



漢坤律師事務所
HAN KUN LAW OFFICES

Newsletter

China Practice

Global Vision



8th Edition of 2016



Legal Updates

1. The Dust Settles - Online Taxi-Hailing Law Promulgated
2. Healthcare Public-Private Partnerships (PPP): Is there a need for bidding?



Legal Updates

1. The Dust Settles - Online Taxi-Hailing Law Promulgated (Author: Yaohua HU)

The afternoon of July 28, 2016, finally saw the dust settle around the much-anticipated taxi reform proposals and taxi-hailing administrative measures with the promulgation of the *Interim Administrative Measures for Online Taxi-hailing Business Services (Order of Ministry of Transport, Ministry of Industry and Information, Ministry of Public Security, State Administration of Industry and Commerce, State Quality Inspection Administration, State Internet Information Office, [2016] No.60)* (the “**Interim Measures**”) and the *Guiding Opinions of the General Office of the State Council on Deepening Reforms to Promote the Healthy Development of the Taxi Industry (Guo Ban Fa [2016] No. 58)* (the “**Guiding Opinions**”).

Public comments drafts of the Guiding Opinions and Interim Measures were released on October 10, 2015, and have been finally promulgated after having been discussed and revised for ten months. The online taxi-hailing industry had previously developed rapidly, but the relevant requirements, which the Interim Measures now stipulate, were not specified with respect to market entry and industry supervision. The main content of the Guiding Opinions and Interim Measures are summarized below:

Formally Clarifying the Legal Status of Online Taxi-Hailing Platform Companies

Although online taxi-hailing has developed rapidly in recent years, there were still no definite and formal regulations with respect to the supervision of the industry. Some local governments even applied supervisory laws and regulations that are applicable to traditional taxi and car rental businesses to regulate the online taxi-hailing industry. With the rapid development of the online taxi-hailing industry, how to regulate, manage and guide the industry rather than simply calling for an end to the existing business model has attracted widespread attention from the public. The Interim Measures, for the first time, legally permit online taxi-hailing.

Operating Requirements

Although the Interim Measures acknowledge the legitimacy of online taxi-hailing, they specify quite a few requirements with respect to the qualifications of the platforms themselves, vehicle requirements, driver qualifications, and standards for business conduct.

a. Qualifications for Online Taxi-hailing Platforms

The Interim Measures require that online taxi-hailing operators must meet the basic requirements shown below, in addition to obtaining an “online taxi-hailing business permit,” with a business scope

for online taxi-hailing, issued by the road transportation administration:

- The operator shall have the status of enterprise legal person;
- The operator shall have developed an internet platform for online taxi-hailing, have the information data exchange and processing capability suitable for the launch of the proposed business, provide for conditions that enable the transportation, communications, public security, taxation and cyberspace departments to access relevant internet data, have the internet platform's databases be accessed by the taxi administrative department's monitoring platform, set up servers in mainland China, and have the network security management system and technical measures for network security that conform to relevant regulations;
- The operator shall sign agreements for the provision of payment and settlement services with banks and non-banking payment institutions in case electronic payment methods are adopted;
- The operator shall have a sound operation and management system, a safety management system, and a service quality assurance system.
- The operator shall have corresponding service agencies and service ability in the location where the services are provided;
- A foreign-invested online taxi-hailing operator, in addition to the conditions above, shall also comply with the relevant legal and regulatory provisions related to foreign investment.

b. Vehicle Qualifications

The Interim Measures require that vehicles used for online taxi-hailing shall meet the requirements below; upon meeting these conditions, the road transportation administration will register the vehicle as a passenger vehicle for hire and issue an "online taxi-hailing transport permit."

