

## Legal Comment

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### Project General Contractor: Calling for the Chinese EPC model

On December 31, 2019, the Ministry of Housing and Urban-Rural Development ("MOHURD") and the National Development and Reform Commission jointly issued the *Measures for Administration of Project General Contracting for House Construction and Municipal Infrastructure Projects* (the "PGC Measures"), which became effective on March 1, 2020.

In the international construction market, especially when involving manufacturing or power equipment, factory plants or similar facilities, infrastructure projects or other types of construction projects, EPC mode is commonly adopted; that is, an integrated general contract including project engineering, equipment and material procurement and civil work construction - also known as a "turnkey project". The most popular EPC template contract was published by the International Federation of Consulting Engineers (in French: Fédération Internationale Des Ingénieurs Conseils, FIDIC), *Conditions of Contract for EPC/Turnkey Projects*. However, EPCs are rarely adopted in the Chinese construction market. A binary mode is commonly adopted in China, with a design institute responsible for engineering design and a construction company taking charge of civil construction works. Such a construction contracting practice is largely due to the statutory regulations on itemized construction qualifications, the regulatory construction project filing mechanism, and the official contracting contract templates.

In 2003, the Ministry of Construction (the predecessor of MOHURD) issued the *Guidance Opinions on Cultivation and Development of Project General Contracting and Project Management Enterprises*, in which the concept of project general contracting ("PGC") was officially mentioned for the first time. In 2011, MOHURD and the State Administration for Industry and Commerce issued the *Model Contract for General Contracting of Construction Projects (Trial)*. On May 20, 2016, MOHURD issued *Several Opinions on Further Promoting the Development of PGC ("Several Opinions on PGC")*, which provided a number of specific rules relating to PGC. Notwithstanding the above, the Chinese construction market for a long time continued to follow the traditional pattern of "design and build", i.e. separate design and construction general contracting ("CGC"). After MOHURD issued two drafts for public comments on December 26, 2017 and May 10, 2019, the PGC Measures were officially issued in the form of a ministerial regulation at the end of 2019. This PGC statutory instrument has become the ultimate authority in China – prior to this, all the PGC-related regulations were merely MOHURD ministerial guidance notes.

### **Preconditions for adopting PGC**

Under the current approval system for housing and infrastructure construction projects, PGC contracts can be awarded upon completion of a preliminary design for a project involving state-owned capital. For the majority of construction projects not involving state-owned capital, e.g., privately-funded projects, the administrative prerequisite is obtaining the construction project approval from the competent development and reform commission (so-called "Li Xiang").

Although the amended *PRC Tender and Bid Law* and its Implementation Regulations have cancelled the mandatory tendering requirement for construction projects not utilizing state-owned capital, in practice, many privately-funded construction projects still adopt a tender and bid approach for selecting the general contractor. Under CGC, a bidder usually formulates the price quote based on drawings and bills of quantities provided by the client or its consultant. Under the PGC Measures, the client shall provide tender requirements (equivalent to the client requirements in the EPC conditions), the hydrogeology, engineering geology, topography and other geological survey data, as well as the feasibility study report, scheme design or preliminary design, etc. PGC bidders are required to provide a lump sum quotation based on the above basic data. In addition, in accordance with the PGC Measures, the PGC contractor for privately-funded projects is recommended to accept a fixed lump sum quotation, which may not be adjusted unless in exceptional circumstances, as agreed in the contract. Conversely, under the *Several Opinions on PGC*, PGC projects may adopt the pricing model of either the fixed lump sum or cost-plus-profit. In this way, the fixed lump sum price affords higher requirements for Chinese contractors in terms of price quoting and project cost management.

