

Special Alert

Indochinecounsel.com | November 2024

Key Updates on Decree 115: Procedures for Investor Selection in Vietnam Investment Projects

Key Takeaways

- *Expanded bidding requirements:* Decree 115 significantly broadens the scope of projects subject to mandatory bidding and amends the list of projects exempt from bidding, thereby expanding the range of projects that require a competitive selection process.
- *Bidding for power projects:* A bidding process is mandated for power projects involving renewable energy, natural gas, or liquefied natural gas (LNG) when multiple investors express interest. However, offshore wind power projects, self-consumption power sources, and extended hydropower projects are exempted from this requirement.
- *Invitation to bid (ITB) preparation:* The ITB for power projects must include essential components and strictly adhere to bidding regulations. The electricity purchaser plays a key role in *coordinating* the ITB preparation and negotiating the final terms of the power purchase agreement.
- *Project implementation:* Domestic investors may choose to implement the project directly or through a project company, whereas foreign investors must establish a project company to *implement* the project.
- *Project transfer:* Investors may transfer a project both before and after its operation, subject to specific conditions and approvals. Changes in shareholding structure within consortia are also *permissible*, provided certain requirements are met.

On 16 September 2024, the Vietnamese Government issued Decree No. 115/2024/ND-CP (“**Decree**

115”), implementing the provisions of the Bidding Law 2023 (the “**Bidding Law**”) concerning the selection of investors for land-use investment projects in Vietnam. The primary objective of Decree 115 is to establish a transparent, competitive, and equitable process for selecting investors, thereby fostering a more conducive and attractive investment environment. This legal update introduced several significant provisions relevant to investors in power projects in Vietnam.

Expanding the scope of mandatory bidding

Decree 115 establishes two categories of land-use projects that require bidding to select investors:

- Urban construction and rural residential development projects: these projects are subject to bidding;¹ and
- Projects subject to sector-specific bidding requirements: Ten types of projects, as provided by specialized laws governing specific sectors and fields (such as the energy industry), are mandated to undergo bidding for investor selection. This includes power projects when two or more investors express interest in implementation.²

This expansion aims to ensure a competitive selection process for a broader range of projects. In addition, Decree 115 amends the list of non-land-use projects for which bidding is required for selecting investors under Decree No. 23/2024/ND-CP³ and Decree No. 137/2013/ND-CP detailing the Electricity Law (“**Decree 137**”).

Bidding requirements for investor selection in power projects

Article 4.2(i) of Decree 115 stipulates that a bidding process must be conducted to select investors for energy projects subject to bidding requirements under the Electricity Law. Decree 115 further expands the scope of power projects that require investor selection through bidding.⁴ Specifically, when two or more investors express interest in developing energy-related construction projects using non-state budget capital and involving the following energy sources, with or without synchronous grid connection:

- Renewable energy sources;
- Power sources using natural gas; and
- Power sources using LNG.

In these cases, the selection of investors will be subject to a bidding process. However, this bidding requirement does not extend to offshore wind power projects, self-consumption power sources, or extended hydropower projects.

¹ Article 4.1, Decree 115 and Article 126.1(a), the Land Law 2024.

² Article 4.2, Decree 115 and Article 126.1(b), the Land Law 2024.

³ Article 1.4, Decree 23, as amended by Article 66.1(a), Decree 115.

⁴ Article 3.6, Decree 137, as amended by Article 70.1, Decree 115.

Preparation and components of the Invitation to Bid (ITB) for power projects

Prerequisites for organizing bidding

According to Decree 115, two essential conditions must be met before organizing a bidding process for a power project:

- Land fund availability: The land used for the project must be part of the State's land recovery process under Article 79 of the Land Law 2024 (the “**Land Law**”)⁵; and
- Land auction listing: The land area must be included in the list of land areas approved for auction by the provincial-level People's Council.⁶

Pre-bidding requirements

Before issuing the ITB, certain preparatory steps must be completed, including:

- In-principle approval: Obtaining preliminary approval for the project;
- Pre-feasibility or feasibility study: Conducting a detailed study to assess the project's viability; and
- Draft Power Purchase Agreement (PPA): Preparing a draft agreement outlining the terms and conditions for purchasing electricity from the project.