- Vehicles are to have seven seats or fewer;
- Vehicles are to be equipped with satellite positioning and emergency alarm devices and have a driving recording function;
- The technical performance of the vehicles meets relevant safe operation standards.

c. Driver Qualifications

The Interim Measures require that the drivers of online-hailed taxis meet the basic requirements shown below. Either the online taxi-hailing platform operator or the drivers themselves may apply to the municipal taxi administrative department in the service location, and the department shall issue an "online taxi-hailing driver's permit" to those drivers who both meet the requirements below and who pass an examination:

- Obtain a motor vehicle driver's license corresponding to the vehicle type and have more than

three years of driving experience;

- Have no criminal record of causing traffic accidents or dangerous driving, no record of drug abuse or driving under the influence, no record of receiving more than 12 points in the three most recent scoring periods;
- Have no record of violent crime;
- Other conditions stipulated by the municipal government.

d. Standards for Business Conduct

With respect to the online taxi-hailing operations, the Interim Measures specify the following requirements:

- Online taxi-hailing platform companies shall guarantee that service vehicles are lawfully operated, in good technical condition, have dependable safety performance, and have the relevant insurance for operating vehicles;
- Online taxi-hailing platform companies shall guarantee that the drivers accessing the platform are legally qualified. The companies must execute either a labor contract or an alternative form of agreement with the drivers, depending upon the drivers' working hours and frequency of service and subject to the relevant laws and regulations, and;
- Online taxi-hailing platform companies shall record data, including information that drivers and customers publish on the taxi-hailing platform, user registration information, identity certification information, order information, access logs, online transaction logs and travel logs, and to back up the recorded information and logs;
- Online taxi-hailing platform companies shall determine and make public its methods for measuring travel distance and pricing in a manner that conforms to the relevant state rules. When providing online taxi-hailing services, companies shall provide information such as the names, photos, cellphone numbers and driver evaluation ratings, as well as vehicle license plate numbers, etc.;
- Online taxi-hailing platform companies shall reasonably determine the fares for online-hailed taxis, clearly mark the fares and issue corresponding taxi invoices to the passengers;
- Online taxi-hailing platform companies shall not commit any acts that impede fair market competition.
- Online taxi-hailing platform companies shall pay taxes in accordance with the law and purchase the relevant insurance for passengers, such as carrier liability insurance, so as to fully protect the interests of passengers.

Key Issues

a. Online Taxi-hailing Platform Operation Qualification Applications

The Interim Measures stipulate that the online taxi-hailing platform companies shall submit an application to the taxi administrative department in the location where the service is provided by submitting the following materials:

- i. An online taxi-hailing business application form;
- ii. Personal identification documents and credit certificates for the investors and persons-in-charge, in duplicate, and the personal identification documents for the individuals entrusted to submit the application, in duplicate, and a power of attorney;
- iii. An enterprise legal person business license; in case of a branch entity, the business license of the branch; in case of foreign-invested enterprise, a Foreign-Invested Enterprise Approval Certificate;
- iv. Information regarding the workplace, person in charge and management staff for the location where the service is to be provided;
- v. Evidentiary materials on the Internet platform and information data processing and handling capabilities, evidence on the conditions that enable the transportation, communications, public security, taxation and internet information departments to access relevant internet data, a description of database access conditions, a statement explaining that the servers are set up in mainland China, and evidentiary materials on the implementation of an internet security management system and technical measures for network security protection;
- vi. Agreements on the provision of payment and settlement services signed with banks, and non-banking payment institutions in the case that electronic payment methods are adopted;
- vii. Texts for the operation and management system, safety management system and service quality assurance system.

Online taxi-hailing platform companies shall submit an application to the taxi administrative department where the company is incorporated. The provincial road transportation administration in the place where the operator company is incorporated shall cooperate with the communication, public security, taxation and cyberspace administrations and the People's Bank of China to examine and verify the materials with respect to online service qualifications referenced in items (5) and (6), above, and produce a verification letter that will be effective nationally. An online taxi-hailing business permit shall be issued by the taxi administrative department after the examination and approval.

b. Regulations on Private Vehicle Service Life Limitations and Removal from Service

In addition to the general qualifications required for vehicles and drivers as set forth in Paragraph 2 above, such as holding an operating license, the Interim Measures also specify strict limitations for the service life of private cars. According to the Interim Measures, a vehicle with a distance traveled

of greater than 600,000 kilometers shall be removed from service, while a vehicle that has an actual distance traveled of less than 600,000 kilometers, but has been placed in service for more than 8 years shall also be removed from service.