### **Dual qualification for PGC contractors**

Chinese law stipulates multiple engineering qualifications for construction, including general contracting, design, survey, construction management, quantity surveying, etc. Projects with different scales and in different trades must engage professional institutions with the corresponding trade and grade of qualifications. In the past, the commonly adopted "design plus CGC" construction mode has brought higher requirements to the client in respect to the project management team and

competency of the construction professionals. The segregation of responsible parties for engineering drawing and civil construction work often leads to disputes between the client, design institute and general contractor, on design error, client variation, design change, construction change, etc.

Although MOHURD has issued various opinions encouraging PGC since 2003, it has not triggered a specialized PGC qualification. It was permissible under both the *Guidance Opinions on General Contracting* and *Several Opinions on PGC* for a contractor with one of the corresponding grade of qualifications on either design or CGC to undertake PGC works. A PGC contractor may sub-contract the design or civil construction works for which it does not have the corresponding qualification. Even in the draft PGC measures issued by MOHURD on May 10, 2019, a single design or CGC qualification appropriate for the project scale was sufficient for PGC works. However, according to Article 10 of the officially issued PGC Measures, a PGC contractor must have both the engineering design and CGC qualifications, the grade of which should be competent for the project scale, or alternatively, a design institute and CGC contractor with the competent grade may form a consortium for PGC works. As such, China has officially adopted a dual qualification mechanism for PGC. While the reason for the authority changing the PGC management from single qualification to dual qualification needs to be clarified, we expect to see significant changes in the Chinese construction market:

Firstly, there will be more single-qualification general contracting companies and design institutes seeking to obtain cross trade qualifications in order to become legally qualified PGC contractors. Article 12 of the PGC Measures encourage design institutes to apply for CGC qualification. A design institute already holding comprehensive engineering design qualification, industry trade or civil work grade A design qualifications may apply for the grade A CGC qualification directly within the corresponding trade. Similarly, CGC companies may apply for the corresponding grade engineering design qualification within the same trade. A contractor already holding grade A or above CGC qualification may apply for grade A engineering design qualification directly within the corresponding trade. The completed PGC projects can be referenced as the corresponding design and CGC works. In the specific regulatory review and approval practice MOHURD still needs to clarify whether direct mutual recognition of the CGC and design qualifications will suffice, or whether the respective statutory requirements for professional personnel and equipment related to a corresponding qualification are still required.

Secondly, we will see more PGC consortia consisting of CGC contractors and design institutes. The PGC Measures explicitly request that, a PGC contractor hold both engineering design and CGC qualifications that are appropriate for the scale of the project, or alternatively, a consortium of a design institute and a CGC contractor with corresponding qualifications may also work. Neither drafts of the PGC measures mentioned PGC consortia. Previously, various implementation opinions from local provincial governments on general contracting consortia varied greatly. For example, in the Jilin Province, only one - either the design institute or the CGC contractor - is permitted to undertake PGC works, but not in the form of a consortium. Where a consortium concludes a PGC contract and undertakes construction work, it poses a more complex allocation of risk and responsibility to both the client and the contractor. The PGC Measures stipulate that, all consortium members jointly conclude PGC contracts and bear joint and several liability towards the client. Such a provision tends

to protect the interest of the client more effectively, and seems in line with the international EPC practice. However, the consortium members are, on top of the PGC contract, to formulate detailed and explicit agreements regarding the allocation of rights, obligations and risks between the consortium members.

### **Risk allocation under PGC**

Under PGC or EPC, most project construction-related risks, such as design, procurement, construction etc., are borne by the contractor. Considering the specific construction market in China, regulatory authorities have specifically stipulated risk allocation principles under Article 15 of the PGC Measures. The following risks are to be borne by the client:

- (1) Price fluctuation of major construction materials, equipment and manpower beyond the contract range;
- (2) Change of contract price caused by change of law;
- (3) Completion time and cost change due to unforeseeable geological conditions;
- (4) Completion time and cost change attributable to the client; and
- (5) Completion time and cost change due to force majeure.

