

CHAPTER 6 PUBLIC-PRIVATE PARTNERSHIPS

OVERVIEW

Modern, efficient infrastructure is vital to continued economic growth and to lowering the cost of doing business. Rapid economic growth and urbanisation are driving high demand for public infrastructure for goods and services. However, Vietnam's infrastructure development needs have been estimated at US\$605 billion from 2021 to 2040. Meanwhile, the infrastructure gap is estimated to be 1.2 % of GDP as of 2019.¹

There has been significant spending on infrastructure projects in Vietnam over the past 20 years. However, the vast majority has been funded by Official Development Aid (ODA), the State budget, and State guarantees of external debt provided by MOF. This is not sustainable in the mid- to long-term, particularly as Vietnam has achieved middle-income status with the resulting reduction of ODA funding. In addition, the Government intends to reduce its exposure to foreign creditors under MOF guarantees, which results in a further tightening of external credit available to finance infrastructure.

Vietnamese commercial banks are increasingly funding infrastructure at a relatively high cost. However, liquidity in the domestic banking market is not sufficient to cover the massive debt finance requirements in this sector. The balance of funding for these requirements, therefore, needs to be accessed from external funding sources willing to offer attractive financing terms and eager to participate in the Vietnamese market. These funding sources, however, require structured solutions in terms of a robust risk allocation between the Government and the private sector investors, including those that can be derived from private investments in the form of public-private partnerships (PPPs), and certainty in relation to Government policies.

Due to difficulties with the evolving PPP regime and the lack of Government policy certainty and risk allocation available, sponsors and investors - particularly foreign private investors - have, in certain sectors such as renewable energy, primarily relied on implementing smaller-scale projects under the Law on Investment, without the protection of a long-term PPP contract and the PPP regulations. This has de facto limited the amount of capital investors are willing to deploy against infrastructure projects in Vietnam, meaning large-scale infrastructure developments remain extremely rare for a country of the scale and growth potential of Vietnam. Whilst the Law on PPP constitutes an important legal development, this will not, by itself, translate into a series of successful privately invested infrastructure projects.

I. DEVELOP A PIPELINE OF VIABLE AND VISIBLE PROJECTS

Relevant authorities: Office of Public-Private Partnership – Public Procurement Agency, Ministry of Planning and Investment (MPI), Ministry of Transport (MOT), authorised State bodies, and other related authorities

Issue description

The success of the PPP legislative framework largely depends on the Government's ability to bring about and promote commercially viable projects, which are visible to foreign investors. There has only been limited progress in this regard.

Clarifying prioritised projects for a PPP project pipeline

Ministry of Planning and Investment, through its Public Procurement Agency, as well as Ministry of Transportation, and certain local authorities such as Ho Chi Minh City's Department of Planning and Investment, have published certain information about potential projects online.² However, the information is not always comprehensive and

¹ Investment forecasts for Vietnam: Global Infrastructure Hub. Available at: <https://www.gihub.org/countries/viet-nam/>, last accessed on 25 October 2023.

² See websites: <http://muasamcong.mpi.gov.vn/> and <https://ppp.tphcm.gov.vn/en/du-an-dang-keu-goi-dau-tu.html> respectively, last accessed on 2 August 2022.

the disparate sources of information introduce the potential for conflicts between them and relevant industry master plans, which can cause confusion for prospective investors. Clear and practical guidance from a single, centralised source of data showing which national-level projects will be prioritised as a “first-in-type”, in which sectors and the support available from the Government (such as assurances regarding revenue streams and incentives), will be critical in attracting cross-border debt and equity funding. This may require a sector-oriented approach including sector-specific regulations.

Unsolicited proposals

Unsolicited projects are permitted by both the Law on Tendering³ (together with its guiding regulations set out in Decree 25⁴) and the Law on PPP. However, to date, no such projects have been publicly reported as having been accepted and the legal aspects of the process remain largely untested. Pending the development of a pipeline of projects to be tendered, clarification of the rules applicable to unsolicited projects is particularly important to get projects “off the ground” and help develop institutional PPP capacity.

Unsolicited project proposals must be approved by the relevant authorised State agency, following which the project proponent must carry out the feasibility study. The project must be put to tender based on the feasibility study prepared by the project proponent, who will be entitled to bidding incentives. This appears, when read with the tendering regulations, to include an increase of the price proposed by other bidders by an additional 5 per cent⁵ when evaluated against that of the project proponent. This has, historically, not been enough of an incentive for investors to propose projects in view of the risk that an investor who develops and proposes an unsolicited project may not be selected as the ultimate investor. In addition, unsolicited projects are only entitled to State capital investment if such State capital is funded by ODA or preferential loans of foreign donors. This narrows down potentially viable projects which may be put forward by potential private project proponents.