c. Internet Business Operating Qualifications

The Interim Measures stipulate that online taxi-hailing platform companies shall file an internet information services record with the provincial level communications administration in the location where the company is incorporated. The information to be filed includes the operator's real identity information and access information and the online taxi-hailing business permit issued by the taxi administrative department. Where telecommunications services are involved, the relevant provisions for telecom management shall also be complied with. In accordance with the Administrative Measures for Internet Information Services, the online taxi-hailing platform company shall file an internet information services record or apply for a value-added telecommunications services license, depending on whether the company charges for the required internet information services. If the company does not charge its passengers a fee for the information services, then the service is not considered to be for-profit and the company only needs to file an internet information services record, and it is not necessary to apply for a value-added telecommunications services business license.

d. Whether Signing a Labor Contract is Required

Considering that the signing of a labor contract would prevent some part-time drivers from engaging in online taxi-hailing, the Interim Measures clearly stipulate that online taxi-hailing platform companies may execute many types of labor contracts and agreements with drivers depending upon their working hours and frequency of service, so as to enable both part-time and full-time drivers to participate in the business. (Note: The Interim Measures (draft for comment) require online taxi-hailing platform companies to sign a formal labor contract with the platform's drivers.)

e. Information Security

The Interim Measures stipulate provisions with respect to information security in the following aspects:

- i. Online taxi-hailing platform companies shall notify of the purpose, methods and scope of the collection and use of personal information of the drivers, ride hailers and passengers on its platform. Unless expressly agreed to by the owner of the information, the companies shall not use such information for other business purposes.
- ii. Online taxi-hailing platform companies cannot collect the information of drivers, ride hailers and passengers beyond the scope of what is necessary for operating the online taxi-hailing business.
- iii. Except for the purpose of cooperating with state organs to exercise their right of supervision/inspection and to conduct criminal investigations, the online taxi-hailing platform

companies shall not provide any information of drivers, ride hailers and passengers to any third party, which includes the name, contact information, home address, bank account or payment account, location and travel routes of such persons, and shall not disclose any sensitive information related to national security such as geographical coordinates and geographical markers.

When such personal or sensitive information is found to have been compromised, the online taxi-hailing platform company shall promptly report to the relevant authorities and take prompt and effective remedial measures.

f. Restrictions on Competition and Price Mechanisms

The Interim Measures clearly prohibit behaviors that would impede fair market competition or damage the legitimate rights and interests of passengers or the public interest. The Interim Measures also provide that online taxi-hailing platform companies shall not engage in any unfair pricing activity, such as operating below cost, disrupting the normal market order, damaging national interests or the legitimate rights and interests of other companies for the purpose of squeezing out competitors, monopolizing the market or engaging other illegal pricing activity. In addition, we note that the Interim Measures also stipulate price mechanisms for online taxi-hailing services. Except for when the municipal government considers it is necessary to implement government pricing, online taxi-hailing services are subject to market pricing.

g. Encouraging Private Passenger Car Sharing

The Guiding Opinions encourage and stipulates regulations for private passenger car sharing. Private passenger car sharing, also known as car-pooling or hitchhiking, refers to a mode of travel by which a car-sharing service provider releases a travel plan in advance, and people who share the same travel route may choose to ride in the provider's car for free or by sharing a part of the cost. As this will alleviate traffic congestion and reduce air pollution, the municipal governments are to encourage and regulate the development of private passenger car sharing and formulate relevant rules to define the rights and obligations of car-sharing service providers, passengers and information service platforms.

In Summary, the Guiding Opinions and Interim Measures not only acknowledge the legitimacy of online taxi-hailing, but also specify the qualifications of parties involved in the online taxi-hailing business and the standards for business conduct, which will certainly have a profound impact on the online taxi-hailing industry.

=====

2. Healthcare Public-Private Partnerships (PPP): Is there a need for bidding? (Authors: Ruina LIU, Huanhao HE)

As the government vigorously promotes cooperation between government and social capital (Public-Private Partnership, PPP) in infrastructure and public services fields, interesting legal questions arise with respect to the operation of PPP projects. Among them, one question is whether PPP projects should be subject to bidding. In this article, we will discuss this issue by illustrating the example of the PPP project in the healthcare field.

Currently, based upon the way that social capital investors participate in healthcare PPPs, these PPP projects can be categorized into three forms. First, investors may participate in a hospital restructuring and ultimately hold equity in the hospital, either directly or indirectly. A second form is for investors to be entrusted by a hospital to manage the hospital and provide specific services to the hospital. A third form is for investors to participate in the construction or renovation of a hospital and to enjoy a contractual right to profits, and the investors would not directly or indirectly hold any equity in the hospital.

