君合专题研究报告

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中国建设工程争议解决年度观察系列（一）

—新近颁布的法律法规

一、概述

（一）建筑业“放管服”改革深化

2017年是建筑业“放管服”[1]改革深化的一年。在2017年已经开始贯彻实施的建筑业“放管服”举措中，在境内受到影响较大的领域集中在工程总承包。

尽管我国自20世纪80年代就已开始工程总承包的探索和实践，但此前更多依赖于市场内在驱动（特别是工业工程领域）以及住房和城乡建设部（以下简称“**住建部**”）等中央部委的推进。在2017年，国务院明确提出“加快推行工程总承包”[2]，这极大地促进了工程总承包模式在各地方的发展实践。但是，在此过程中，也产生了比较突出的地方政府各自为政的问题，亟待通过出台上位法予以规范和统一。

（二）对外承包工程业务持续发展

根据国家商务部统计，2017年我国对外承包工程完成营业额1685.9亿美元，同比增长5.8%；新签合同额2652.8亿美元，同比增长8.7%。其中在“一带一路”沿线国家，无论是营业额还是新签合同额，均占50%以上比重[3]。

2017年国务院取消对外承包工程资格制度和核准制度后，境外承包工程准入市场门槛大幅度降低，相信会在很大程度上推动我国境外工程业务量的增长，但同时也可能带来恶性竞争加剧的不利后果，可谓“喜忧参半”。

（三）建设工程争议解决面临新挑战

与建设工程行业的发展动态相比，建设工程争议解决往往存在滞后效应。鉴此，与此前年度观察成果相似，2017年全国建设工程纠纷的争议焦点，仍大量集中于“黑白合同”效力、挂靠和转包及违法分包、造价鉴定、工程质量、优先受偿权等问题（其中相当一部分具有中国特色）。

但是，在2015—2017年期间，建设工程合同纠纷的类型和焦点问题，也在发生一些重要变化，集中体现在：

首先，受宏观经济形势和产业政策的影响，煤炭、化工、建材、钢铁等主要采用EPC总承包模式的工业项目，大量出现EPC合同长期暂停乃至解除的现象，以EPC工程进度款或EPC合同解除后结算价款为主要诉求的纠纷日益增多。以中华人民共和国最高人民法院（以下简称“**最高人民法院**”）近些年审理的EPC合同纠纷案件为例，以“EPC”、“交

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1 “简政放权、放管结合、优化服务”的简称。

2《国务院办公厅关于促进建筑业持续健康发展的意见》（国办发〔2017〕19 号）第三条第三款“加快推行工程总承包”。

3 中华人民共和国商务部：“商务部合作司负责人谈 2017 年全年对外投资合作情况”，http://www.mofcom.gov.cn/article/ae/ag/201801/20180102699398.shtml，访问时间：2018 年 2 月 18 日。

钥匙工程”作为关键词，在目前全部检索到的16件案例中，有13件的终局判决或裁定集中发生在2015—2017年间，其中2015年5件、2016年3件、2017年5件[4]。以上16件案例更多集中于环保工程（5件）、化学工程（4件）和新能源工程（3件）。EPC合同纠纷虽然也涉及招标、资质等问题，但与常规建设工程合同纠纷的争议焦点往往存在较大不同，更着重于EPC工程自身特性，且与国际工程市场对接程度明显更高。

其次，随着“一带一路”倡议的深入实施，在中国境内审理的境外工程相关纠纷逐年增加。基于境外工程争议的自身特点和当事人争议解决需求，中国境内仲裁机构扮演着更加积极的角色。例如，北京仲裁委员会/北京国际仲裁中心（BAC/BIAC，以下简称“**北仲**”）与吉隆坡区域仲裁中心（KLRCA）、开罗地区国际商事仲裁中心（CRCICA）共同联合发起“一带一路仲裁行动计划”。又如，2017年9月8日，中国国际经济贸易仲裁委员会丝绸之路仲裁中心在陕西西安正式揭牌。2017年，北仲处理的涉外工程类案件的类型主要为涉外建设工程施工合同、涉外建设工程设计合同、涉外建设工程劳务分包合同等，平均标的额0.52亿元。

基于以上建设工程争议解决领域的新发展趋势，本年度报告将工程总承包和境外工程作为观察重点。

(四)PPP领域规范发展成为焦点

2017年7月全国金融工作会议召开，金融风险防控被提升到国家安全的高度，地方政府隐性债务风险再度成为焦点。在此背景下，中央各相关部委在11月集中出台一系列规范性文件，对PPP项目进行空前的严格监管。

