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A RESEARCH ON PREFERENTIAL AND ENSURING INVESTMENT MECHANISM UNDER PUBLIC-PRIVATE PARTNERSHIP MODEL IN VIETNAM

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Abstract

In recent years, Vietnam has strong socio-economic changes and achieved certain results. However, the need for infrastructure investment capital is very large, but the limited state budget is a challenge to meet investment needs. One of the effective channels to attract investment capital is the public-private partnerships model (PPP). But to mobilize this capital, the State needs to issue incentives and guarantees for investors. The study has clarified the investment incentives and guarantees in the PPP cooperation mode, and at the same time pointed out the inadequacies as a basis for proposing solutions to improve the law in order to effectively attract customers private capital sources into the socio-economic development process in Vietnam.

Keywords: PPP, State, investors, preference, investment guarantees

INTRODUCTION

The PPP model is known as one of the methods of mobilizing important resources from the private sector to participate in the process of building infrastructure, meeting the needs of socio-economic development effective in Vietnam today.

In Vietnam, the average investment demand in infrastructure in the 2011-2015 period is about 12.6 billion USD, in the 2016-2020 period about 25 billion USD, it is forecasted to be about 30 billion USD by 2030 (VietNamese Government, 2019). However, limited investment capital from the state budget is a challenge to the ability to meet investment needs. In that condition, Vietnam's policy is to mobilize maximum resources for infrastructure investment through the policy of socialization of investment with one of the main channels being the PPP method. In order to effectively attract private capital into the infrastructure construction process, the state has issued many policies to improve this investment environment and initially obtained certain results. As of January 30, 2019, more than USD 71.4 billion has been mobilized from PPP method, contributing to significantly improving the country's transport, urban and energy infrastructure system, enhancing the people's quality of life, changing the face of many localities (VietNamese Government, 2019). But this number is still quite modest compared to the potential of private investors. One of the main reasons is that investors are still afraid of preferential policies as well as ensuring mechanism when implementing PPP projects. Therefore, the study and evaluation of PPP investment incentives and guarantees in Vietnam to solve legal problems will be an important basis for mobilizing investment capital for infrastructure development.

RESEARCH APPROACH

PPP is a cooperative method that has appeared for a long time in the world, but it has only been really recognized in Vietnamese law since 1997 by sub-law documents. Only when the Law on Investment in Public-Private Partnership No. 64/2020/QH14 (PPP Law 2020) is approved by the National Assembly of the Socialist Republic of Vietnam, the PPP model is specifically recorded in a Law document. Previously, the regulations governing these activities were contained in sub-law documents and scattered in other related Law documents. In this paper, the author is limited in research on investment incentives and guarantees under the PPP model specified in the PPP Law 2020.

The study clarifies the preferential mechanisms and ensuring investment of the State for the PPP, and also points out the limitations as a basis for proposing solutions to improve the law on PPP in Vietnam. This study applies the method of synthesizing and analyzing the reported data to clarify the research content.

LITERATURE REVIEW

It must be recognized that PPP is a relatively new content in Vietnamese law. In the past, there have been a number of authors who have studied this content, such as: Public private partnership to develop Vietnam's road transport infrastructure (H.T.T.Giang, 2012); Public-private partnership: Nature and legal risks (V.T.Hao, 2012); Public-private partnership (PPP) model in Vietnam (N.T.T.Hang, 2015); State management of public-private cooperation in aviation infrastructure investment (N.Q.Duc, 2016)…

The above works have studied PPP with diverse aspects and many research results have been published. However, there has not been any specific research on the preferential mechanism and investment guarantees under the PPP, especially since the PPP Law 2020 has been issued. Therefore, this study is appropriate in the context that the demand for infrastructure investment in Vietnam is increasing while the capital from the state budget is very limit.

RESULTS AND DISCUSSION

Identifying PPP cooperation methods

According to KPMG (2011), a PPP is a long-term contract, it only provides service and has not ownership between one side is government and the other side is a private investors, in that allows the private entity is provided public infrastructure (KPMG, 2011). A more general conclusion from the European Commission (European Commission, 2003), a PPP is a public-private contract by which the skills and assets of each party are shared in the delivery of services for the society. According to the World Bank, PPP is the transfer to the private sector of investment projects that traditionally have to be state-invested and operated. This definition has two aspects that need to be kept in mind: The investor assumes responsibility for providing services through the project; Some of the risks associated with the project will be transferred from the public sector to the private sector.