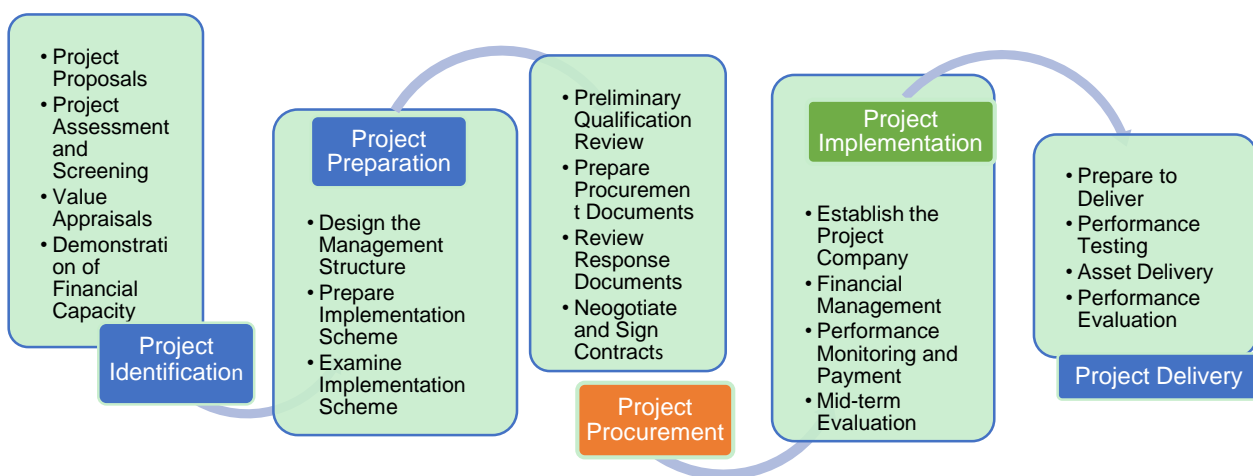
Two PPP Project Stages may Involve Bid Invitations

PPPs are mainly applicable to public service and infrastructure projects for which the government is the responsible provider and that are suitable for market-oriented operations. Municipal facilities, such as gas, electricity, water, heating, sewage and garbage disposal facilities, transportation facilities, such as roads, railways, airports and urban rail transportation, public service projects such as healthcare, tourism, education and training, medical treatment and elderly care, as well as the water conservation, and resource, environmental and ecological protection projects can all be operated as PPPs.¹

In fact, PPP projects can last for decades and involve multiple processes. So, the real question is which stages may involve open bidding? Taking the example of PPP projects in the healthcare sector, there are two stages which may involve bid invitations. The first stage is to select investors, which is common among all three forms of PPP projects as mentioned above. Second is the project implementation stage. This stage mainly relates to new construction projects and hospital renovation projects.

¹ See Section 3 of *Guiding Opinions of the National Development and Reform Commission on Launching the Cooperation between Governments and Social Capital* (Fa Gai Tou Zi [2014] No.2724).

According to the *Circular on Printing and Issuing Operational Guidance on the Modes of Cooperation by Governments and Social Capital (for Trial Implementation)* (Cai Jin [2014] No. 113, hereinafter referred to as the "**Circular No. 113** ") promulgated by the Ministry of Finance and *Circular on Forwarding the Guiding Opinions of the Ministry of Finance, National Development and Reform Commission and People's Bank of China on Promoting the Public-Private-Partnership (PPP) Mechanism in the Public Services*, promulgated by the General Office of the State Council (Guo Ban Fa [2015] No. 42), the operation of PPP projects can be divided into five steps: project identification, project preparation, project procurement, project implementation and project delivery (as shown in the drawing below), of which the project procurement and project implementation may involve bid invitations.



Project Procurement – Selecting Investors

According to the *Circular on Issues Concerning the Promotion and Application of the Public-Private Partnership Model* (Cai Jin [2014] No. 76, hereinafter referred to as "Circular No. 76"), the PPP model is a type of long-term cooperative relationship established in the infrastructure and public service fields, which is in essence the government procurement of services. The project procurement process is actually the implementing agency's selection of investors, which is therefore based on the *Government Procurement Law (Revised in 2014)* and relevant laws and regulations. It follows then that the process of selecting investors for healthcare PPP projects is actually the process by which hospitals, as the public institutions making procurements with fiscal funds, select investors that will provide the services.