在PPP争议解决领域，2017年度虽然并未发生重大的具有全国影响力的PPP合同纠纷案件，但这应当只是阶段性的现象。随着这些规范性文件影响的持续发酵，预计2018—2019年将可能集中爆发已签约PPP项目合同解除纠纷。具体详见本文第二（四）“PPP领域”部分。

二、新出台的法律法规或其他规范性文件

(一) 常规建设工程领域

1、 全国人大法工委《对地方性法规中以审计结果作为政府投资建设项目竣工结算依据有关规定的研究意见》（法工委函[2017]2号）

2015年5月，中国建筑业协会向全国人大法工委提交《关于申请对规定“ 以审计结果作为建设工程竣工结算依据”的地方性法规进行立法审查的函》。

2017年2月22日，全国人大法工委印发《对地方性法规中以审计结果作为政府投资建设项目竣工结算依据有关规定的研究意见》（法工委函[2017]2号），明确规定对地方性法规中的如下情形，即：第一种，直接规定以审计结果作为竣工结算的依据；第二种，规定应**当在**招标文件中载明或者在合同中约定以审计结果作为竣工结算依据的条款，应当予以清理纠正。但是，对于第三种情形，即规定建设单位**可以**在招标文件中载明或者在合同中约定以审计结果作为竣工结算的依据的条款，全国人大法工委认为并不存在与法律不一致、超越地方立法权限的问题。

2017年6月5日，全国人大法工委法规备案审查室向中国建筑业协会复函，即《关于对地方性法规中以审计结果作为政府投资建设项目竣工结算依据有关规定提出的审查建议的复函》（法工备函[2017]22号），进一步明确：“地方性法规中直接以审计结果作为竣工结算依据和应当在招标文件中

[4]中国裁判文书网，http://wenshu.court.gov.cn/，访问时间：2018 年 1 月 16 日，正文中提到的 16 个案例的案号为：
1.（2011）民再申字第 84 号
2.（2012）民申字第 668 号
3.（2013）民申字第 2437 号
4.（2014）民一终字第 256 号
5.（2015）民申字第 185 号
6.（2015）民一终字第 144 号
7.（2015）民申字第 2022 号
8.（2015）民申字第 2955 号
9.（2016）最高法民终 357 号
10.（2016）最高法民再 192 号
11.（2016）最高法民再 53 号
12.（2016）最高法民终 695 号
13.（2017）最高法民辖终 151 号
14.（2017）最高法民终 57 号
15.（2017）最高法民辖终 193 号
16.（2017）最高法民终 409 号

载明或者在合同中约定以审计结果作为竣工结算依据的规定，限制了民事权利，超越了地方立法权限，应当予以纠正。”

这是立法机关首次就建设工程合同履行过程中的行政审计问题出具意见，对于从源头解决长期存在行政审计机关与建设工程合同当事人之间的竣工结算争议，意义重大。

2、 最高人民法院《关于审理建设工程施工合同纠纷案件适用法律若干问题的解释（二）》征求意见稿

2017年7月，最高人民法院发布《关于审理建设工程施工合同纠纷案件适用法律若干问题的解释（二）》（征求意见稿），集中就“合同效力及相关问题”、“工程价款的结算”、“建设工程造价鉴定”、“实际施工人权利的保护”、“建设工程价款的优先受偿权”等五方面共三十六条，向社会征求意见，引起业界广泛关注和深入讨论。

3、 国家发改委《关于修改<招标投标法><招标投标法实施条例>的决定（征求意见稿）》

2017年8月29日，为深化招标投标领域“放管服”改革，增强招标投标制度的适用性和前瞻性，推动政府职能转变，国家发改委起草形成了《关于修改<招标投标法><招标投标法实施条例>的决定》（征求意见稿）。其中，对最低价中标的限制、确定中标人方式的改变、合同履行情况公布制度的创设等备受瞩目。

4、 国家九部委《关于印发<标准设备采购招标文件>等五个标准招标文件的通知》（发改法规[2017]1606号）

2017年9月4日，国家发改委等九部委共同发布了新一批标准招标文件，包括《中华人民共和国标准设备采购招标文件》（2017年版）、《中华人民共和国标准材料采购招标文件》（2017年版）、《中华人民共和国标准勘察招标文件》（2017年版）、《中华人民共和国标准设计招标文件》（2017年版）及《中华人民共和国标准监理招标文件》（2017年版）。至此，历经10年，《招标投标法实施条例》第15条第4款所规定的适用于“依法必须进行招标的项目”的标准招标文件体系基本形成。

