

Vietnam's new rules on the selection of investors for PPPs 2013 Law on Public Procurement takes effect



INTRODUCTION

Vietnam's Law 43/2013/QH13 on Public Procurement ("**LOPP**"), passed in November 2013, came into effect on 1 July 2014. A significant update to the 2005 Law on Public Procurement, the new law includes provisions on the selection of investors for public-private-partnerships ("**PPPs**"). Previously, the Law on Public Procurement only applied to the selection of contractors for projects that had at least thirty percent (30%) state investment. As the level of state investment is often not clear at the tendering stage, there was often confusion on the rules relating to the selection of investors for PPPs. The LOPP now clarifies that it will apply to all PPPs.

The LOPP is intended to complement other key PPP legislation, such as Decree 108/2009/ND-CP on BOT, BTO, and BOO projects ("**Decree 108**") and Decision 71/2010/QD-ttg on pilot projects involving PPP ("**Decision 71**"). The Government of Vietnam is currently revising Decree 108 and Decision 71 and we understand that it expects to issue a revised PPP decree (to be read alongside the LOPP) in the fourth quarter of this year or early 2015. The Government of Vietnam is also drafting a separate decree on the selection of PPP investors which will give further details and guidelines on the general provisions set out in the LOPP.

By clarifying that PPPs fall within its scope, the LOPP brings a certain standard of transparency to the selection of investors for PPPs. For example, the default selection method is an international competitive tender. Also, Article 89 lists the

forbidden acts in the procurement process, including bribery, collusion, and dishonesty. However, the LOPP falls short of providing a comprehensive and clear legal framework for the selection of investors for PPPs. Instead, it lays out the general overview, and leaves such details for future regulations.

SCOPE OF APPLICATION

Besides including the selection of investors for PPPs within its scope, the LOPP applies to the procurement of consulting and other services, goods, and construction projects using state funds. These include projects by state-owned enterprises and projects where state funding is thirty percent (30%) of the total investment capital or where state funding reaches VN\$500 billion (approximately US\$23.6 million). The law also applies to the selection of investors for projects involving the use of land, and certain petroleum tenders (other than those governed by the Law on Petroleum) (Article 1).

It is not clear whether the LOPP would apply to the selection of sub-contractors under a PPP. As drafted, PPP projects which have more than thirty percent (30%) or VN\$500 billion state funding would require sub-contractors to follow the tendering procedures under the LOPP. The market has expressed concerns that this does not follow international practice which generally permits investors in a PPP project to select their own sub-contractors according to their internal policies, as in a private procurement. We understand that the Government is considering clarifying this in the new decree on selection of PPP investors. It is hoped that the coming decree, once adopted, would allow PPP investors discretion in selecting their own sub-contractors.

ELIGIBILITY CRITERIA

The eligibility criteria require foreign bidders to partner with local companies on bids, unless local companies are not capable of participating in the particular project. While we believe this provision is not intended to apply to the tendering of PPP projects (through the use of the term "contractors" rather than "investors" and through our discussions with the drafters during the drafting process), such intention is not clear in the text of the law. Similarly, Article 14 on preferential treatment for local content does not explicitly exclude PPP projects.

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There are other, more general, eligibility criteria for investors including: being duly registered, having independent auditors, being solvent, fulfilling competition criteria (such as not being affiliated with the procuring entity), being registered on the e-procurement portal, and being shortlisted, where applicable (Article 5).



METHODS OF SELECTION

PPP projects must be internationally tendered (Article 15). The LOPP details several forms for tendering a PPP project, including open tender, limited tender, and direct contracting. In principle, all PPP projects must be subject to open tender for selection of investors (Article 20.2). Limited tenders are for projects that are “highly technical”. It is not specified what criteria apply to determine which projects fall under this category or who decides what qualifies as “highly technical”.

Direct contracting is available for selection of investors where (a) only one investor registers for a tender, (b) only one investor is capable to perform due to IP rights, commercial or technological secrets or funding arrangement reasons and (c) where an investor proposes a project via an unsolicited proposal and the government determines that such investor is most suitable to implement the project. It is hoped that the Government issue further guidelines on (b) and (c) above.

The LOPP provides some general procedures for selection of investor (Section 2) and outlines the steps involved (Articles 55-59) but leaves the details for future regulations. For example, there are no provisions on the process for prequalification of investors or details on the assessment of bids.

COSTS

The LOPP lays out some specific costs related to the bidding process. Bid security must be 0.5% to 1.5% of the total investment capital of the project (Article 11). Expenses relating to the tender must be paid by the selected investor (Article 13). Finally, performance security under the contract

must be 1%-3% of the total investment capital of the project (Article 72).

TYPES OF CONTRACTS

The types of PPP contracts listed in the LOPP include building-operation-transfer (BOT) contract, building-transfer-operation (BTO) contract, building-owning-operation (BOO) contract, building-transfer (BT) contract and other contractual types under the laws and regulations on investment (Article 68). It appears that this clause is intended to be non-exhaustive, allowing the addition of other types of contracts in the laws and regulations on investment. Future PPP regulations will likely set out further details on this.

INSTITUTIONAL FRAMEWORK

The LOPP attempts to set out the responsibilities of the various institutional entities and the role of the Prime Minister (“PM”) and the Ministry of Planning and Investment (“MPI”) relating to the selection of investors (Chapter X). Article 82, for example, states that the PM must approve the investor selection plan in “special circumstances” but does not elaborate on what such circumstances might be. Similarly, Article 83 states that MPI is to appraise projects that fall under the PM’s decision making authority. It is possible that the PPP decree currently being revised will set out details on the circumstances under which a project will require the PM’s authority.

CONCLUSION

While the new LOPP provides some framework for the selection of investors for PPP projects, it may generate more questions than answers for investors looking for guidance on the rules in Vietnam for PPP tenders. While the LOPP is a small step towards a clearer legal regime for procurement of PPP projects, investors will have to wait for further details in future government decrees and regulations.

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