The project implementing agency shall choose the appropriate procurement methods depending upon the characteristics of the procurement requirements, including bidding procurement (including open bidding and selective bidding) and non-bidding procurement (including competitive negotiations, single-source procurement and competitive consultations). The specific content of the different procuring methods is detailed in the following table:

Bidding or Non-bidding	Method of Procurement	Content	Applicable Laws
Bidding	Open Bidding	The procuring unit shall invite unspecified suppliers to submit bids by issuing a bid invitation announcement.	Administrative Measures for Tendering and Bidding in Government Procurement of Goods and Services
	Selective Bidding	The procuring unit shall randomly select three or more suppliers from the qualified suppliers and invite them to submit bids by issuing them a bid invitation letter.	
Non-bidding	Competitive Negotiations	The negotiating team shall negotiate with the qualified suppliers with respect to procurement matters. Subsequently, the suppliers shall submit responsive files and the final price offer in accordance with the requirements of the negotiation documents. Finally, the procurer shall choose the final supplier from the candidates proposed by the negotiating team.	Administrative Measures for the Non-Bidding Procurement Process in Government Procurement
	Single-source Procurement	The procurer shall procure goods or services from a specific supplier.	
	Competitive Consultations	The consultation team shall consult with the qualified suppliers with respect to procurement matters. Subsequently, the suppliers shall submit responses and final price offers in accordance with the requirements of the negotiation documents. Finally, the procurer shall choose the final supplier from the candidates proposed by the consultation team after evaluation.	Interim Administration Measures for Government Procurement through the Competitive Consultation Procurement Method

Notes: According to the *Government Procurement Law*, procurement methods shall also include price inquiries. Since price inquiries only apply to the procurement of goods, it is not listed as a PPP project procurement method.

Section 26 of the *Government Procurement Law* clearly stipulates that “open bidding shall be the main procurement method in government procurement.” However, does this mean that PPP projects must first choose to adopt open bidding? In our opinion, it is better to analyze the question on a case-by-case basis and not to draw a broad conclusion in this regard. In fact, considering the complexity of PPP projects, different projects may subject to different procurement methods depending on their specific operating methods and characteristics. The specific content is shown on the following table:

Method of Procurement	Applicable Cases
Open Bidding	(1) Procurement projects that reach the open bidding threshold amount, unless other procurement

	<p>methods are approved before procurement begins by the financial departments of governments above the level of districted cities and autonomous prefectures.</p> <p>(2) It mainly applies to projects whose core boundary conditions and technical and economic parameters are clear and complete and consistent with state laws and regulations and government procurement policies, and which will not be changed during the procurement process.</p>
Selective Bidding	<p>(1) The goods or services are of a special nature and can only be procured from a limited number of suppliers; or</p> <p>(2) The ratio of expenses to the total value of the government procurement will be too large if the goods or services are procured by open bidding.</p>
Competitive Negotiations	<p>(1) After bidding, there is no supplier tender or qualified tender or re-bidding is not possible;</p> <p>(2) The detailed specifications or requirements for the project cannot be determined due to the project's complex technology or specialized nature;</p> <p>(3) The time limit cannot meet the demands of users if open bidding is adopted; or</p> <p>(4) The total price of the goods or services cannot be determined beforehand.</p>
Single-source Procurement	<p>(1) The commodities or services can only be procured from a single supplier;</p> <p>(2) Procurement from other suppliers is impossible due to the occurrence of an unexpected critical situation; or</p> <p>(3) Additional procurements should be made from the original suppliers in order to keep consistency with the previous procurements or to meet the needs of supportive services, and the total amount of the additional procurement does not exceed 10% of the original contract value of the procurement.</p>
Competitive Consultations	<p>(1) Government-procured service projects;</p> <p>(2) The detailed specifications or requirements of the project cannot be determined due to the project's complex technology or specialized nature;</p> <p>(3) The total price cannot be determined in advance due to uncertainty regarding time and quantity with respect to artwork to be procured, patents, proprietary technology or services.</p> <p>(4) Scientific research projects that have insufficient market competition and the scientific and technological achievement transformation projects that need government support; or</p> <p>(5) Construction projects other than those that must be subject to open bidding in accordance with the <i>Tendering and Bidding Law</i> and its implementing regulations.</p>

Project Implementation – Selecting Project Contractors by Open Bidding

In addition to the procurement stage that may involve open bidding, the project implementation stage for construction projects may also invite bids from project contractors. PPPs for new construction projects and hospital renovations are required to involve construction project bidding at the project implementation stage.