ITB preparation⁷

The ITB for power projects will be prepared based on the following guidelines:

- Bidding regulations: Adhering to the established rules and procedures for bidding processes;
- Investment policy approval: Considering the approved investment policy for the project.
- Pre-feasibility or feasibility study: Incorporating the findings and recommendations from the study; and
- Draft PPA: Including the draft PPA agreed with the electricity purchaser.

Electricity purchaser and PPA

- Determination of electricity purchaser: The state authority will designate the entity responsible for purchasing electricity from the project.⁸
- Coordination in ITB preparation: The electricity purchaser will collaborate with the competent state authority in preparing the ITB and finalizing the draft PPA.⁹

⁵ Article 4.3(a), Decree 115.

⁶ Article 4.3(b), Decree 115.

⁷ Article 3.7, Decree 137, as amended by Article 70.2, Decree 115.

⁸ Article 3.7, Decree 137, as amended by Article 70.2, Decree 115.

- PPA as ITB component: The draft PPA agreed upon by the electricity purchaser will be an integral part of the ITB. The final PPA signed between the winning investor and the electricity purchaser will serve as the basis for executing the project contract.¹⁰

Evaluation criteria¹¹

In addition to the general evaluation criteria stipulated in Decree 115, specific criteria will be applied to assess the effectiveness of proposed power projects:

- Electricity price: The proposed ceiling price for electricity must be lower than the ceiling price framework set by the Ministry of Industry and Trade; and
- Pricing principle: The pricing mechanism agreed upon with the electricity buyer (e.g., EVN) will be taken into consideration.

Implementing the project

Domestic investors who are successful in a bidding process for a land-use project have two options for project implementation:

- Direct implementation: The investor may directly implement the project.
- Establishment of a project company: If specified in the bidding dossier, the investor may establish a new company (project company) to undertake the project.

On the other hand, foreign investors who win a bidding process are required to establish a project company in Vietnam to implement the project.¹² This requirement aligns with the land laws, which provide that foreign entities must establish a local presence to obtain land use rights. The project company must be wholly owned by the successful investor and comply with relevant laws and regulations, including the project contract, enterprise laws, investment laws, construction laws, land laws, real estate business laws, and other applicable legislation.

Transferring the project

In addition to the legal framework provided in the Bidding Law, Decree 115 introduces new regulations governing the transfer of equity in a project company, both before and after the project's operation.

Transfer before project operation

⁹ Article 3.8(a), Decree 137, as amended by Article 70.3, Decree 115.

¹⁰ Article 14.1, Decree 115, and Article 3.7, Decree 137, as amended by Article 70.2, Decree 115.

¹¹ Article 49.2, Decree 115.

¹² Article 51.1, Decree 115.

Before a project is put into operation, the successful investor or the project company may transfer the project, subject to certain conditions and approval from the authority as follows:

- Transferee investor qualifications: The transferee investor must: (i) have legal entity status and meet applicable legal requirements; (ii) possess the necessary capacity and experience for the project; (iii) inherit all rights and obligations of the transferor as specified in the bidding dossier and project contract; and (iv) maintain the minimum equity ratio for consortium members, with the leading member contributing at least 30% of the total equity capital, and other members at least 15%.¹³
- Authority approval: The transfer must be approved by the relevant government body.

