

# LEGAL BRIEFING

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## NEW REGULATIONS ON CONSTRUCTION CONTRACT IN DECREE 50/2021/ND-CP

On April 1<sup>st</sup>, 2021, Decree 50/2021/ND-CP (“**Decree 50**”) came into force amending specific provisions of Decree 37/2015/ND-CP (“**Decree 37**”) on detailed regulations on construction contract, bringing about broad changes which will considerably affect new projects which utilize state funds (including ODA and PPP projects).

In particular, Decree 50 expands the mandatory scope of application compared with Decree 37, amends and supplements many provisions related to contracts for design, procurement of materials and equipment and engineering procurement and construction (EPC), changes to provision of variation of construction contracts, and introduced a number of newly recognized contract types. The essential contents of Decree 50 are as follows:

### 1. WIDEN THE SCOPE OF APPLICATION

Previously, the provisions of Decree 37 are mandatory to projects using “*state capital, corporate capital from 30% and over or from under 30% to over VND 500 billion of total project investment capital*”. Decree 50 massively expanded this scope to now include “*projects that use public investment capital, and construction contracts between PPP project enterprises and construction contractors implementing bidding packages of investment projects under the public-private partnership model*”. As such, under Decree 50, any projects using state capital, regardless of the percentage, including PPP projects, will be mandatorily subject to the provisions of Decree 37 and 50.

While this change naturally increases the number of projects, parties and contracts which will be subject to mandatory requirements under Decree 50 and 37, perhaps new PPP project enterprises will be the most affected. In practice, the state capital contribution in PPP projects can be less than 30% of the PPP project’s total investment capital, and thus the PPP project would not be a subject under Decree 37. Moreover, the state often made contribution in the form of land use rights or land lease, meaning actual working capital would be contributed by private parties. PPP project enterprises thus often had flexibility to negotiate and handle contentious issues such as variations, claims regarding construction contracts. However with Decree 50, this flexibility has been curbed, and PPP private investors may consider this a negative point.

### 2. NEW KINDS OF CONSTRUCTION CONTRACTS ARE INTRODUCED

Two new kinds of contracts are introduced by Decree 50: (i) simple and small-scale construction contract, and (ii) fee plus cost-based construction contract.

The simple and small-scale construction contract is a construction contract for the execution of bidding packages and whose value do not exceed the limit of a small-sized bidding package in accordance with the law on bidding. For these contracts, some unnecessary procedures have been removed to optimize the performance of construction contract in small projects.

The fee plus cost-based construction contract is not a new type of construction contract per se. In fact, this contract is stipulated as one in Article 140 of Construction Law 2014; however, it was not addressed in Decree 37.

It is welcoming that Decree 50 has recognized new construction contract types. We expect this change to create more flexibility for employers who now has more options to decide what's best to apply to their project. However, it should be noted that Decree 50 has not provided clear guidance on these new types of contracts, and it will remain to Ministry of Construction will be providing detailed guidance on them in the form of new circulars in the future.

### **3. REVISION TO PROVISIONS REGARDING EPC CONTRACT**

Amongst the most significant revisions brought about by Decree 50 are new provisions relating to EPC Contracts. Specifically, Article 4.5 of Decree 50 imposes several key head of terms that parties must agree on before signing the EPC contract, including scope of work; construction place; information about natural conditions; requirements for construction design; technology, equipment plan, interfacing, provision of utilities, applicable standards.

Secondly, Decree 50 now specifies when EPC contracts should be applied. Notably, there's now a "preference" to use EPC Contract for complex projects, required high demands for technology, and must adhere to consistency from design to equipment supply, construction, technology transfer training.

Employers must now consider far more factors prior to choosing to use the EPC contract form. Before deciding to apply the EPC contract for the project, the employer must organize the assessment of technical and technological requirements, whether there's shortening the implementation time of the project, the consistency from the design to provision of equipment, the construction to operation step, the transfer of construction to meet the objectives and requirements of the approved project. The employer will also be responsible for ensuring the feasibility of the application of EPC contract compared to other types of contracts.

Decree 50 provides a useful checklist for issues which commonly arise during practice of EPC constructions in Vietnam (interfacing, allocation of responsibility for provisions of utilities, applicable standards...). By requiring Parties to expressly agree on these provisions beforehand, the drafters of Decree 50 perhaps expect to reduce the number of disputes which arise in relation to public-funded construction projects. However, employers are now required to expressly consider many more factors prior to using EPC contracts, which may result in less usage in the future.