According to Section 3 of the *Tendering and Bidding Law*, the following construction projects

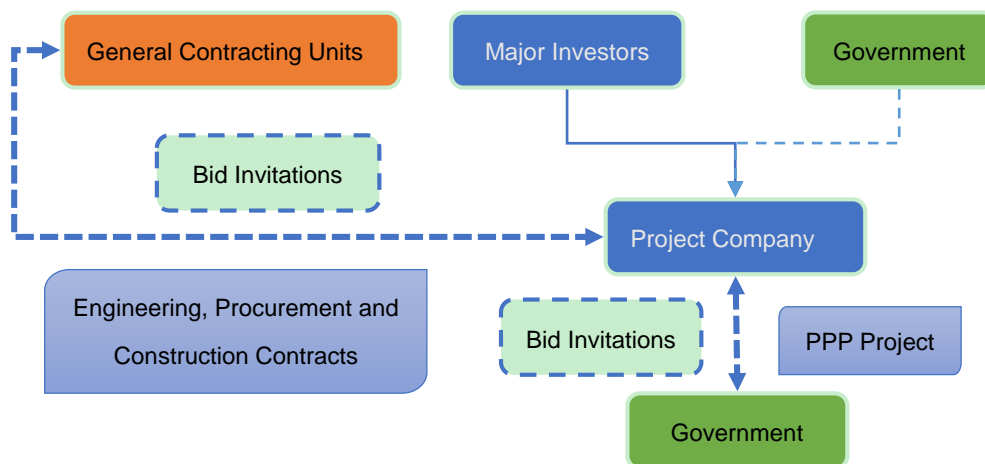
conducted in the territory of the People's Republic of China must be subject to bidding, including surveying and prospecting, design, engineering and the supervision of such projects as well as the procurement of major equipment and materials related to the construction thereof:

- a. projects such as large-scale infrastructure and public utilities involving social and public interests and public security;
- b. projects that are wholly or partly invested with state-owned funds or funded through State financing; and
- c. projects using loans or aid funds from international organizations or foreign governments.

As described above, the PPP model mainly applies to the infrastructure and public service sectors. As long as the projects are “large-scale infrastructure and public utilities projects that involve social and public interests and public security,” such projects must be subject to open bidding according to the laws. The specific scope and standards for these projects reference the *Provisions on the Scope and Scale Standards of Construction Projects for Tendering (Order of State Development Planning Commission, No.3)*.

“PPP + EPC” Model – Saving the Trouble of "Second Bidding"?

As described above, there are two stages in the process of PPP project operation that may involve open bidding, as shown in the chart below:

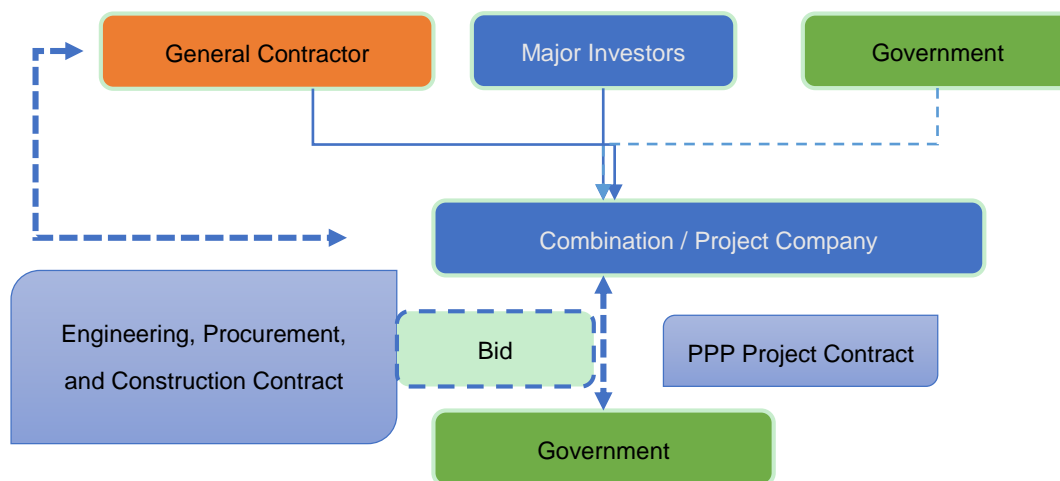


- Notes: 1. The project company is normally founded after the successful bidder is chosen/ the social investors are selected;
2. As the case may be, the government may invest in the project company but the shareholding ratio is normally not high.

In order to avoid "second bidding," the "PPP + EPC (engineering, procurement and construction contract)" model is usually adopted in practice. That is, the agency implementing the project chooses the social investors for the PPP project in accordance with the law, while at the same time determining the general contractor for the PPP construction project.

According to Section 9 of the *Implementing Regulations of the Tendering and Bidding Law of the People's Republic of China*, “if the investors of concession projects selected by means of bid invitation can construct, produce or provide the project, goods or services on their own, open bid invitations may not be carried out,” and the construction company may join the major investors to form a combination to submit a bid for the PPP project. After winning the bid, the combination of the construction company and the major investors (and the subsequently established project company) shall together sign a PPP project contract with the government while the construction company shall separately sign an EPC contract with the project company as the general contractor. For example, in May 2011, after China Communications Construction Company (“CCCC”) won the bidding for the East Coast Park development in Shantou, Guangdong under the “PPP+EPC” model, CCCC Investment Company Ltd., which was subordinate to CCCC and CCCC Mechanical & Electrical Engineering Co., Ltd. jointly set up the CCCC (Shantou) East Coast Park Investment Construction Co., Ltd. to jointly promote the implementation of the project.

The "PPP + EPC" model is shown as below:



However, PPP + EPC model is not universal in all cases. After all, Section 9 of *Implementing Regulations on the Tendering and Bidding Law of the People's Republic of China* only applies to investors that are selected through open bidding. In fact, in practice, competitive negotiations and competitive consultations have become the most common means to select PPP project investors.

Additionally, the “concession projects” referenced in Section 9 of the *Implementing Regulations of the Tendering and Bidding Law of the People's Republic of China* cannot be equated to “PPP projects” either. In fact, the relationship between “concession projects” and “PPP Projects” directly reflects the conflict of the regulations issued by NDRC and the Ministry of Finance, which has been a long-lasting puzzle to PPP practitioners.

It is noted that, according to Section 9 of *Opinions on Deepening the Reform of Investment and*

Financing Systems issued by CPC Central Committee and State Council on July 18, 2016, "The government encourages the cooperation of the government and social capital. Various departments of various regions may seek to expand the supply of public goods and services by granting concessions and the government procurement of services in the form of a single project, a combination of projects and contiguous development in the areas of transportation, environmental protection, healthcare, elderly care, etc." This is the first time the central government has categorized "government and social capital cooperation (PPP)" into two models: concessions and the government procurement of services, which also challenges the expression referenced in Circular No. 76, namely that "PPPs are in essence the government's procurement of services." In order to better coordinate the powers of the two ministries and resolve the conflicts of their respective regulations, it is necessary to promulgate a superior law, the *Government and Social Capital Cooperation Law*, and its implementing regulations as soon as possible. We'll further discuss this issue in another article.



Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:



Contact Us

Beijing Office

Tel.: +86-10-8525 5500
Suite 906, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Estella CHEN Attorney-at-law

Tel.: +86-10-8525 5541
Email: estella.chen@hankunlaw.com

Shanghai Office

Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing
West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law

Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office

Tel.: +86-755-3680 6500
Room 2103, 21/F, Kerry Plaza Tower 3, 1-1
Zhongxinsi Road, Futian District, Shenzhen
518048, Guangdong, P. R. China

Jason WANG Attorney at-law

Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com

Hong Kong Office

Tel.: +00852-2820 5600
Suite Rooms 2001-02, 20/F, Hutchison
House, 10 Harcourt Road, Central,
Hong Kong, P. R. China

Dafei CHEN Attorney at-law

Tel.: +852-2820 5616
Email: dafei.chen@hankunlaw.com