Under the traditional "design + CGC" mode, especially in a fixed lump-sum price contract, it appears that the contractor bears more risk for cost and completion time. However, in practice, due to the segregated responsibilities of the design institute and CGC contractor, and that 100% accuracy of construction drawings is usually not realistic, disputes between the client and CGC contractor largely exist in relation to inflated cost, completion time delay, or quality defects attributable to change of drawings. Where PGC is adopted, in principle, other than the five risks listed above which are to be borne by the client, other risks in relation to cost, completion time and quality are to be borne by the contractor. It is worth noting that, unlike the PGC Measures, in accordance with the FIDIC *Conditions of Contract for EPC/Turnkey Projects*, those risks which are listed under Article 15, paragraph (1) of the PGC Measures (labor, materials, equipment), and under Article 15, paragraph (3) (unforeseeable geological conditions) are to be borne by the contractor, unless otherwise agreed by the parties. In practice, subject to a specific legal system, for those unforeseeable factors that seriously affect the contractor's construction cost, the contractor may still claim for price adjustments based on significant change of circumstances.

Despite the provisions under Article 15 of the PGC Measures in relation to risk allocation, owing to the rather low legislative hierarchy of the PGC Measures, there is still uncertainty as to whether a judicial claim filed based on the PGC Measures will be supported, if a PGC contract lacks concrete agreements. It is suggested that the PGC parties make explicit and detailed risk allocation provisions in the contract.

### **Frequently Arising practical issues missing from the PGC Measures**

Subcontracting: In respect of general contracting of construction projects, regardless of whether CGC or PGC, companies should be encouraged to do professional works within their expertise and trade qualification, while subcontracting those part of works beyond their expertise to other, more qualified, professional organizations or teams. In the draft PGC measures dated May 10, 2019, it was permissible for PGC contractors to subcontract, by way of direct engagement, design or construction works, to a firm holding the corresponding qualification. Regrettably, it was deleted from the officially issued PGC Measures. The PGC Measures eventually adopted dual qualification and, as a result, PGC contractors may be keen to obtain such dual qualifications for both engineering design and CGC. The practical needs in subcontracting design or construction works still largely exist due to the generally varied expertise in design and civil construction. For the PGC Measures, some issues with high practical relevance still need to be clarified further by the regulatory authorities, including whether a dual-qualified PGC contractor may subcontract the design or construction works to a correspondingly qualified professional firm, and whether a subcontracted contractor may further subcontract design or special trade engineering works for those parts other than main structure of the project.

Regulatory administration: As the authority directly responsible for regulatory matters such as construction project approvals, construction permits, construction project completion acceptances, etc., it is surprising that MOHURD did not address such highly relevant issues in the PGC Measures. One of the reasons why PGC or EPC has so far not been commonly adopted in China, is that there is conflict between (i) the PGC or EPC, which requests one single general contractor to be responsible and independently liable towards the client for all the works, including geological survey, engineering design and construction, and (ii) the current construction administrative system, involving construction contract filing, issuing construction permits, completion acceptance filings, etc., which generally does not accept a single PGC contract for filing purpose. A rather prominent practical issue is that, on one hand, the administrative authorities have issued multiple legal documents to encourage PGC; and on the other hand, owing to the still quite stubborn regulatory rules, clients and contractors have to execute a series of contracts which, although complying with regulatory requirements, deviate from real life. This has led to a common legal issue of "black and white construction contracts" in the Chinese construction market. In the *Administration Measures for Shanghai Municipal PGC Pilot Projects* issued by the Shanghai Municipal Commission of Housing and Urban-Rural Development in 2016 and in its implementing rules, efforts have been made to address such a paradox in the form of provincial local rules, which could be referenced by MOHURD and other local construction authorities.

