

Investment in Vietnamese infrastructure

By Nguyen Dang Viet

Following almost a year in which there were no legal guidelines for the contracts after the 2005 Investment Law took effect, the Vietnamese Government has released Decree No. 78/2007/ND-CP dated May 11, 2007 on investment under the contract forms of Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO), and Build-Transfer (BT), replacing the obsolete Decrees No. 77/CP, 62/1998/ND-CP, and 02/1999/ND-CP governing the same matter.

Key definitions

A BOT contract is defined under the 2005 Investment Law and Decree 78 as a contract signed between competent state authorities with investor(s) to build and operate infrastructure within a period of time. When that period expires, investor(s) shall transfer the works, without compensation, to the state. Under BTO contracts, investor(s) shall be given the right to operate the infrastructural works within a period of time after transferring the built infrastructural work to the state. For the BT contracts, after build and transfer, the investor(s) shall be given favourable conditions to run other projects to recover their investment costs and earn profits.

Promoted sectors

The Government encourages investment under the BOT, BTO, or BT contracts in construction, infrastructural operation, or renovation, enlargement, modernisation, operation and management of certain works such as roads, bridges, tunnels, railways, airports, sea & river ports, water supply factories, water drainage systems, waste treatment systems, power plants, power grids, and other infrastructures.

Thin capitalisation rule

Albeit the new laws do not require investors to satisfy any thin capitalisation limitation, Decree 78 requires investors must fund equity of at least 30 percent, 20 percent or 10 percent total investment where the total investment hits three levels respectively (that is, below 75 billion dong; from 75 billion dong to below 1,500 billion dong; or from VN\$1,500 billion dong or more).

Investment licensing

It's different from other modes of investment where the licensing powers are mostly allocated to local authorities, Decree 78

states that all BOT, BTO, BT contracts must be appraised and licensed by the Ministry of Planning and Investment. If new incorporation is proposed under the BOT, BTO, or BT contract, after obtaining the investment licence, investors shall apply for establishment of a company according to the provisions of the 2005 Law on Enterprises.

Increasing incentives

Decree 78 stipulates a number of significant incentives for investment projects under the form of BOT, BTO or BT contracts, including: BOT and BTO companies shall enjoy corporate income tax incentives as same as specially encouraged projects for the whole project life; tax exemption shall be granted to the royalties generated from technology and intellectual property transfers if any; exemption shall be granted to land use fee or rental for the whole project life; the Government may designate guarantors for investors' loans; and other supports are promised by the Decree during the project operation.

Foreign laws applicable to the contracts

Positively, Article 16 of Decree 78 stipulates that, with respect to foreign invested projects, parties to the contracts are allowed to apply foreign laws to the contracts, provided that such agreement is not contradicted with the basic principles of Vietnamese laws. There remains a concern as to the legality of this Article. How it will justify Article 5 of the 2005 Law on Investment which requires that all investment activities in Vietnam must comply with provisions of this Law and related provisions; parties to contracts can select to apply the foreign laws and international practices only in case there is no relevant provision under Vietnamese laws.

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