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FOREIGN CONSTRUCTION CONTRACTOR IN VIETNAM: LOCAL COMPLIANCE FRAMEWORK

In this article we describe requirements of Vietnamese law that need to be complied with when foreign contractors are engaged in construction works in Vietnam.

1. Does foreign contractor need to establish a subsidiary in Vietnam to perform construction activity in the country?

Vietnam law defines foreign contractor as “a foreign organization or individual that is legally capacitated and having civil legal capacity to conclude and execute the contract. Passive legal capacity and active legal capacity of the foreign contractor shall be determined according to the law of the country of which the contractor holds nationality. The foreign contractor may be a general contractor, contractor, joint venture contractor or sub-contractor.”

Construction activities in Vietnam can include “construction planning, formulation of an investment project to construct a work, construction survey, construction design, construction, construction supervision, project management, selection of contractors, pre-acceptance test, handover of the work for exploitation or use, its warranty and maintenance and other activities related to its construction.”

Foreign contractor can establish a Vietnam subsidiary entity to perform construction activities with 100% foreign ownership. Relevant CPC (Central Product Classification) for the business objectives can include CPC 511 to CPC 518.

As a matter of practice, the route with establishing a subsidiary is usually followed by construction companies that intend to take part in multiple projects over a long period of time. Direct participation without establishing a subsidiary can make more sense to participate just in a single project.

2. Which registrations and licenses are required to be received by the foreign contractor?

Under domestic laws, foreign contractor is only permitted to carry out construction activities in Vietnam upon receiving a construction operating license issued by state agency in charge of construction.

The foreign contractor must submit an application to the agency issuing construction operating license which is either (i) Construction authorities affiliated to the Ministry of Construction for those projects of national importance, group-A projects or

Highlights of this note

- ▶ Does foreign contractor need to establish a subsidiary in Vietnam to perform construction activity in the country?
- ▶ Which registrations and licenses are required to be received by the foreign contractor?
- ▶ Does the customer that hires a foreign contractor need to receive any licenses or permits?
- ▶ Can foreign contractor relocate construction workers from abroad for the purposes of implementing works on an individual project?
- ▶ How to hire local employees.
- ▶ Payments to foreign contractor from local customer: foreign exchange regime
- ▶ Tax regime

construction projects located in at least two provinces or (ii) local Departments of Construction for those group-B or group-C projects of provinces.

Foreign contractor is generally expected to set up a joint venture (partnership or consortium) with a Vietnamese contractor or employ Vietnamese sub-contractors, unless Vietnamese contractors are do not have capabilities to execute tasks of the contract package.

Usual timeline to obtain a construction operating license is 20 days but in some cases it can take longer.

Once the license is obtained, foreign contractors must comply with its obligations that are usually set out in the license, including:

- Set up a project office and make relevant registrations with local authorities;
- Register for Foreign Contractor Tax (FCT) compliance;
- Recruit employees;
- Obtain insurance.

3. Does the customer that hires a foreign contractor need to receive any licenses or permits?

Project owner does not need license to engage with foreign contractor, but needs to comply with bidding regulation to select contractor in the cases required by law.

Requirements applicable to the project owner engaging foreign contractors to conduct the construction activities include the following:

- enter into contract with the foreign contractor if such foreign contractor obtained the construction operating license;
- supervising the foreign contractor in relation to the work allocated for main contractor/sub-contractor or between contractors in a consortium;
- consider the capacity and possibility of use of domestic construction equipment before agreeing a list of construction

machinery, equipment of foreign contractor that applies for temporary import – re-export;

- consider capacity of technical labor supply in Vietnam before agreeing on a list of foreigner staff working for the foreign contractor by the time they apply for entering Vietnam;
- certify statement of imported materials of the foreign contractor upon the construction completion;
- for management consultancy project and/or supervising construction quality project, inform other contractors and government agencies in charge of construction quality management to be aware of the functions and tasks of the foreign contractor.

4. Can foreign contractor relocate construction workers from abroad for the purposes of implementing works on an individual project?

As a general requirement, only economic management experts, technical management experts and skilled employees that are not available in Vietnam can be relocated to Vietnam from abroad.

Prior to recruiting foreign workers, foreign contractor shall specify the quantity, qualifications, professional competence and experience of foreign workers that are needed for performance of the project in Vietnam and submit a written request for the recruitment of Vietnamese workers to the job positions to the President of the People's Committee of province where the project is performed.

The President of the People's Committee of province shall direct local agencies and organizations to recommend and supply Vietnamese workers to the contractor and cooperate with other local agencies and organizations in recommending and making Vietnamese workers available to the contractor.

If Vietnamese workers are not made available to the contractor within



2 months from the day on which a request for recruitment of 500 workers or more is received, or within 1 month from the day on which a request for recruitment of 100 to fewer than 500 workers is received, or within 15 days from the day on which a request for recruitment of fewer than 100 workers is received, the President of the People's Committee of province shall consider allowing the contractor to recruit foreign workers to hold relevant job positions.