(二) 工程总承包领域

1、 国务院办公厅《关于促进建筑业持续健康发展的意见》（国办发〔2017〕19号）

2017年2月21日，国务院办公厅下发《关于促进建筑业持续健康发展的意见》（国办发〔2017〕19号）（以下简称“**《意见》**”），首次面向全国建筑业提出“加快推行工程总承包。装配式建筑原则上应采用工程总承包模式。政府投资工程应完善建设管理模式，带头推行工程总承包。”

《意见》发布后，各地政府陆续“井喷式”发布大量与工程总承包有关的行政规范性文件。但这些文件对于诸如“ 前期咨询单位能否成为工程总承包单位”、“工程总承包单位是否需要同时具备设计和施工资质”、“工程总承包的再分包”等问题，各地规定尺度不一，亟待统一和规范。

2、 住建部《房屋建筑和市政基础设施项目工程总承包管理办法（征求意见稿）》（建市设函[2017]65号）及各地相关规范性文件

为贯彻落实《意见》，完善工程总承包管理制度，住建部建筑市场监管司于2017年12月28日发布《房屋建筑和市政基础设施项目工程总承包管理办法》（征求意见稿），这对改善各地工程总承包管理制度各自为政的局面，在房屋建筑和市政基础设施领域建立全国统一规范的工程总承包市场具有重要意义。

在此之前，2017年9月4日，住建部办公厅发布《建设项目工程总承包费用项目组成（征求意见稿）》，旨在规范总承包费用项目组成，有效控制项目投资和提高工程建设效率。这在全国工程总承包发展史上尚属首次，具有非常重要的实践应用价值。值得关注的是，浙江省比住建部领跑一步，已于2017年12月11日出台《浙江省工程总承包计价规则（试行）》（2018年1月1日起施行），成为全国首个施行地方性工程总承包计价规则的省份。

(三) 境外工程领域

1、 国务院取消对外承包工程资格制度

2017年3月1日国务院颁布《国务院关于修改和废止部分行政法规的决定》（国务院第676号令，以下简称“**《决定》**”），删除了2008年7月21日国务院《对外承包工程管理条例》第二章“对外承包工程资格”。至此，我国长期实行的对外承包工程资格制度正式退出历史舞台。

该项制度的取消，是中央“ 简政放权”执政理念的体现，对于降低中小企业走出去的“门槛”，促进“一带一路”倡议的深化实施具有积极意义。但是，这也使得境外工程市场本已长期存在的恶性竞争更为激烈，进而对不同类型市场主体、行业自律组织（如中国对外承包工程商会）乃至中国境内争议解决机构，提出新的艰巨任务和挑战。

2、 国务院取消对外承包工程项目投（议）标核准制度

《决定》还同时取消了对外承包工程项目投（议）标核准制度。2017年11月13日，商务部发布《关于做好对外承包工程项目备案管理的通知》，对一般项目实行分级分类备案管理。其中，中央企业总部的境外工程项目备案由商务部负责；地方企业和中央企业下属单位的境外工程项目备案由省级商务主管部门负责。但是，对在与我无外交关系的国家（地区）承揽的项目、涉及多国利益及重大地区安全风险的项目，仍按照特定项目由商务部统一管理。

对外承包工程项目备案管理制度的实施，简化政府监管流程，这将有利于中国对外承包工程企业提高效率。但是，与对外承包工程资格取消的后果类似，对外承包工程项目投（议）标核准制度取消后，因境外工程市场“门槛”降低而可能带来的负面影响，仍需要密切观察。

（四）PPP领域

1、 国务院《基础设施和公共服务领域政府和社会资本合作条例》（征求意见稿）

2017年7月21日，国务院法制办发布《基础设施和公共服务领域政府和社会资本合作条例》（征求意见稿），这标志着中国PPP顶层统一立法进程迈出重要一步，尤其是在该征求意见稿第五章“争议解决”部分，拟确认PPP项目的可仲裁性。

2、 财政部办公厅《关于规范政府和社会资本合作（PPP）综合信息平台项目库管理的通知》（财办金[2017]92号）

2017年11月10日，财政部办公厅发布《关于规范政府和社会资本合作（PPP）综合信息平台项目库管理的通知》（财办金[2017]92号）（以下简称“92号文”），旨在进一步规范PPP项目运作，防止PPP异化为新的融资平台。