Transfer after project operation

Once a project is operational, the transfer of equity in the project company is not subject to the same stringent requirements as before. However, the transfer must still comply with general enterprise regulations and any specific regulations applicable to the type of project company.¹⁴

Changes in consortium shareholding structure

Decree 115 introduces a new regulation allowing for changes in the shareholding structure of a consortium after it has won a bid. If such changes occur before the project contract is executed or becomes effective, the bid solicitor must assess the capabilities of the new investors and update relevant information. This ensures that the consortium continues to meet the required capabilities and minimum shareholding ratio.¹⁵

Handling deadlock situation in investor selection

Decree 115 addresses several complex scenarios that may arise during the investor selection process, providing guidance on how to handle them effectively:

No investors submitting bid dossiers

If no investor submits a bid dossier by the bid closing time, the inviting party or bid solicitor must report the situation to the relevant authority for resolution. The authority will consider the following options:

- Extend the bid closing time for up to 30 days.

¹³ Articles 52.4 and 46.1(a), Decree 115.

¹⁴ Article 52.4, Decree 115.

¹⁵ Article 59.7, Decree 115.

- Cancel the invitations for expression of interest and bidding, revise the relevant dossiers, and reorganize the investor selection process.

Fewer than three investors submitting bid dossiers

If there are fewer than three bidders at the bid closing time, the inviting party or bid solicitor must report the situation to the relevant authority within 24 hours. The authority will consider one of the following options:

- Extend the bid closing time and review and revise the invitation for expressions of interest or bidding dossiers to attract more investors.
- Proceed with immediate bid opening and assessment.

Unclear or differing interpretations in bidding dossiers

If the bid solicitor identifies unclear or differing interpretations in the bidding dossier, they must report the issue to the relevant authority for resolution. The following steps will be taken:

- Modify the bidding dossiers to address the ambiguities.
- Inform all investors of the amendments and request them to submit additional bids.
- Re-evaluate the bids based on the revised bidding dossiers.

Conclusion

Decree 115 marks a significant development in the regulatory framework for investor selection in Vietnam. It aims to foster a more competitive, transparent, and efficient investment environment, which will eventually attract qualified investors and contribute to the nation's economic progress and sustainable growth.

Please stay updated with us for any developments in Vietnam's legal framework for real estate sector. Should you have any questions or comments, please feel free to reach out to us.

About Indochine Counsel

Established in October 2006, Indochine Counsel is a leading commercial law firm in Vietnam. Our firm is ideally positioned to assist international investors and foreign firms to navigate the legal landscape in one of Asia's most dynamic and challenging countries. We also take pride in our services offered to domestic clients in searching for opportunities abroad. With over 45 lawyers many of whom have been trained abroad and staffs in two offices, Ho Chi Minh City and Hanoi, Indochine Counsel offers expertise in a dozen practice areas and provides assistance throughout the entire life cycle of your business.

Indochine Counsel represents and advises clients on all legal aspects in the following major areas of expertise:

- Anti-trust & Competition
- Banking & Finance
- Corporate & Commercial
- Energy, Natural Resources & Infrastructure
- Intellectual Property
- Inward Investment
- Labour & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Real Estate & Construction
- Securities & Capital Markets
- Technology, Media & Telecommunications

A full list of partners, associates and other professionals is available on our website. |

Contact Us

For further information or assistance, please contact the following Indochine professionals:



Pham Viet Tuan

Senior Associate | Head of Litigation & Dispute Resolution, Real Estate & Construction
E tuan.pham@indochinecounsel.com



Ton That Hoang

Junior Associate
E hoang.ton@indochinecounsel.com

Ho Chi Minh City

Unit 305, 3rd Floor, Centec Tower
72-74 Nguyen Thi Minh Khai, District 3
Ho Chi Minh City, Vietnam
T +84 28 3823 9640
F +84 28 3823 9641
E info@indochinecounsel.com

Hanoi

Unit 705, 7th Floor, CMC Tower
Duy Tan Street, Cau Giay District
Hanoi, Vietnam
T +84 24 3795 5261
F +84 24 3795 5262
E hanoi@indochinecounsel.com

www.indochinecounsel.com

This Special Alert is designed to provide our clients and contacts with general information of the relevant topic for reference only, without the assumption of a duty of care by Indochine Counsel. The information provided is not intended to be nor should it be relied upon as a substitute for legal or other professional advice.

© 2024 Indochine Counsel | All Rights Reserved.