

Client Alert

February 2020

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Draft Decree proposes new opportunities for private investments in airport and aviation infrastructure projects in Vietnam

Recent developments

The Ministry of Transport of Vietnam ("**MOT**") recently released a draft of the new decree on the management and operation of airports and airfields in Vietnam ("**Draft Decree**") to replace Decree No. 102 ("**Decree No. 102**").¹ The Draft Decree provides for, among other things, new regulations on investment and construction of airport infrastructure projects.

In the context of the global shift from government ownership and operation to private control in the airport and aviation infrastructure sector, and increasing demands to promote private sector investments at airports in Vietnam, the Draft Decree proposes new mechanisms to facilitate new opportunities for private investment at airports in Vietnam.

However, there are legal issues that will need to be considered in relation to airport concessions in Vietnam depending on the legal and contractual frameworks involved, whether under public-private partnership ("**PPP**") or private investment structures on a project-by-project basis.

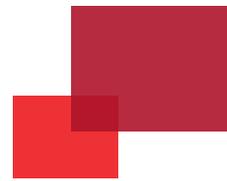
Proposed concession for supply of aviation services

In Vietnam, the grantor is an airport enterprise that has been issued an airport operation business license by the MOT to manage and operate an airport and airfield. An airport enterprise, as the grantor, may grant or hire another licensed provider of aviation services to provide such services at airports and airfields under a concession contractual arrangement to ensure security, safety, service quality, environment and compliance with the operation conditions at airports and airfields under which they can agree on the rights and obligations of each party, concession fees and the term of concession agreement. The provider of aviation services must be licensed by the MOT's Civil Aviation Authority of Vietnam to supply the proposed services.

Concessionaire for investment and construction of airport infrastructure

For airport infrastructure and construction facilities, an airport enterprise (as grantor) may organize a tendering for the selection of investors as concessionaire to grant concession investment in such airport infrastructure and construction facilities.

¹ Decree No. 102/2015/ND-CP of the Government of Vietnam dated 20 October 2015 on management and operation of airports and airfields - as amended and supplemented by Decree No. 92/2016/ND-CP dated 1 July 2016 and Decree No. 44/2018/ND-CP dated 13 March 2018 ("**Decree No. 102**").



However, under the Draft Decree, the scope of infrastructure construction facilities to which this tendering process is applied are limited to: (i) non-essential construction facilities of airport infrastructure and (ii) construction works for supply of non-aviation services. As such, the concessionaire's scope of work may be limited to the "landsite" of airport infrastructure; and the grantor and the government may still have control over the "airside", which is more regulated under the current regulations.

The airport enterprise will enter into a concession contract with the selected investor for the construction work determined in the approved investment, development, renovation or expansion plan of the airport/airfield.

Specific regulations on the tendering process for selecting investors for construction of airport infrastructure are proposed as follows:

A. Tendering form for selecting investors

The selection of investors must be in the form of open national tendering, except for the following cases in which direct appointment of investor shall be applied:

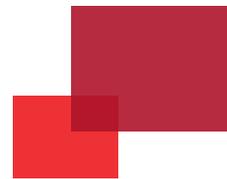
- Only one investor has registered to participate in the tendering to perform the work;
- Only one investor is capable of performing the work due to reasons related to intellectual property, trade secrets and specialized technology; or
- The target project is directly related to national defense and security, or the target project contains special conditions for which direct appointment of investor is allocated under the decision of the Prime Minister.

B. Tendering method for selecting investors

There are two separate methods proposed depending on the target projects, including:

- **One stage one envelope:** will apply to cases where the target project is a Group C project. In such case, bidders (investors) are required to prepare both the technical proposal and financial proposal per the bid invitation documents. Bid opening will be conducted once.
- **One stage two envelopes:** will be applied to other open tendering for selection of investors (excluding Group C projects). In such case, bidders (investors) are required to prepare technical proposals and financial proposals respectively (but simultaneously) per the bid invitation documents. Bid opening will be conducted two times. Submission for technical proposals shall be opened right after the deadline for closure of the tendering. Bidders (investors), who meet the technical requirements, will then proceed to open financial proposal for evaluation.

The airport enterprise (as grantor) must also prepare, appraise and approve bid invitation documents. The contents of bid invitation documents must include, among other things, the draft of investment concession agreement, the contract term of the concession contract, and floor price (i.e., minimum



concession price that bidders/investors must pay to the airport enterprise during the time of the project operation).