5. How to hire local employees.

There are no special procedures for the foreign contractors to hire local employees. There are no restrictions on the number of local employees to be hired as long as the foreign contractor complies with generally applicable labour regulations.

When no local subsidiaries are established, employment agreements are typically executed by the project office of the foreign contractor registered in Vietnam. The project office is not a legal entity in nature, but from operating perspective, it acts as a representative office with authorization from the foreign contractor to manage and fulfill rights and obligation in Vietnam in dealing with third parties including signing employment contracts directly with local employees.

6. Payments to foreign contractor from local customer: foreign exchange regime

The project office is required to establish a bank account in Vietnam to facilitate for receiving payments from project owner, pay expenses, taxes and similar payments.

The project office must comply with the forex control regulations as a resident of Vietnam. As such, transactions between the project office and other residents must be quoted, priced, and paid in local currency. In addition:

- a. For costs outside Vietnam involving the implementation of bidding package through international

bid as prescribed in the Law on bid: Contractors are allowed to bid in foreign currency and receive payments in foreign currency by transfer from investors or principal contractors for payment and remittance to foreign countries.

- b. For implementation of bidding package as prescribed by law on oil and gas: Contractors are allowed to bid in foreign currency and receive payments in foreign currency by transfer from investors or principal contractors for payment and remittance to foreign countries.

In practice, for smaller scale projects where the foreign contractor chooses to declare and pay tax under withholding method (i.e., the project owner will withhold and declare on behalf of the foreign contractor), then project owner can make the payment remittance directly to foreign bank account of foreign contractor after deducting the withholding tax. The project owner can demonstrate the invoice (in foreign currency) and construction contract to the commercial bank for approving

the payment remittance. The bank in such case would sell necessary foreign currency to make it possible to make the remittance. Certain banks can request to see withholding tax evidence even though the regulations require the project owner to have obligation to declare and pay withholding tax within 10 days from actual remittance.

For other large-scale projects, such as those involving bidding process, foreign contractor often implements project and fulfils its tax obligation through its project office in Vietnam. The project office will be the one to issue invoice in local currency to the project owner and receives payments made into its Vietnam bank account. It can then use these amounts to cover Vietnam expenses or buying foreign currency from commercial bank to remit to offshore supplier/vendor to pay for overseas costs as mentioned in the bidding package.

Once the project office is liquidated and all Vietnam tax is cleared, profit after tax can be remitted overseas.



7. Tax regime

Under Vietnamese tax laws, foreign business organizations (with or without a permanent establishment in Vietnam) and foreign business individuals (whether they are residents or non-residents of Vietnam) must pay the Foreign Contractor Tax if they have business activities in Vietnam or income derived from Vietnam as defined under Circular 103.

Income derived from Vietnam is defined as the income, in any form, of a foreign contractor or foreign subcontractor that is paid by a Vietnamese party irrespective of the location of the business establishment through which the foreign contractor or foreign subcontractor conducts its business activities. Generally, foreign companies and individuals without a legal presence in Vietnam are subject to FCT: (i) if the services are performed in Vietnam; or (ii) the income is derived from Vietnam.

The FCT rates are based on the foreign contractor's line of business. In terms of construction activities, the VAT component ranges from 3% - 5% and Corporate Income Tax component is 2%.

Foreign contractors declare and pay FCT by one of the following three methods:

- The Withholding Method - the Vietnamese contracting party (customer) withholds the FCT when paying the foreign contractor;
- The VAS Method - the foreign

contractor registers under the Vietnamese accounting system for the direct payment of taxes to the tax office; or

- The Hybrid Method - the foreign contractor registers only for VAT. It is a hybrid, with elements of both the VAS Method and the Withholding Method.

The most commonly used is the Withholding Method. Under this method, the foreign contractor is not required to register under VAS or to pay FCT directly to the tax office. The Vietnamese contracting party is responsible to withhold the FCT – both the VAT and CIT portions – from payments made to the foreign contractor and pay it to the tax office on the foreign contractor's behalf. The added value used for VAT calculations and the CIT rate are fixed rates based on the nature of the service.

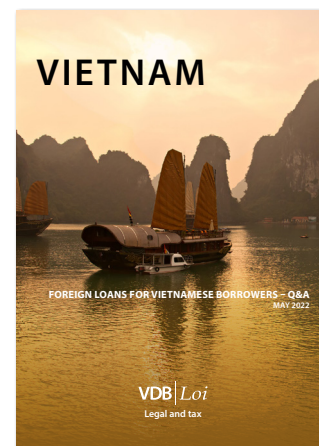
Applying the VAS Method is similar to paying tax as an enterprise with a taxable presence in most respects. The taxpayer will be expected to comply with relatively strict provisions on the deduction of head office expenses and the non-deductibility of invoices that do not comply with all formal requirements.

Under the Hybrid Method, the tax authorities grant a VAT number to the foreign contractor. The foreign contractor would then be allowed to offset input VAT (charged by local suppliers, such as subcontractors), but would still have to pay CIT by means of withholding.

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