Before the concept of PPP appeared, in Vietnam there were concepts of investment in the form of public-private partnership such as "socialization" or "the state and the people do it". Although, these concepts have been mentioned in Vietnam for a long time (in the resolutions and policies of the Party and State), but there is no clear definition and a legal mechanism to ensure the implementation enforcement. It was not until the PPP Law 2020 was promulgated that there was an official document defining this method. According to Clause 10, Article 3 of the Law on PPP 2020 stipulates: “Public Private Partnership (hereinafter referred to as PPP investment) is an investment method made on a contractual basis definite-term cooperation between the State and private investors through the signing and implementation of PPP project contracts in order to attract private investors to participate in PPP projects" (National Assembly, 2020).

Advantage of PPP is can save government resources. The government only needs to focus on project management without having to rely on its own resources to implement the project. Thus, the Government's resource power is used more effectively, the quality service of the company is enhanced. Other hand, effectively using skills, private sector experience, public service can be done more. Through PPP, the Government and the private sector can share risks at different stages. When the private sector is involved in projects, the risks of capital overwork and project delays can be reduced. At the same time, with the completion of the design, construction and operation of PPP projects, the private sector can help to create a public service model with a more efficient.

Preferential mechanism and guarantee for PPP investment in Vietnam

According to the ADB, Vietnam needs to invest 110 billion USD in infrastructure in the 2021-2025 period (equivalent to 22 billion USD per year) and 150 billion USD in the energy sector between now and 2030. (equivalent to 15 billion USD per year) (Donald Lambert 2020). According to the World Bank, Vietnam belongs to the group of low-middle-income countries, so this money cannot only be spent by state budget, but needs the contribution of the private sector (Word Bank, 2019). One of the important ways to attract investment from private investors is to provide them with a mechanism of preferential and investment guarantees. In that, the State commits to take to ensure the legitimate interests of all investors during the process of investing and contributing capital to the implementation of projects. In order to attract resources for socio-economic development, the law of investment has been increasingly improved. In Chapter VII - PPP Law 2020, the state's investment guarantee policies for investors and project enterprises (PE) include the following measures:

Ensuring land access rights, land use rights and other public assets (Clause 2, Article 80 of the PPP Law 2020). Accordingly, PE is assigned land, leased land or allowed to use other public property by the State to perform the PPP project contract in accordance with the provisions of the law on land and the law on management and use of public property; and the project's land use purpose is guaranteed by the State to remain unchanged during the entire contract performance term and in any other case. The use of public property by the State to invest in the implementation of PPP projects is not a new content compared to the previous regulations. However, the State's commitment to guaranteeing investors and PE the right to access and use public assets to implement PPP project contracts is a new content that reaffirms the comprehensive investment guarantee policy of the Government, State for PPP projects.

Ensuring the provision of public services (Clause 3, Article 80 of the Law on PPP 2020). Accordingly, PE is allowed to use public works and other ancillary works to implement the project in accordance with the law. In case there is a scarcity of public services or a restriction on who can use public works, PE shall be given priority to provide public services or be given priority to grant the right to use public works to perform public works project. Competent agencies are responsible for assisting PE in carrying out the necessary procedures for priority use of public services and public works. The policy to ensure the provision of public services has been prescribed from the Decrees on investment under the mode of public-private partnership and this policy has not changed significantly in the PPP Law 2020.

Secure the right to mortgage assets, the right to operate the works, the infrastructure system (Clause 4, Article 80 of the Law on PPP 2020). Accordingly, PE is entitled to mortgage assets, land use rights and business rights to works, infrastructure systems for the lender in accordance with the provisions of the land law and civil law. The mortgage duration shall not exceed the contract term, unless otherwise agreed in the contract. However, the mortgage of assets, the right to operate the works, the infrastructure system must not affect the objectives, scale, technical standards, progress of the project and other conditions that have been satisfied agreed in the contract.

Ensure security, order and safety of people and properties of PE and contractors during the implementation of PPP projects (Clause 5, Article 80 of the Law on PPP 2020). Accordingly, the contracting agency and competent agency shall coordinate with the local government where the PPP project is implemented to ensure security, order and safety of people and property of the project, PE, contractors during the implementation of PPP projects. Ensuring security, social order and safety for businesses and people is always the responsibility of local governments at all levels, but specifying this in the form of investment guarantees of the PPP Law 2020 once again affirms the State's guarantee for the investment process.

A notable new point in the provisions on Investment Security in Article 80 of the PPP Law 2020 is that: The PPP Law 2020 only identifies “PE” as the subject to enjoy investment security measures, instead of stipulating “ investors, PE” are entitled to investment security measures as previously prescribed. This shows that the State clearly distinguishes between the role of investors and the role of PE in the process of implementing investment in PPP projects. Accordingly, PE is the main actor in the process of implementing investment in PPP projects, so it is entitled to policies to guarantee investment directly, while investors, mainly participate in the role of shareholders. shareholders, capital contributors in PE, so although not regulated directly, investors still enjoy policies to guarantee investment indirectly.