第一，92号文规定存在下列情形之一的项目，不得进入全国PPP综合信息平台项目库（以下简称“**项目库**”）：（1）不适宜采用PPP模式实施；（2）前期准备工作不到位；（3）未建立按效付费机制。

第二，92号文还规定存在下列情形之一的项目，应予以清退：（1）未按规定开展“两个论证”；（2）不宜继续采用PPP模式实施；（3）不符合规范运作要求，包括未按规定转型的融资平台公司作为社会资本方的；采用建设—移交（BT）方式实施的；采购文件中设置歧视性条款、影响社会资本平等参与的；未按合同约定落实项目债权融资的；违反相关法律和政策规定，未按时足额缴纳项目资本金、以债务性资金充当资本金或由第三方代持社会资本方股份的；（4）构成违法违规举债担保；（5）未按规定进行信息公开。

第三，92号文规定2018年3月31日为完成项目库集中清理的期限。

3、 国资委《关于加强中央企业PPP业务风险管控的通知》（国资发财管[2017]192号）

2017年11月17日，国资委发布《关于加强中央企业PPP业务风险管控的通知》（国资发财管[2017]192号）（以下简称“192号文”），严格规范和限制中央企业参与PPP项目。

第一，192号文要求央企“多措并举加大项目资本金投入，但不得通过引入‘名股实债’类股权资金或购买劣后级份额等方式承担本应由其他方

承担的风险”。据此，央企需要通过变更磋商，将自有资金置换基金融资以充实项目资本金，并及时清算被置换的基金，避免劣后级风险。

第二，192号文还提出了央企不得在PPP项目中为其他方股权出资提供担保，不得为债务融资单独提供增信措施的要求。为此，央企需要撤销为其他股东出资行为提供的担保，由其他股东（政府出资代表除外）按照其在项目公司的持股比例，共同为债务融资提供担保。

第三，192号文明确提出“对存在瑕疵的项目，要积极与合作方协商完善；对不具备经济性或存在其他重大问题的项目，要逐一制定处置方案，风险化解前，该停止的坚决停止，未开工项目不得开工”。

结合境内PPP项目市场的现状，对92号文及192号文的规定进行分析，在92号文规定的2018年3月31日前完成整改要求的难度相当大。鉴此，除非延长整改期限，否则可能将引发大面积的PPP项目合同解除及补偿纠纷。

声明：本文是作者执笔的《中国建设工程年度观察（2018）》的部分研究成果，全部研究成果收录于北京仲裁委员会主编的《中国商事争议解决年度观察（2018）》，该年度观察将于近期在中国法制出版社正式出版，欢迎关注。

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JUN HE
SPECIAL REPORT

JUNHE

April 2, 2018

Annual Review on Construction Disputes in China (Series 1)——Newly-Promulgated Laws and Regulations

1. Overview

1.1 Further "DIO" Reform in Construction Industry

It was in 2017 that the reform to delegate power, improve regulation and optimize services (hereinafter referred to as the "DIO reform") in the construction industry went further. The DIO measures that have been implemented in the construction industry in 2017 have made a significant influence on the domestic EPC field.

Although China has already initiated the exploration and practice of EPC since 1980s, the progress thereof, however, was more dependent on market internal drivers (especially in industrial engineering sectors) and the promotion by central ministries and commissions, especially the Ministry of Housing and Urban-Rural Development (hereinafter referred to as the "**MOHURD**"). In 2017, the State Council explicitly proposed to accelerate developing the EPC approach, which has been greatly promoting the development and practice of EPC throughout the country. However, during the course of the State Council's proposal, a severe problem that local governments acted of their own free wills arose, which urgently will require standardization and unification by superordinate laws.

1.2 Sustained Development in Overseas Contracting Business

According to the statistics of MOFCOM, in 2017, China reached a turnover of USD 168.59 billion in overseas contracted projects, up 5.8% year on year and the value of newly-signed contracts was USD 265.28 billion, up 8.7% year on year, among which countries alongside the Belt and Road routes took up more than 50% of the overall turnover and value of newly-signed contracts.[1]

The "threshold" of market access for overseas construction projects has been greatly cut down after the State Council abolished the Overseas Contracting Qualification System and Approval of Overseas Contracted Projects System in 2017，which is expected to greatly promote the growth of overseas construction business of China, meanwhile it may also bring adverse effect of aggravating fierce competition, which in some sense is "a hope mingled with fear".