### **Tax structuring under PGC**

According to the current value-added tax (the "VAT") rules, the VAT rate for engineering design service is 6%, 9% for construction service and 13% for sales of construction materials. Under PGC, practical exploration and official clarification is still necessary on how the different VAT rates should apply to those work contents of the general contractor in survey, design, construction and procurement. For a consortium PGC, one should check with the competent tax authority, and make it clear in the PGC contract and the consortium agreement on how the respective consortium members should issue VAT invoices.

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## 以工程总承包的名义：呼唤中国的 EPC 工程承包模式

2019 年 12 月 31 日，住房和城乡建设部、国家发展改革委联合发布了《房屋建筑和市政基础设施项目工程总承包管理办法》（“《工程总承包办法》”），该项文件将于 2020 年 3 月 1 日起施行。

在国际工程承包领域，尤其是涉及加工或动力设备、工厂或类似设施，基础设施工程或其它类型开发项目时，多采用 EPC 方式建设，即项目设计（Engineering）、项目设备和设施采购（Procurement）和施工（Construction）一体的总承包，业内也俗称“交钥匙工程”。最常见的 EPC 合同条件范本即为国际咨询工程师联合会（FIDIC）出版的《设计采购施工（EPC）/ 交钥匙工程合同条件》。但在中国的工程建设中，鲜有采用 EPC 模式的，多采用设计院设计、建筑公司施工总承包的二元方式，这与中国一直以来在工程建设领域采用的分项资质、工程项目报建制度以及官方发布的施工合同示范文本等有很大的关系。

2003 年，当时的建设部发布《关于培育发展工程总承包和工程项目管理企业的指导意见》（“《工程总承包指导意见》”），首次官方系统地提出了“工程总承包”的概念。2011 年，住建部和国家工商总局发布《建设项目工程总承包合同示范文本（试行）》。2016 年 5 月 20 日，住建部发布《关于进一步推进工程总承包发展的若干意见》（“《工程总承包若干意见》”），对工程总承包的不少具体问题做出了规定。尽管如此，工程项目建设领域依然长时间沿袭了传统的“设计+施工总承包”模式。住建部先后于 2017 年 12 月 26 日和 2019 年 5 月 10 日发布《工程总承包办法》的征求意见稿后，终于在 2019 年岁末以部门规章的形式正式发布该办法。这也是迄今中国在工程总承包及 EPC 领域发布的层级最高的法律文件，此前有关工程总承包的规定均为住建部自行发布的部门规范性文件。

### 实行工程总承包的前提条件

在中国目前的房屋和基础设施建设项目审批制度下，对于涉及利用国有资本的投资项目，原则上应当在初步设计审批完成后进行发包；对于绝大部分不涉及利用国有资本的建设项目，如企业投资项目，取得发改委的基本建设项目立项批复是工程总承包发包的行政程序前提条件。

虽然修订后的《招标投标法》及其实施条例已经取消了对非利用政府资金建设项目的强制性招标要求，实践中许多企业投资建设项目依然会采用招标的方式选择承包商。在施工总承包模式下，投标人习惯根据业主及其咨询顾问提供的图纸以及工程量清单进行投标报价。而《工程总承包办法》规定，业主应当提供发包人要求（即相当于 EPC 合同条件中的“雇主要求”），在发包前完成的水文地质、工程地质、地形等勘察资料，以及可行性研究报告、方案设计文件或者初步设计文件等。工程总承包的投标人需要根据以上基本资料对项目总价进行报价，并且根据《工程总承包办法》的规定，企业投资项目的工程总承包宜采用总价合同，除合同约定可以调整的情形外，合同总价一般不予调整。在 2016 年的《工程总承包若干意见》中，尚规定了工程总承包项目可以采用总价合同或者成本加酬金合同。相比较而言，总价合同对国内的施工承包商在项目报价、项目造价管理等方面提出了更高的要求。

