

Improved PPP regulations are expected to revitalize investment in infrastructure projects in Vietnam, but legal instability and entanglements remain investor concerns.



Vietnam's infrastructure has struggled to keep up with its robust economic and population growth.

Rapid economic growth and urbanization are driving demand for roads, power, airports, ports, waste and water treatment, hospitals, and other public infrastructure for goods and services.

Meanwhile, public funding is unable to meet these needs. The gap would have to be made up from other sources including private investment in the form of public-private partnerships (PPPs).

To put it simply, the public sector has the 'users' (or customers) and land and can provide other incentives such as tax breaks. The private sector can bring in technology, capital and efficiency through experience.

Other countries have successfully implemented PPPs. In Vietnam, a number of tools have been created to assist the government in its support for PPPs, aiming to create a much improved

legal framework for PPP to revitalize investment in infrastructure projects.

Legal issues update

The new tools include the Project Development Facility to help make a rigorous assessment of potential projects and the Viability Gap Fund, which provides needed government support to make them financially viable if they are not otherwise.

The government has enacted several laws to promote infrastructure development, especially through private investment.

Decree 15/2015/ND-CP on PPP investment is very promising with regard to the forms of contracts, the various sectors targeted, state support or participation, projects' bankability, and tender requirements.

However, in the process of implementation, there are conflicting legal issues that deter investors from choosing PPP as an investment mode, meaning there are few PPP projects thus far.

For instance, Decree 15 clearly allows project contracts to be governed by foreign laws, namely contracts involving a foreign party and government agency guarantee contracts.

But an issue arises when it comes to real-estate related matters, which are not yet finally decided under the Land Law which will be the governing law.

Moreover, as PPP laws are only at decree level, the regulatory framework for PPP projects mainly includes the Law on Enterprises, Law on Public Investment, Law on Bidding, etc., most of which regulate public investment, and not private, or investment cooperation between the government and private investors.

Investors are also concerned about the stability of PPP regulations since they are mainly decrees. Since a PPP project could take years to complete, regulations in decrees could change and cause investors confusion in the implementation of the laws.

State agencies also face certain difficulties in managing PPP projects. In an actual incident narrated by an officer at the Vietnam Chamber of Commerce and Industry (VCCI), the government once signed a PPP contract with an investor, but later amended the contract value due to changes in policies. As a result, the land price increased 14 times from the previously agreed level, leading to a substantial loss for the investor.

According to the Ministry of Planning and Investment, there will be an expected 598 registered PPP projects in 2016-20 with a total investment of VND250 trillion (\$10.69 billion).

Given the shortcomings of Decree 15, it would be hard to achieve these numbers without its replacement by another decree.

In that context, Decree 63/2018/ND-CP was issued on May 4, 2018, to eliminate bottlenecks in PPP implementation.

Decree 63 - What is new?

Capital contribution responsibility

The investor is responsible for contributing and mobilizing capital for the project, with the ratio of the investor's capital to the owner's equity determined as follows:

For projects with a total investment amount of up to VND1.5 trillion (\$64.13 million), the equity the investor must maintain is at least 20 percent of that amount;

In case of projects worth more than VND1.5 trillion, it must be at least 20 percent of the first VND1.5 trillion and 10 percent of the amount exceeding that.

There is no capital contribution requirement by the government, thus reducing the financial burden on the government.

Payment methods in BT projects

Investors are very interested in well-located lands when implementing build-transfer (BT) projects. However, when the lands gradually run out, BT projects do not seem to attract investors.

Decree 63 has added another method in addition to the exchange of land for infrastructure, so that investors have more options in terms of compensation.

Now investors may also receive payment in the form of transfer of rights to do business, exploit works/ services, etc.

Impact of CPTPP and EVFTA on PPP projects

Covered government entities and agencies

According to Decree 63, tenders for the selection of PPP investors will be governed by the Law on Public Procurement.

While the Law on Public Procurement still has some shortcomings, Vietnam will be bound by its commitments in the Government Procurement chapter in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the EU-Vietnam FTA (EVFTA), including

procedures to carry out a tender and in what specific circumstances the Government must call for a public tender.

Investors now have the opportunity to participate in procurement by Vietnamese government entities and challenge the government if it does not grant them the opportunity to do so in qualified circumstances.

The CPTPP and the EVFTA both make a list of government entities and agencies whose procurement of particular goods and services at a particular amount must be subject to public tender.

While the CPTPP only allows expansion of the list within 5 years of the entry into force of the agreement, the EVFTA allows a longer period of 15 years.

How to appeal government tender decision?

The CPTPP and the EVFTA make it possible for foreign investors to sue the Vietnamese government for its tender decisions according to the dispute settlement by arbitration rules.

The violating party must take all necessary measures to promptly comply with the arbitral decision.

In case of non-compliance, as in the WTO, the CPTPP and the EVFTA allow temporary remedies (compensation) at the request of the complaining party.

Enforcement of arbitral awards

The final arbitral award is binding and enforceable without any question from the local courts

regarding its validity. This is an advantage for investors considering the fact that the percentage of annulled foreign arbitral awards in Vietnam remains relatively high for various reasons.

Conclusion

Vietnam's strong economic growth and its demand for infrastructure development are great opportunities for investors planning to invest in the country. The CPTPP and the EVFTA are effective tools to support foreign investment in Vietnam's infrastructure sector in the form of PPP. Under these agreements, foreign investors could take recourse to arbitration proceedings and have the arbitral awards fully enforced in Vietnam.

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Source: VNE