Ensure foreign currency balance for important PPP projects (Article 81 PPP Law 2020). According to the Law on PPP 2020, the guarantee of foreign currency balance applies only to PPP projects under the authority to decide on investment policies of the National Assembly and the Prime Minister. The Government will decide on the application of the mechanism to ensure foreign currency balance on the basis of foreign exchange management policy and foreign currency balance ability in each period. Where the PE has exercised the right to purchase foreign currency to meet the demand for current transactions, capital transactions and other transactions or to transfer capital, profits, or liquidation of investments abroad in accordance with the law on foreign exchange management, but the market cannot meet the legal foreign currency demand of PE, the foreign currency balance is guaranteed not to exceed 30% of the project's revenue in Vietnam Dong after deducting expenditures in VND Vietnam. Policy to ensure foreign currency balance is very necessary for investors and PE, especially for projects that use foreign currencies to import project inputs (such as equipment, raw materials, etc.) materials) or mobilize loan capital in foreign currencies because the risks related to foreign exchange rates and foreign currency conversion are very likely to occur; while the project's revenue is calculated in local currency (VND).

Mechanism for sharing revenue increase and decrease (Article 82 of the Law on PPP 2020). This is a completely new policy of the state compared to the previous regulations. Accordingly, when the actual revenue reaches 125% of the revenue in the financial plan in the project contract, the investor and the PE share with the State 50% of the difference between the actual revenue and the 125% of revenue in the financial plan. The share of revenue increase is applied after adjusting prices and fees for public products and services, adjusting the term of PPP project contracts according to regulations and having been audited by the State Audit of Vietnam increase revenue. Conversely, when the actual revenue is less than 75% of the revenue in the financial plan in the project contract, the State shares with the investor, PE 50% of the difference between 75% of the revenue in the project contract financial projections and actual revenue. The share of revenue reduction is applied when the following conditions are met: (i) The project applies the type of BOT contract, BTO contract, BOO contract; (ii) Changes in relevant planning, policies, and laws that reduce revenue; (iii) Measures have been taken to adjust prices and fees for public products and services, and adjust the duration of PPP project contracts according to regulations, but the minimum revenue is not guaranteed at 75%; (iv) Has been audited by the State Audit of the revenue reduction..

Although it is not associated with the term "investment guarantee", the mechanism for sharing the increase and decrease in revenue is specified very specifically in Article 82 of the PPP Law 2020 which is considered as a commitment of the state to share when PPP project's revenue has a decrease compared to the initially determined financial plan or vice versa, when the revenue increases compared to the original financial plan, the investor and PE must also share the benefits this with the state. This policy is considered by experts and investors as a highlight in the Government's investment incentives and guarantees and is the core point to attract investors to participate in PPP projects in the near future. next time.

In addition to the above investment guarantee policies, investors and PEs are also entitled to investment security policies specified in the Investment Law 2020 including: property ownership guaranteed by the State, operation guarantee business investment; Guarantee the right to transfer assets of foreign investors abroad; Guaranteed to enjoy investment incentives in case of legal changes.

Inadequacies and solutions to improve the law on PPP investment incentives and guarantees in Vietnam

Firstly, it is necessary to create a fair position between the state and investors. Specifically, according to the law in PPP investment, the relationship between the State and investors is equal, harmonizing the interests of the parties, but in reality there are still many shortcomings in the implementation of the agency's commitments The State and the investor in the project contract. While investors are obliged to make many commitments (in terms of quality, progress,...), to make guarantees (advance, contract performance,...), if investors Failure to comply with commitments will be handled for violations, but in the opposite direction, State agencies in cases of failure to comply with commitments, affecting the Project, causing damage to investors, banks. funding… is not resolved and there is no clear sanction to handle responsibility.

Inequality between the parties of the contract, pushing risks to investors. Accordingly, the investor is considered a breach of contract when he fails to comply with any terms, while the competent State agency only fails to comply with the basic obligation to be considered a breach of contract. Therefore, the law should have specific provisions on the rights and obligations of the parties when entering into a PPP contract. Attach specific responsibilities to each agency and individual to raise the sense of responsibility and ensure the interests and confidence of investors.

Secondly, the PPP Law only stipulates a risk-sharing mechanism for new projects (specified at the step of approving investment policies) but has no specific regulations for existing and ongoing projects. share and remove difficulties and problems for projects. It can be mentioned that in the Deo Ca tunnel project, the state budget participation is 5,048 billion VND, but only 3,868 billion VND of state budget has been disbursed, still 1,180 billion VND has not been allocated disbursed as committed (Anh Minh, 2021). This seriously affects the efficiency of capital use, generates interest on credit loans during project implementation, and affects the overall financial plan of the project..

