

## Circular Issued for BOT Projects

On 27 January 2011, the Ministry of Planning and Investment issued Circular No. 03/2011/TT-BKH (Circular 03) to provide guidelines on implementation of some articles of Decree No. 108/2009/ND-CP dated 27 November 2009 on investment on the basis of BOT (Build-Operate-Transfer) contracts, BTO (Build-Transfer-Operate) contracts and BT (Build-Transfer) contracts (Decree 108).

For information about Decree 108, see Mayer Brown JSM's Legal Update on "[New Decree on BOT, BTO and BT Contracts](#)" of 9 December 2009.

Circular 03 clarifies key matters in Decree 108 such as the legal position of investors and the project enterprise and tender application and selection procedures.

Among other things, Circular 03 provides specific guidelines on the formulation and announcement of lists of projects, selection of investors and negotiation of project contracts, contents of project contracts and related contracts, procedures for issuance of investment certificates, and project implementation.

### Clarification of Key Matters in Decree 108

#### INVESTOR AND PROJECT ENTERPRISE

To implement a BOT, BTO or BT project, the investor must establish a new project enterprise in accordance with the procedures set out in Circular 03, which are the same provisions already set out in the Law on Enterprises and the Law on Investment to establish companies in Vietnam.

Also, if a project enterprise has several members/shareholders then the founding members/shareholders must be the investors initially signing the project contract with the authorised State body.

The project enterprise must conduct its activities in compliance with the provisions in the project contract and the investment certificate/business registration certificate. The BT enterprise may concurrently implement other projects.

The rights and obligations of the project enterprise and the relationship between the investor and the project enterprise must be specifically set out in the project contract in one of the following ways:

- The project enterprise, after being established, will sign the project contract to become, jointly with the investor, a party to such contract; or
- The authorised State body, the investor and the project enterprise will sign a document permitting the project enterprise to assume and exercise the rights and obligations of the investor pursuant to the provisions in the project contract. This document will constitute an integral part of the project contract.

#### STATE BODY AUTHORISED TO ENTER INTO AND IMPLEMENT PROJECT CONTRACTS

An entity implementing the State's administrative function, and being a subsidiary unit of a ministry, branch or provincial People's Committee, when delegated with authority, will become the State body authorised to enter into and implement a project contract.

The delegation of authority must be made in writing and the authority and responsibilities of the authorised body during project preparation, negotiation and implementation of the project contract must be specifically set out.

#### CAPITAL SOURCES FOR CARRYING OUT PROJECTS

Circular 03 defines “equity” as the actual capital the investor undertakes to contribute to the charter capital of the project enterprise and which is fixed on the basis of total investment capital of each project.

Capital sources, the schedule for raising capital, the conditions for increasing or reducing equity or total investment capital of a project, and measures for dealing with issues in these situations must be agreed in the project contract in compliance with the provisions of Decree 108, legislation on enterprises, legislation on investment in construction, and other relevant laws.

#### APPLICABLE LEGISLATION FOR SELECTION OF CONSULTANTS

Selection of consultants with adequate capability and experience to formulate the feasibility report, or selection of contractors to participate in project implementation must comply with the Law on Tendering and its implementing regulations

#### Formulation and announcement of lists of projects

A project must satisfy all the following conditions in order to be considered for inclusion in a list of projects:

- It is consistent with the master plan for development of the branch and the master plan for socio-economic development of the locality;
- It is consistent with the investment sectors prescribed in Decree 108;
- The project objective satisfies the need for using socio-economic infrastructure works, but during the time limit for implementing the project, the ministry, branch or locality is unable to raise State budget or other funds to implement the project;

- In the case of a BT project, there is a feasible plan to balance capital sources for making payment to the investor or for assigning other projects for the investor to implement.

Within 30 business days from the date of publishing the basic items of the proposed project, the authorised State body will conduct the following procedures:

- Directly appoint the investor if no other investor registers to participate in project implementation; or
- Hold open tendering to select an investor if other investors register to participate in project implementation.

#### Selection of investor and negotiation of project contract

Circular 03 stipulates that to be eligible to participate in tendering, an investor must satisfy stipulated conditions that are detailed in the circular.

Circular 03 prescribes a process of open tendering or direct appointment to select an investor based on capability and experience and the best technical and financial proposals in accordance with criteria set out in the tender invitation documents or set of requirements.

Circular 03 sets out a five-step process for selecting an investor as follows:

- Formulation, evaluation and approval of plan on selection of investor
- Preparation for selection of investor
- Issuance of tender invitation documents or set of requirements, and receipt of tenders or proposals
- Assessment of tenders or proposals
- Submission, evaluation, approval and notification of results of selection of investor

#### Project contract and related contracts

Circular 03 sets out the basic contents of a project contract. The contents of other contracts related to project implementation will be as agreed by the parties in compliance with the project contract and current law.

## Procedures for issuance of investment certificates for project implementation

The procedures for investment under the forms of investment of BOT, BTO and BT are conducted independently from current regulations on investment.

These standard forms are set out in the appendices to Circular 03.

## Implementation provisions

### TRANSITIONAL PROVISION

- Investors issued with an investment certificate pursuant to Decree 108 prior to the effective date of Circular 03 will continue to implement the project in accordance with the provisions of Decree 108, the project contract and investment certificate.
- Circular 03 encourages projects with approved tender invitation documents or approved sets of requirements before the effective date of Circular 03 to follow procedures for selection of investor in accordance with Circular 03.
- Projects with tender invitation documents or sets of requirements approved as from the effective date of Circular 03 must follow procedures for selection of investor in accordance with Circular 03.

### EFFECTIVE DATE

Circular 03 will be of full force and effect as from 1 April 2011.

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