C. Preliminary negotiation of the concession contract

The investor ranked first will be invited to the preliminary contract negotiation. If the invited investor fails to come forth or refuses to participate in the contract negotiation, such investor's bid security shall be forfeited.

In terms of the principles for preliminary contract negotiation, the preliminary negotiation will not cover any contents for which the bidder (investor) has offered at the request under the bid invitation documents. In addition, the preliminary negotiation must not change the fundamental contents of the bid dossier.

The contents of preliminary negotiation will cover:

- content that is not specific, clear, or appropriate enough, not consistent between the bid documents and the bid dossiers, or inconsistencies within the bid dossier, which may lead to disputes or affect the responsibilities of parties when the contract is executed;
- issues that arise during the process of selection of investors (if any) in order to finalize the details of the project; and
- other necessary matters.

During the preliminary contract negotiation, the parties to concession contract will finalize the draft of investment concession contract.

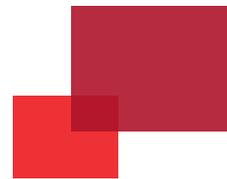
In case the preliminary negotiation of the contract with the first ranked bidder fails, the grantor (as bid inviting party) must report the same to the relevant authority (e.g., MOT and its Civil Aviation Authority of Vietnam) for decision to invite the investor ranked second into the preliminary contract negotiation. If the preliminary negotiation with such investor fails as, then the grantor (as the bid inviting party) must report the same to the relevant authority (e.g., MOT and its Civil Aviation Authority of Vietnam) for its consideration.

D. Approval process for investor selection results, negotiation, finalization and signing of concession contracts

Under the Draft New Decision, the selected investor must meet all of the following conditions:

- have a valid bid-dossier;
- be qualified in terms of capability and experience;
- satisfy the technical requirements; and
- Its proposed concession price is the highest price and is not lower than the approved floor price under the bid invitation documents.

Based on the result of preliminary contract negotiation, the airport enterprise (as grantor) will proceed with the appraisal and approval steps of the investor selection result. Subsequently, based on the result of investor selection, the airport enterprise (as grantor) will proceed with official negotiation, finalization and signing of the concession contract with the selected investor to commence the execution of the project.



Specific land lease issues at airports

Under the Draft Decree, the land lease term at airports shall be determined as follows:

- For construction investment projects for new airports/airfields in the form of PPP at airports and airfields, the land lease term is determined according to the PPP/concession contract, which may not exceed 50 years;
- For construction investment projects for new construction facilities at existing airports and airfields, the land lease term shall be determined based on the master planning period for such airport/airfield which may be extensible upon request but may not exceed 50 years.

In addition, the Draft Decree provides for a transitional provision for airport construction facilities which have been completed but lack land title documents of land allocation or land as follows:

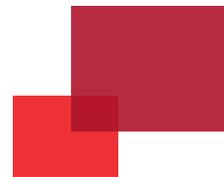
- For existing construction facilities which have been and are being exploited, used without disputes with adjacent construction facilities at airports/ airfields and which are in accordance with the approved airports/ airfields master planning, the airport authority (i.e., the Civil Aviation Authority of Vietnam and its affiliated authorities) will continue leasing such land for a term of no more than 50 years and determine the land lease term according to the period of such airports/airfields master planning.
- For land of existing construction facilities which were built under the previous master planning, or under a decision of the relevant State authority, and are being exploited and stably used with no dispute with adjacent construction facilities at airports and airfields but which are no longer suitable to the newly approved or adjusted airports/ airfields master planning, then the airport authority will lease the land on the basis of the application for land lease, and the land lease term in the contract will be determined for each year until the land is recovered by the Government for implementing a new or adjusted master planning.

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While the Draft Decree is limited to proposals relating to the general framework on concession arrangements for airport infrastructure and supply of aviation services, we expect the MOT to additionally issue an implementing circular to provide for further guidelines.

In terms of contractual framework, relevant incentives, risk allocation mechanisms, specific characteristics of the concession arrangements (fees, revenue sharing mechanism, issues on property rights, revenues, liabilities of parties involved, etc.), they will also depend on the investment form involved, whether under PPP or private investment structures.

Please note that the Draft Decree is still in draft form and therefore, subject to further public comments, the Government's further discussion, conclusion and signing.



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Please do not hesitate to contact us if you would like to understand more about:

- further details of the legal frameworks on airport infrastructure projects in Vietnam;
- opportunities for private investors to invest in this area as well as necessary steps and best practices to prepare; and
- key legal, project and structuring issues and challenges and legal solutions for investments in infrastructure projects in Vietnam.