Potential gains/concerns for Vietnam

Having tangible projects identified, prepared, and announced to the market (whether greenfield or brownfield) continues to be of the highest priority to kick-start Vietnam’s PPP programme. It is critical that the existing regulations be tested by implementing PPP projects which, in turn, should increase the confidence of investors.

Recommendations

- Publish, through a centralised process, a list of key national and regional projects, particularly in sectors which have a good track record in other jurisdictions with well-trodden models and which are highly sought after by foreign investors such as transportation and energy with the aim of prioritising commercially viable projects as those slated to be implemented as PPPs.
- Clarify the bidding process for unsolicited projects and the process for conversion of State-funded projects into PPP format.
- Submit selected projects to a competitive, transparent tender process as contemplated under the Law on PPP.
- Allow projects to be developed by leading global sponsors based on unsolicited proposals/direct appointment as pilot projects in specified high-priority sectors in order to develop a baseline standard of bankable project documentation and risk allocation which could secure international project financings from foreign lenders.
- Put potential projects through a rigorous commerciality assessment (and appoint reputable international technical and financial consultants to advise and assist relevant Government authorities on such process) involving homogenous international standard screening procedures.
- Provide incentives and attractive measures for sectors struggling to attract PPP investment.

³ Law 43/2013/QH13 dated 26 November 2013 of National Assembly on Tendering (Law on Tendering).

⁴ Decree 25/2020/ND-CP dated 28 February 2020 of the Government implementing the Law on Tendering (Decree 25).

⁵ Article 3 of Decree 25/2020/ND-CP dated 28 February 2020 of the Government on elaboration of some Articles of the Law on Bidding on investor selection.

II. IMPROVE CAPACITY AND COORDINATION AMONGST GOVERNMENT AGENCIES

Relevant authorities: Office of Public-Private Partnership – Public Procurement Agency, Ministry of Planning and Investment (MPI), authorised State bodies, and other related authorities

Issue description

Inconsistent approach among Government authorities

The lack of institutional and practical capacity and the lack of a unified and standardised risk approach among public authorities continue to be frequently cited by potential international project investors and sponsors as major difficulties for carrying out projects, including PPP projects, in Vietnam. There are also only very limited precedents of completed privately invested projects that have secured international project financings. The Government authorities, therefore, often do not have sufficient legal and practical guidance to smoothly manage the implementation of projects, particularly outside the conventional power generation sector.

Lack of coordination among Government authorities

The lack of coordination by the Government and among related authorities has also caused confusion for investors.

Foreign investors have observed that the practice of central and provincial Government authorities is not unified, and different authorities may take different views on the key issues relating to the investability of a project. Provincial authorities, especially in more remote provinces, continue to be left outside the reform process.

Potential gains/concerns for Vietnam

The institutional and practical capacity and coordination issue will, in our view, in addition to the commercial and economic realities of individual PPP projects, continue to be one of the most important factors reducing the competitiveness of Vietnam's PPP programme. Project delays and increase costs could, potentially, result in a loss of investors' patience and interest in the Vietnamese PPP programme. Failing to address this issue in a timely manner will make it even more difficult for Vietnam to develop a competitive and visible project pipeline given the robust PPP programmes in other markets in Southeast Asia.

Recommendations

- Develop (with the help of reputable international consultants with experience in other markets) sets of approved bidding documents, including project contracts containing internationally acceptable risk allocation models, as a basis for bidding to reduce the risk of prolonged negotiation delays.
- Bring in tangible projects in line with international best practices to provide authorised State bodies with hands-on experience.
- Organise capacity-building sessions on the Law on PPP to ensure its cohesive implementation.
- Require a joint implementing process involving all key Ministries and authorities for a unified practice in the identification, assessment and development of projects, potentially leveraging those individuals who have gained experience of bankability issues in the context of successful power projects.

III. RATIONALISE DETAILED IMPLEMENTING REGULATIONS

Relevant authorities: Office of Public-Private Partnership – Public Procurement Agency, Ministry of Planning and Investment (MPI), authorised State bodies, and other related authorities

Issue description

Notwithstanding the significant consolidation brought about by the Law on PPP, particularly as far as investment procedures are concerned, remaining gaps and inconsistencies are likely to frustrate the international financing and development of major infrastructure projects in Vietnam. The Law on PPP should contain a comprehensive and independent framework for the implementation and administration of PPP projects to avoid potential conflicts with other investment regimes.