### 工程总承包双资质要求

中国法律对于工程建设领域设置了诸多专业资质要求，包括了施工、设计、勘察、监理、造价咨询等等，不同规模、不同专业领域的项目必须要聘请具备相应专业和等级资质的专业

机构实施。过去长期实施的“设计+施工”建设模式对业主提出了较高的项目管理团队和水平的要求，施工图设计和施工单位分离的模式也极易在业主、设计院和承包商之间因设计缺漏、业主变更、设计变更、施工变更等情形产生纠纷。

虽然住建部自 2003 年起就发文鼓励工程总承包，但从未设置专门的工程总承包资质。此前的《工程总承包指导意见》和《工程总承包若干意见》均规定，具备与项目建设规模相符合的设计或者施工其中之一专业资质的承包商，可以进行工程总承包。工程总承包商不具备资质的设计或施工工作，可以分包给具有相应专业资质的机构。即使在 2019 年 5 月 10 日住建部发布的《工程总承包办法》征求意见稿中，依然规定了工程总承包商仅需要具备相应等级的设计或施工资质即可。然而正式发布的《工程总承包办法》在其第十条规定，工程总承包单位应当同时具有与工程规模相适应的工程设计资质和施工资质，或者由具有相应资质的设计单位和施工单位组成联合体。自此，我国正式确立了工程总承包的双资质制度。对于行政监管层面为何将工程总承包从单资质转向双资质管理，其中的原因尚待考量，但这一转变势必将给工程建设领域带来深刻而长远的变化。

其一，将会有更多单一资质的施工和设计机构跨领域申请资质，成为法律意义上的“工程总承包商”。《工程总承包办法》第十二条规定，鼓励设计单位申请取得施工资质，已取得工程设计综合资质、行业甲级资质、建筑工程专业甲级资质的单位，可以直接申请相应类别施工总承包一级资质。鼓励施工单位申请取得工程设计资质，具有一级及以上施工总承包资质的单位可以直接申请相应类别的工程设计甲级资质。完成的相应规模工程总承包业绩可以作为设计、施工业绩申报。具体审批实践中，究竟是施工与设计资质直接互认还是仍然要求具备法律规定的相应资质的人员、设备条件，尚有待住建部进一步规定或澄清。

其二，将会有更多设计+施工联合体的工程总承包。《工程总承包办法》明确规定了工程总承包商应当具备与工程规模相适应的工程设计资质和施工资质，或者由具有相应资质的设计单位和施工单位组成联合体。此前，工程总承包是否可以联合体的形式承接，两次《工程总承包办法》征求意见稿中都未有提及。工程审批实践中，各地方制定的实施意见中有两种完全不同的观点，例如吉林，只允许设计或施工中的一家，而不允许联合体承接工程总承包项目。联合体承接工程项目、签署承包合同，不论对业主还是对承包商都面临更为复杂的风险和责任分担。《工程总承包办法》规定，联合体各方应当共同与业主签订工程总承包合

同，就工程总承包项目承担连带责任。这一规定倾向于更有效地保护业主的利益，也符合 EPC 建设模式的国际惯例，但联合体各方尤其需要就双方在联合体内的具体权利义务、风险责任分担，在总承包合同以外做出更详尽、明确的约定。

### 工程总承包的风险分担

工程总承包或 EPC 模式中，设计、采购、施工等与项目建设相关的绝大部分风险均由承包商承担。考虑到中国建筑市场的实际情况，监管部门在《工程总承包办法》第十五条特别规定了工程总承包项目中的风险分担原则，明确了应由建设单位承担的风险，包括：（1）主要工程材料、设备、人工市场价格波动超过合同约定幅度的风险，（2）法规变化导致的合同价格变化风险，（3）不可预见的地质条件造成的工期和费用变化风险，（4）建设单位自身原因造成的工期和费用变化风险，和（5）不可抗力造成的工期和费用变化风险。