1.3 New Challenges Facing Dispute Resolution of Construction Industry

Compared with the development of the construction industry, there is always a lag

[1] MOFCOM: Director of the Head of Department of Outward Investment and Economic Cooperation on the outward investment cooperation in 2017, at http://www.mofcom.gov.cn/article/ae/ag/201801/20180102699398.shtml，last visited on 18 February 2018.

effect in construction dispute resolution. For this reason, similar to the previous annual review, key issues of nationwide construction dispute resolution in 2017 still focus on issues such as validity of the "black and white contracts", affiliated enterprises, illegal assignment and illegal subcontracting, construction cost appraisal, quality of the work and preemptive right, most of which are of Chinese characteristics.

However, from 2015 to 2017, the types and key issues of disputes over construction contracts have undergone some important changes, which are as follows:

Firstly, influenced by macro-economic situation and industrial policies, for industrial projects where EPC approach is more popular such as projects of coal, chemistry, construction materials, iron, and steel, and so on, a number of EPC contracts have been in prolonged suspensions or even terminated and the number of disputes over EPC progress payments or settlement payment caused by termination of EPC contracts has been increasing. Taking such cases as examples of disputes over EPC contracts adjudicated by the Supreme People's Court (or "**SPC**") in recent years, among the 16 cases found on China Judgments and Decisions website by keywords "EPC" or "Turnkey projects", 13 of them were finally judged or ruled within 2015 to 2017, among which were 5 cases in 2015, 3 cases in 2016 and 5 cases in 2017.[2]

Fields of the 16 cases mainly revolve around environmental protection engineering (5 cases), chemical engineering (4 cases) and new energy engineering (3 cases). Although disputes over EPC contracts also involve issues such as bidding, qualification and so on, the key issues of EPC contracts can be greatly varied from those of contracts for conventional construction (based on design-bid-building approach) as the former emphasizes more the nature of the contract and is apparently more consistent with the game rules in international construction markets.

Secondly, as the Belt and Road Initiative is further implemented, the number of disputes that are related to overseas construction projects being adjudicated within China has increased year by year. Based on the characteristics of overseas construction projects and the parties' demands thereof for dispute resolution, we are of the opinion that Chinese domestic arbitration institutes would play a more active role therein, where the following are some examples: the Beijing Arbitration Commission/Beijing International Arbitration Center ("BAC/BIAC") together with the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") and the Cairo Regional Center for International Commercial Arbitration ("CRCICA") jointly proposed "One Belt One Road Arbitration Initiative"; CIETAC Silk Road Arbitration Center was officially established in Xi'an, Shanxi Province on 8 September 2017. In BIAC, major types of foreign-related engineering cases were construction contract, design contract and subcontract of labor service. The average amount in dispute was RMB 52 million.

In view of the above new development trends of construction dispute resolution, this

[2] China Judgments and Decisions Website at http://wenshu.court.gov.cn/, last visited on 16 January 2018. The dockets of the above-mentioned 16 cases are as follows:
(a). (2011) Min-Zai-Zi No.84
(b). (2012) Min-Shen-Zi No.668
(c). (2013) Min-Shen-Zi No.2437
(d). (2014) Min-Yi-Zhong-Zi No.256
(e). (2015) Min-Shen-Zi No.185
(f). (2015) Min-Yi-Zhong-Zi No.144
(g). (2015) Min-Shen-Zi No.2022
(h). (2015) Min-Shen-Zi No.2955
(i). (2016) Zui-Gao-Fa-Min-Zhong No.357
(j). (2016) Zui-Gao-Fa-Min-Zai No.192
(k). (2016) Zui-Gao-Fa-Min-Zai No.53
(l). (2016) Zui-Gao-Fa-Min-Zhong No.695
(m). (2017) Zui-Gao-Fa-Min-Xia-Zhong No.151
(n). (2017) Zui-Gao-Fa-Min-Zhong No.57
(o). (2017) Zui-Gao-Fa-Min-Xia-Zhong No.193
(p). (2017) Zui-Gao-Fa-Min-Zhong No.409

Annual Review will focus on EPC and overseas construction projects.

1.4 Development of Regulations on PPP Becoming Focus

The national meeting of financial work was held in July 2017, in which the prevention and control of financial risks was promoted to the height of influencing national security, and thus the risk of local governments' hidden debt became the focus once again. In this situation, relevant central ministries and commissions promulgated a series of regulatory documents in November, regulating PPP projects more rigorously than ever.