Therefore, there should be regulations to remove obstacles and solve outstanding problems from projects that have been and are being implemented before the effective date of the PPP Law 2020 or regulations in the direction of allowing these projects are also subject to the application of this law.

Third, ensure investment in case of changes in legal policy. The PPP Law 2020 has stipulated many methods of investment guarantee, but there is no regulation on investment guarantee when there is a change in the law. This is a content that investors are very interested in due to the unpredictable nature of Vietnamese law. The provision on investment security when there is a change in the law is prescribed in Article 13 of the Law on Investment, however, this provision only stops at the change of the legal document on investment incentives. Meanwhile, PPP projects always require a stable legal environment.

In next time, the law needs to specify the content of investment security when there is a change in the law in the following direction: in case a newly issued legal document has higher rights and incentives, the investor can apply new legal documents; In case the newly promulgated legal document adversely affects the legitimate interests of the investor, the investor may apply the previous legal document. This principle does not apply in the case of changing provisions of legal documents for reasons of national defense, security, social order and safety, social ethics, community health, protection of the community. environment. In case investors have to apply new laws, they will be compensated. The investor must make a written request within 3 years from the effective date of the new legal document.

Fourth, the State should have a specific support mechanism for the entire project implementation process, especially in site clearance. In fact, the compensation for site clearance is very complicated and takes a long time; sometimes requires coercion from the state. This is a difficult job that requires synchronous coordination from the state and investors. The compensation for site clearance must comply with the State's regulations on the land price bracket as well as the implementation order. There are projects that after approving investment projects, the locality has issued a new price bracket, leading to the approved financial plan no longer feasible, potentially many legal disputes between investors and housing authorities country. Projects where the cost of site clearance is paid for by the Investor and included in the total investment capital may be acceptable to domestic investors but is generally not acceptable to foreign investors and inconsistent with international practices.

Fifth, the PPP Law has provisions on foreign currency balance with important PPP projects, but this policy is only applied to important PPP projects that fall under the authority to decide on investment policies of the National Assembly, the Prime Minister Prime Minister, but not applied to all PPP projects as the previous regulations. Besides, the State only guarantees the foreign currency balance for investors but does not guarantee the foreign currency ratio in the sense of guaranteeing the exchange rate fluctuations. These regulations partly make PPP less attractive in the eyes of foreign investors, especially investors in the fields of energy and renewable energy because materials are made mainly from imported sources.

CONCLUSION

PPP is an effective way to attract resources from the private sector, effectively using these resources to make up the shortfalls of the state budget in infrastructure investment, creating an important motivation promoting the economy and society, bringing the country to sustainable development in the following years. However, in order to attract investors, the State needs to have reasonable preferential regulations and investment guarantees to create confidence and reduce risks for them.

In the future, it is recommended to continue the research on risk-sharing measures with investors, evaluating the impact of incentives and investment guarantees on attracting investment capital into projects PPP for a better overview of this content. Accordingly, some specific recommendations are made to repair, supplement the provisions of Law with the goal of mobilizing maximum private resources into the process of socio-economic development.

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REFERENCES

Donald Lambert (2020). “Building Viet Nam’s bridge to greater economic growth and development”. Retrieved May 25, 2021, from https://blogs.adb.org/blog/building-viet-nam-s-bridge-greater-economic-growth-and-development.

European Commission. (2003), Guidelines for Successful Public-Private Partnerships.

H.T.T. Giang (2012). "Public - Private partnership model for developing Vietnam's road transport infrastructure". Doctoral Thesis in Economic Law, University of Economics Ho Chi Minh City.

KPMH. (2011). KPMG looks to push PPP. Retrieved May 25, 2021, from https://www.vir.com.vn/kpmg-looks-to-push-ppp-11277.html

Minh. (2021). The plan to allocate 1,180 billion VND of budget capital for the Deo Ca tunnel project; Retrieved May 26, 2021, from https://baodautu.vn/phuong-an-bo-tri-1180-ty-dong-von-ngan-sach-cho-du-an-ham-deo-ca-d137346.html

N.T.T.Hang (2015). “Public-private partnership (PPP) model in Vietnam”. Master thesis, Faculty of Law - Hanoi National University.

National Assembly of the Socialist Republic of Vietnam (2020). Law on Investment under the mode of public-private partnership.

Nguyen Quang Duc (2016). “State management of public-private cooperation in aviation infrastructure investment”. Master Thesis – National Academy of Public Administration through Ho Chi Minh.

V.T.Hao (2014). “Public-Private Partnership: Nature and Legal Risks”.

VietNamese Government. (2019). Report No. 25/BC-CP, January 30 2019.

World Bank, (2019). World Development Indicators; Retrieved May 25, 2021, from https://data.worldbank.org/country/vietnam?locale=vi.