 934551191

trangvm@bizconsult.vn

bizconsult
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No. 20, Tran Hung Dao St.
Hoan Kiem district
Hanoi
Vietnam
E-mail: info-hn@bizconsult.vn

11th Floor, Sailing Tower
111A Pasteur, District 1
Ho Chi Minh City
Vietnam
E-mail: info-hn@bizconsult.vn

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