As far as the PPP dispute resolution is concerned, there was no major PPP contract-related cases with nationwide influence taking place in 2017, but this should be just a temporary phenomenon. With the above-mentioned regulatory documents continuously influencing the business environment, it is predicted that there might be an explosion of disputes over termination of PPP contracts from 2018 to 2019, which can be found in detail in Section IV of Part II, below.

2. Newly-Promulgated Laws, Regulations and other Regulatory Documents

2.1 In the Field of Conventional Construction (Based on the Design-Bid-Build Approach)

2.1.1 *Research Opinions on Local Regulations on Taking Audit Results as Basis of Completion Settlement for Government-Invested Construction Projects (Fa-Gong-Wei-Han [2017] No.2)* by the Standing Committee of the National People's Congress, Legislative Affairs Commission (hereinafter referred to as the "SCNPCLAC")

In May 2015, China Construction Industry Association submitted to SCNPCLAC the *Letter on the Application for Legislation Review of Local Regulations on Taking Audit Results as Basis of Completion Settlement for Construction Projects.*

On 22 February 2017, SCNPCLAC issued *Research Opinions on Local Regulations on Taking Audit Results as a Basis of Completion Settlement for Government-Invested Construction Projects (Fa-Gong-Wei-Han [2017] No.2)*, explicitly requiring that two kinds of regulatory provisions shall be deleted and corrected, which are (1) those that directly provide for audit results to serve as the basis of completion settlement and (2) those that provide for a clause that stipulate the audit results to serve as the basis of completion settlement **must** be included in bidding documents or in the contract. However, as for the third kind of regulatory provisions which provides that the employer **may** set out in bidding documents or in the contract a clause providing for audit results to serve as the basis of completion settlement is not in violation of the law nor exceeding the legislative power of local governments.

On 5 June 2017, the Record-Filing and Review Office of SCNPCLAC replied to China Construction Industry Association by letter (i.e. the "*Reply Letter to Application for Legislation Review of Local Regulations on Taking Audit Results as Basis of Completion Settlement for Construction Projects" (Fa-Gong-Bei-Han [2017] No.22))*, which further clarified that "*local regulations, which directly provide for audit results to serve as the basis of completion settlement, or a clause that the audit results to serve as the basis of completion settlement must be included in bidding documents or in the contract, restrict the civil rights and exceed the legislative power of local governments and thus shall be corrected.*"

This was the first time the legislature issued

opinions on administrative audit regarding the implementation of construction contracts, which is of great significance to fundamentally resolve the longstanding disputes over completion settlement between the administrative audit authorities and the parities to construction contracts.

2.1.2 *Interpretation II on Issues Concerning the Application of Law for the Trial of Cases of Dispute over Construction Contracts (Draft for Solicitation)* by the SPC

In July 2017, the SPC issued *Interpretation II on Issues Concerning the Application of Law for the Trial of Cases of Dispute over Construction Contracts (Draft for Solicitation)* with 5 aspects, 36 articles in total, soliciting for social comments on issues such as *validity of the contract and its related questions*, *settlement for construction costs*, *construction cost appraisal*, *protection for rights of actual construction undertaker* and *preemptive right to construction payments*. The draft Judicial Interpretation II on Construction Contract has drawn wide attention and deep discussion of practitioners.

2.1.3 *Decisions on Amendments of the Bidding Law and Regulations on Implementation of the Bidding Law (Draft for Solicitation)* by the National Development and Reform Commission of People's Republic of China (or "NDRC").

On 29 August 2017, to further the DIO reform in bidding field, to reinforce the applicability and foresight of the bidding system and to promote transformation of governmental functions, NDRC drafted the *Decisions on Amendments of the Bidding Law and Regulations on Implementation of the Bidding Law (Draft for Solicitation).* What is high profile in the proposed amendments are the limitation of Winning Bid at the Lowest Price Rule, the change of approach to determine the winning bidder and the establishment of the System of Publication of Contract Implementation.

2.1.4 *Notice on Issuing Standardized Bidding Documents for the Procurement of Equipment and Other Four Standardized Bidding Documents (Fa-Gai-Fa-Gui [2017] No.1606)* by nine state departments and commissions

On 4 September 2017, NDRC together with eight other state departments and commissions jointly issued a series of standardized bidding documents, including *Standardized Bidding Documents for Procurement of Equipment of People's Republic of China (2017 Edition), Standardized Bidding Documents for Procurement of Materials of People's Republic of China (2017 Edition), Standardized Bidding Documents for Surveying of People's Republic of China (2017 Edition), Standardized Bidding Documents for Design of People's Republic of China (2017 Edition)* and *Standardized Bidding Documents for Supervision of People's Republic of China (2017 Edition)*. So far, after ten years, the standardized bidding documents system, which is provided for in Clause 4 of Article 15 in the *Regulations on Implementation of the Bidding Law* to be applied for projects under mandatory bidding procedure, has been basically formed.