#### **4. CHANGE IN THE VARIATION TO CONSTRUCTION CONTRACT AND CONTRACT PRICE**

Decree 50 has amended regulation on a variation of unit-price-based construction contracts, particularly. Previously, Decree 37 provides that a change in the quantity of work by 20% can justify a new unit price subject to contracting parties' agreement. Decree 50 now requires additionally that there must be concurrently a change by 0.25% of the contract value, and over 1% of the specific work's unit price.

Additionally, even if parties agree on a new unit price due to a change in over 20% of quantity of work, that price will only apply for the work amounts actually performed in excess of 120% of the volume stated in the contract. In effect, any new unit price will apply only in respect of the volume of work no. 121% onwards.

On the flip side, if the actual work volume decreases greater than 20% of the corresponding workload stated in the contract, the new unit price is applied to the entire volume of actual completed work.

Finally, the method of determining contract price variation has been clarified. Decree 50 now specifies a new method of contract price adjustment - the direct settlement method. It has also clarified the price index for the purpose of varying construction contract price to be the construction price index.

Employers and contractors should both keep these requirements in mind for the purpose of cost control and estimation when preparing, submitting bid proposals, and when negotiating construction contracts. Variation and the cost of variation works have always been contentious issue in the practice of construction for Vietnam public works and public infrastructure. With this requirement, employers and contractors are given incentive to accurately calculate the cost and quantity of works as both parties will be more restricted in their ability to vary construction works during the performance.

As for the method of determination of contract price variation, this will be a welcoming clarification, especially with regards to the application of the construction price index for price determination purposes. However, as the Vietnam construction

price index may deviate from the market price, contractors should take note of this provision with regards to their cost control, and when analyzing bid document for potential future variations.

## OTHER LEGAL UPDATES

Several important legal instruments have also recently been promulgated:

- 1. Decision 17/2021/QĐ-TTg** regulates amounts of vocational training support for employees participating in unemployment insurance. According to this Decision, if employees participating in unemployment insurance meet conditions for vocational training support prescribed in Article 55 in the 2013 Law on Employment, they will receive the amount of support equals to the tuition fees charged by vocational training institutions based on the actual training duration, but not exceeding 4,500,000 dong/student/course (for 3 months' training courses). With regard to participants in more than 3 months' training courses, the amount of support will be calculated per month and on the basis of the tuition fees and the actual training duration, but will not be greater than 1,500,000 dong/person/month. The Decision takes effect on 15 May 2021).
- 2. Decree 12/2021/NĐ-CP** amends Decree 89/2013/NĐ-CP providing instructions on appraisal prescribed in the Law on Prices. According to this document, appraisal enterprises must notify the Ministry of Finance on the changes when enterprises created after corporate division, splitting, merger, amalgamation and ownership transformation. On the occasion of enterprise's dissolving, bankrupt or suspended from business; of their own free will, terminating their appraisal services; changing shareholders/capital contributing members that are appraisers practicing at enterprises, the enterprise also needs to inform Ministry of Finance on these changes. The Decree is entering into force as of 1 May 2021
- 3. Circular 03/2021/TT-NHNN** regulates provisions concerning debt rescheduling, interest reduction or exemption or debt non-restructuring for the purpose of supporting customers stricken with Covid-19. Accordingly, credit institutions and foreign bank branches may, at their discretion, decide to grant exemption or reduction of interest or fees prescribed in their internal rules and regulations with respect to outstanding debts incurred from credit facilities before June 10, 2020 (except corporate bond purchase and investment) if: (1) Obligations to repay principal and/or interest are due during the period from January 23, 2020 to December 31, 2021; (2) Customers are incapable of repaying principal and/or interest debts by payment due dates under terms and conditions of lending contracts or agreements due to decreases in their revenue and income caused by the Covid-19 outbreak. Interest and fee exemption or reduction granted to customers under Circular 03 will last until 31 December 2021 (effective on 17 May 2021).
- 4. Circular 02/2021/TT-NHNN** provides instructions about foreign exchange transactions of credit institutions licensed to provide foreign exchange services (briefly called credit

institutions). The Circular stipulates that credit institutions licensed to conduct foreign exchange transactions may conduct spot trading, forward trading, swaps, option transactions with subjects including other authorized credit institutions; economic organizations. Credit institutions may not collect transaction fees for foreign currency transactions. In foreign currency transactions with other credit institutions, credit institutions are not required to present documents proving the foreign currency use purpose. For foreign investors, they must provide documents proving the ownership of Government bonds, ensuring that the value and term of the foreign currency transaction do not exceed the purchase price and the remaining period of that Government bond. The Circular takes effect from 17 May 2021.

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