In addition to the Law on PPP, the Law on Public Investment, and the Law on Tendering, foreign investors in PPP projects also need to comply with other laws and regulations. Ideally, all investor selection processes and criteria applicable to PPP contracts and investments would be included in one all-comprising text (and implementing regulations) to help facilitate this type of investment. Finally, provisions under the Law on PPP do not yet fully address key host country support issues identified in developing and financing infrastructure projects in Vietnam, and there remain gaps which need to be filled.

Security over land and assets attached to land

The Law on PPP states that project land may be used as collateral in accordance with Vietnamese “laws on land and civil laws” – which, therefore, does not go beyond the existing regulations.⁶ These regulations restrict the right to mortgage land-use rights where an investor has benefited from exemptions of land-use fees or rent (as one of the incentives available to investors in PPP projects). In addition, the Land Law continues to prohibit the granting of security over “land and assets attached to the land” to foreign lenders. This inability to mortgage project land, unfortunately, undermines the land-use incentives set out in the Law on PPP and is a critical issue limiting the bankability of PPP projects in Vietnam and the availability of debt funding from foreign lenders.

Foreign currency guarantee

Foreign exchange considerations also continue to affect the attractiveness of PPP projects in Vietnam for investors relying on foreign lending. The Government guarantee of foreign exchange rates is a central issue for investors (and their foreign lenders) seeking to remit capital overseas. The Law on PPP contains provisions to guarantee a maximum of 30 per cent of the VND revenue for PPP projects whose investment policy approvals fall within the authority of the National Assembly, or the Prime Minister.⁷ However, the sufficiency of this threshold remains to be tested outside the conventional power sector, as does the practical implementation of this new provision.

Viability Gap Funding (VGF), minimum revenue guarantees, and risk sharing

Another key area affecting the future development of PPP projects is the absence of any guidance and practice relating to VGF. The Law on PPP does, like its predecessors, appear to envisage the possible availability of VGF at a high level in very general terms, providing that State capital may be used to “provide support” to a project during the construction phase. However, few details have been provided and the Government is directed to “provide guidance” in due course.⁸ Without detailed guidelines regarding the quantification of the State investment capital in a given PPP project in place, it will not be possible to implement a project with VGF terms.

The Law on PPP also introduces a risk-sharing mechanism in which the Government bears 50 per cent of the deficit between actual and “committed” revenue for the project in certain circumstances and would also benefit from 50 per cent of the surplus between actual and committed revenue. It is not clear whether the mechanism is optional for a given project or if it is to apply to all projects (when specific conditions are met), and the guidance of the Government should be clarified in this respect. The revenue decrease share is subject to strict conditions that do not apply where the revenue of a project exceeds projections.

⁶ Article 80.4 of the Law on PPP.

⁷ Article 81.2 of the Law on PPP.

⁸ Articles 69 and 70 of the Law on PPP.

Ideally, the Law on PPP and its guiding documents should avoid being over-prescriptive at this early stage in the evolution of practical PPP project implementation in Vietnam. It should make available a range of funding support and credit enhancement measures, including VGF, minimum revenue guarantees, and risk-sharing provisions. This would maximise flexibility across the wide range of projects that can be implemented in PPP form and enable appropriate support to be selected based on the needs of a given project.

Governing law

The Law on PPP also requires that PPP contracts be governed by Vietnamese law.⁹ This differs from the previous regime under which PPP contracts may be governed by a foreign law in certain circumstances envisaged by the Vietnamese Civil Code. This, broadly, would be where the contract has a “foreign element”, including where one of the parties is an overseas entity. The application of international, neutral, and well-developed bodies of law (usually English law) to BOT project contracts has been and continues to be an absolutely critical bankability issue to mobilise the funds required for large-scale PPP projects. The Law on PPP indicates that “issues not yet regulated by Vietnamese law” may be set out in the PPP contract so long as they are not contrary to “the fundamental principles of Vietnamese law”, which remains an undefined concept subject to a broad interpretation and is too vague to remove the concern of international investors and foreign lenders.