2.2 In the Field of EPC

2.2.1 *Opinions on Promoting Sustainable Healthy Development of Construction Industry (Guo-Ban-Fa [2017] No.19)* by the General Office of the State Council

On 21 February 2017, the General Office of the State Council issued *Opinions on Promoting Sustainable Healthy Development of Construction Industry (Guo-Ban-Fa [2017] No.19)* (hereinafter referred to as the "Opinions"), for the first time proposing towards the nationwide construction industry

to “accelerate implementing EPC”, “prefabricated buildings shall adopt an EPC approach in principle” and “government-invested projects shall improve construction management mode and take the lead in promoting EPC.”

After the release of the Opinions, local governments issued in succession a mass of administrative documents concerning EPC. These administrative documents, however, provide for different standards and requirements upon issues such as whether or not the early-stage consultancy unit can act as the EPC contractor, whether or not an EPC contractor shall have both design and construction qualification certificate and whether or not a subcontractor is entitled to re-subcontract in an EPC project, which urgently need normalization and standardization.

2.2.2 *Administrative Measures for EPC Projects of Housing Construction and Municipal Infrastructure (Draft for Solicitation) (Jian-Shi-She-Han [2017] No.65)* by MOHURD and other local regulations

To fully implement the Opinions and to improve the EPC management system, Department of Construction Market of MOHURD issued *Administrative Measures for EPC Projects of Housing Construction and Municipal Infrastructure (Draft for Solicitation)* on 28 December 2018. It is of help to improve the situation where localities act of their own wills in relation to the EPC management system, and is of great significance to form a nationwide unified system of EPC market in housing construction and municipal infrastructure sectors.

Prior to the issue of Draft Measures for EPC, on 4 September 2017, the General Office of MOHURD issued *Costs Components of EPC Projects (Draft for Solicitation),* which aimed to standardize the costs components of EPC projects and effectively control the funds of projects, thereby increasing the efficiency of construction. This was the first instance of EPC policy development in China, and is of great value in practice. It is noteworthy that Zhejiang Province took an earlier step than MOHURD and had formally promulgated *Pricing Rules of EPC Projects of Zhejiang Province (For Trial)* on 11 December 2017, which became effective on 1 January 2018 and made Zhejiang the first province in China to implement local pricing rules of EPC projects.

2.3 In the Field of Overseas Construction Projects

2.3.1 The State Council Abolished Overseas Contracting Qualification System

On 1 March 2017, the State Council published *Decisions on Revising and Repealing Certain Pieces of Administrative Regulations (Guo-Wu-Yuan-Ling No. 676)* (hereinafter referred to as the “Decisions”), deleting Chapter II (Overseas Contracting Qualification) of *Regulations on the Administration of Overseas Contracting Projects* (which was promulgated on July 21, 2008). This formally marked the end of the longstanding Overseas Contracting Qualification System in China.

The abolition of this system is a symbol of the central government’s concept of governance “to streamline administration and to delegate powers”, which is of positive significance to cut down the threshold of going global for small and medium-sized enterprises and promote further implementation of the Belt and Road Initiative. However, the abolition also intensifies the longstanding fierce competition in the market of overseas construction projects and thus a series of new hard tasks and challenges are faced by various types of market entities, industry self-discipline organizations (like China

International Contractors Association) and even dispute resolution institutions within China.

2.3.2 The State Council Abolished the Approval System of Bid (Negotiation) for Overseas Contracted Projects

The Decisions also abolished the approval system of bid (negotiation) for overseas construction projects in the meantime. On November 13, 2017, MOFCOM issued *Notice on Well-Conducting Record-filing Management of Overseas Construction Projects* implementing classification and categorization management of normal projects where MOFCOM is responsible for record-filings of overseas construction projects by central state-owned enterprises' headquarters, and provincial commerce authorities are responsible for record-filings of overseas construction projects by local enterprises and central state-owned enterprises' subsidiaries. Nevertheless, projects in countries (regions) with no diplomatic relations with China or projects involving multiple national interests and major regional security risks are classified as specific projects and still uniformly administrated by MOFCOM.