在设计+施工总承包的二元模式中，尤其是固定总价合同下，表面上看承包商承担了较多的造价与工期风险。然而在实践中，由于设计方与施工方分离，而施工图一般不能做到百分百准确，因此业主与施工方经常因图纸变更而产生额外价款、工期延误甚至工程质量方面的争议。采用工程总承包模式，原则上除了以上所列的五项风险由业主承担外，其余造价、工期和质量等风险均应由承包商承担。需要注意的是，与《工程总承包办法》不同，根据 FIDIC 出版的 EPC 合同条件，《工程总承包办法》第十五条所列的第一项（人、材、机）和第三项（不可预见地质条件）风险，如无在专用条件中特别约定，应由承包商承担。当然，在法律实践中，取决于不同法律体系，对于严重影响承包商建造成本的不可预见因素，还存在承包商以“情势变更”为由请求法院或仲裁庭进行价格调整的可能性。

尽管有《工程总承包办法》第十五条关于承包风险分担的规定，囿于《工程总承包办法》本身较低的法律层级，如果工程总承包合同缺乏相应约定，当事人依据上述规定请求司法机关作出裁判是否一定能获得支持尚存疑问。建议发承包双方在合同中对于具体的风险分担做出明确、具体约定。

### 《工程总承包办法》未予规定的高发实务问题

**分包问题：**建设项目总承包，不论是施工总承包还是工程总承包，鼓励专业机构和团队做专业的事，在资质条件下进行必要和适当的分包是总承包模式的应有之义。此前 2019 年 5 月 10 日发布的《工程总承包办法》征求意见稿规定，工程总承包商可以将设计或者施工

业务分包给具有相应资质的单位，并可以采用直接发包的方式予以分包。遗憾的是正式发布的《工程总承包办法》将该部分条款删除。虽然《工程总承包办法》最后采用了设计和施工兼具要求的“双资质制度”，未来工程承包单位也会积极进行资质的双申报，但在实务中工程总承包商在设计和施工领域的专长一般会有所不同，因此仍然会出现将设计或施工承包内容进行分包的实际需求。但根据《工程总承包办法》，诸如具备双资质且单独中标的工程总承包单位是否可将设计或施工工作分包给具备相应资质的单位，以及设计或施工工作被分包给具备相应资质的单位后，分包方是否可将工程主体部分以外的设计或工程主体结构施工以外的施工继续分包给其他单位等实务中的高发问题，尚有待监管部门进一步澄清。

行政监管要求：尽管住建部自身为工程项目报建、核发施工许可证、竣工验收等行政事务的直接主管部门，比较意外的是《工程总承包办法》对这些问题均未做出规定。一直以来工程总承包或者 EPC 模式在中国不能长足发展的原因之一就是，由一家总承包商负责勘察、设计、施工等工作并独立向业主承担责任的承包模式，与目前建设工程合同备案、施工许可证核发、竣工验收备案登记等行政监管模式相冲突。比较突出的实际问题为，一方面行政部门发文鼓励提倡工程总承包，另一方面由于工程项目报建的行政监管规定，承包商与业主不得不签署一系列虽符合行政程序要求但与实际不符的合同，用以完成报建手续不可或缺的合同备案，甚至产生“阴阳合同”的法律问题。上海市住建局在 2016 年发布的《上海市工程总承包试点项目管理办法》及其实施要点中，试图以地方政府规章的形式解决此项悖论问题，住建部和其它的地方建设行政主管部门可以此作为参考。

### 工程总承包的税务架构设计

目前的增值税体系中，建筑设计服务的增值税率为 6%，建筑施工服务的增值税率为 9%，原材料货物销售的增值税率为 13%。若采用工程总承包，总承包商在承包合同项下针对勘察、设计、施工、设备设施采购等不同内容，应该如何进行税率适用，尚待实践摸索和税务部门的进一步澄清。在联合体实施工程总承包的模式下，联合体成员签署同一总承包合同应如何进行发票开具等，也需要联合体各成员事先与税务部门核实并在承包合同和联合体协议中加以明确约定。

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