Timing to financial close

The Law on PPP introduces a requirement for sponsors and project companies to achieve financial close within 18 months from the signing of a project agreement for projects approved by the National Assembly or Prime Minister, or 12 months from the signing of a project agreement for other projects.¹⁰ This does seem overly prescriptive in light of the time it has historically taken to negotiate BOT contracts for complex internationally funded power projects. Additionally, the consequences of failing to meet the statutory deadlines on financial close are not clear. Based on the experience of foreign lenders to large-scale projects in Vietnam, the earlier mentioned timelines will be viewed as extremely ambitious and may be a deterrent to investment in view of the lack of certainty in the event they are not met.

Consents for capital assignment

The Law on PPP requires the authorised State agency party to the PPP contract to consent to, and imposes other restrictions on, a transfer of equity in the project company to third parties prior to completion of construction (or otherwise when the project becomes operational if there is no construction component). These restrictions are likely to act as a deterrent to investors as there are no fixed criteria for permissible transfers in equity holdings in projects and project companies – these are at the discretion of the State agency. These matters are more appropriate for contractual negotiations between the parties concerned.

Termination rights and termination payments

The Law on PPP limits circumstances in which the PPP contract may be terminated before the end of the contractual term to the following cases:¹¹

- prolonged force majeure;
- insolvency of the project company;
- serious breach of the PPP contract by either party;
- where permitted by the Civil Code upon a fundamental change of circumstances; and
- for national security considerations.

It is unclear how much flexibility the contracting parties will have to further specify the parameters of each of these categories in the PPP contract, and the prescriptiveness of the Law on PPP for this issue is likely to be of concern to investors. Moreover, the Law on PPP provides that termination payments will be made available to the

⁹ Article 55 of the Law on PPP.

¹⁰ Article 76 of the Law on PPP.

¹¹ Article 52 of the Law on PPP.

project company only where early termination is due to a serious breach of the PPP contract by the contracting State agency, or for national security considerations. These two cases are more limited than the five listed before. The scope of application of termination payments is narrow and international lenders will be unwilling to finance significant projects without assurance that their debt will be covered, in other circumstances, such as long-term Government force majeure or natural force majeure. Vietnamese laws and regulations should not limit the flexibility of the parties to do this without risking the availability of financing sources for projects in Vietnam.

Lender's step-in rights

The Law on PPP also removes lenders' rights to 'step-in' and take-over the project in the event of default under the project financing documents. This was possible under the previous regulations. Lenders are now required to coordinate with the State agency to appoint a new investor where circumstances require – and it appears that this is only permitted where the PPP contract has been terminated early in the circumstances prescribed in the Law on PPP (as set out above). International lenders expect step-in rights to cure and address events of default in their financing agreements. The current position in the Law on PPP does not cover this expectation and will likely, unless varied in template or negotiated PPP contracts, result in a very serious hurdle to accessing project financing.

Amendments

The Law on PPP provides that circumstances which allow amendment of the PPP contract must be stipulated in the contract, and sets out specific circumstances in which amendments to the PPP contract must be considered by the parties.¹² These circumstances include force majeure, change in the term of the PPP contract (when contemplated by the Law on PPP), where permitted by the Civil Code upon a fundamental change of circumstances, and other circumstances within the authority of the contracting State agency which will bring financial or socio-economic benefits to the project. It is not clear whether parties are free to agree other triggers for possible amendments, or whether the circumstances set out in the Law on PPP would give the parties an enforceable right to amend the PPP contract when these circumstances arise – and if the Law on PPP gives this right, how this possibility to amend could be implemented in practice. In any event, these provisions appear to significantly undermine the parties' freedom to contract, and, in our view, the lack of clarity will be of concern to investors.

Potential gains/concerns for Vietnam

Providing a balanced and practical legal framework around the bigger-picture issues relating to the financial viability of infrastructure projects to be assisted through the public part of the "public-private partnership" should be a focus of the legislative exercise. Issues such as a lack of clarity in existing regulations, conflict with other legislative regimes that serve to undermine incentives for PPP investors, and key structural gaps relating to Government support persist. We believe that these will limit the attractiveness of PPP projects to foreign investors.

Recommendations

- Provide clear guidance on the Law on PPP and bring existing regulations to an international standard to increase the attractiveness of Vietnamese PPP projects to foreign investors.
- Create a clear and cohesive framework for PPPs to benefit from VGF, minimum revenue guarantees, and risk-sharing measures.
- Continue to streamline the policies and guidelines related to PPPs, focusing on key elements such as the availability and disbursement of debt and equity funding and credit support measures.
- Test these regulations with actual projects.

ACKNOWLEDGMENTS

EuroCham Legal Sector Committee

¹² Article 50 of the Law on PPP.