The implementation of record-filing system for overseas construction projects will simplify the government supervision process and will benefit the Chinese international contractors in improving their efficiency. However, similar to the consequence of the abolishment of overseas contracting qualification, the abolishment of approval system of bid (negotiation) for overseas construction projects may bring adverse impacts as the threshold of the overseas construction market has been cut down, to which we shall pay more attention.

2.4 In the Field of PPP

2.4.1 *Regulations of Public-Private Partnership in Infrastructure and Public Services (Draft for Solicitation)* by the State Council

On July 21, 2017, Legislative Affairs Office of the State Council issued *Regulations of Public-Private Partnership in Infrastructure and Public Services (Draft for Solicitation)*, which marked an important step in the process of unified top legislation of PPP in China wherein section five concerning "dispute resolution" thereof, the arbitrability of PPP projects is to be confirmed.

2.4.2 *Notice on Standardization of Projects Library of Public-Private Partnership (PPP) Comprehensive Information Platform (Cai-Ban-Jin [2017] No.92)* by the General Office of the Ministry of Finance

On November 10, 2017, the General Office of the Ministry of Finance issued the No.92 Document aiming to further standardize the operation of PPP projects and to prevent PPP from becoming a new kind of pure financing platform.

Firstly, the No.92 Document provides that the following projects are forbidden to be stored in the Projects Library of National PPP Comprehensive Information Platform (hereinafter referred to as the "Projects Library"), which are: (1) those inappropriate for a PPP approach; (2) those without adequate preparatory works; and (3) those lacking a Pay for Performance System.

Secondly, the No.92 Document also provides that the following projects must be swept away: (1) those without "Two Assessments" being carried out in accordance with relevant regulations; (2) those no longer appropriate for PPP approach; (3) those incompliant with standardized operational requirements, including (i) those where the private party is a government-owned financing platform company yet to be transformed pursuant to relevant regulations, (ii) those adopting the Build-Transfer (BT) approach, (iii) those

where the government procurement documents contains discriminatory clauses that obstruct private parties from equal participation, (iv) those where debt financing is yet to be carried out in accordance with agreements, and (v) those in violation of relevant laws and policies where project capital was not contributed on time and in full, or debts are used as equity capital, or private shares are held in the name of a third party; (4) those where public party illegally provides guarantee to raise debt; and (5) those failing to publicize project information in accordance with relevant provisions.

Thirdly, the No.92 Document provides that March 31, 2018 is the deadline for completion of cleaning up the Projects Library.

2.4.3 *Notice on Enhancing Risk Control of Central State-Owned Enterprises' PPP Business (Guo-Zi-Fa-Cai-Guan [2017] No.192)* by SASAC.

On 17 November 2017, the State-Owned Assets Supervision and Administration Commission of the State Council (or "SASAC") issued the No.192 Document, strictly regulating and constraining central state-owned enterprises to participate in PPP projects.

Firstly, the No.192 Document requires central state-owned enterprises to take measures to increase project capital contribution while prohibiting them from bearing risks that should be borne by other parties in manners of introducing such funds as are equity in name but debt in nature because of promised fixed payback or buying in subordinated shares. As such, central state-owned enterprises need to replace their own funds into fund finance to enrich project capital by negotiations for amendment and timely settle down the replaced funds to avoid risks arising out of subordinated shares.

Secondly, the No.192 Document also provides that central state-owned enterprises are not allowed to provide security for other shareholders' equity contributions nor to alone provide credit enhancement measures for debt financing. As such, central state-owned enterprises shall revoke guarantees having been made for other shareholders' equity contributions and other shareholders (except for government contribution representatives) shall jointly provide guarantees for debt financing in accordance with their respective proportions of shares held in the project company.

Thirdly, the No.192 Document explicitly requires central state-owned enterprises to actively negotiate with partners to improve and perfect defective projects, and to formulate disposal plans for uneconomic or otherwise severely problematic projects one by one. Before the risks of these projects are resolved, central state-owned enterprises are required to suspend current or future projects.

Based on our analysis of the provisions of the No.92 Document and the No.192 Document and combined with the current situation of domestic PPP market, we are of the opinion that it would be very difficult for the relevant parties to meet the rectification requirements by March 31, 2018 as provided in the No.92 Document. As such, unless there is an extension of rectification time, a large number of disputes over PPP contract-related terminations and compensations may arise.

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