



# law

## New PRC Guidelines for Foreign Contractors

China has sent another sign lately that it is interested in stepping up ties with the best and brightest of the foreign contractors doing business in the region. Twenty-six months before the PRC was actually obliged to open up its domestic construction sector under liberalisation following China's accession to the World Trade Organisation to permit greater overseas competition in contracting the Ministry of Construction and MOFTEC have passed new Guidelines to make it happen, sort of. I qualify my statement here because the Guidelines themselves are qualified. They do allow a new route to entry, qualification and tendering but only within certain limits. I will come to those limits in a moment. For now, the Guidelines will operate alongside the traditional joint venture participation route for contractors on PRC construction projects.

The Guidelines follow shortly behind the introduction of the new Tendering Law in 2000 and build upon the foundation that was laid in the earlier Wholly Foreign Owned Enterprise Law. Companies doing business in reliance on the "WFOE" Law as it's called do have considerable freedom of action. Despite having drawn up that Law though the new Guidelines still do not go as far as it has.

At present, the Guidelines only apply to projects involving forms of foreign direct investment with the following characteristics; they are:

- Construction projects wholly financed by foreign investment and/or grants.
- Construction projects financed by loans of international financial institutions and awarded through international tendering according to the terms of the loans.

- Chinese-foreign jointly constructed projects with foreign investment equal to or more than 50%, and Chinese-foreign jointly constructed projects with foreign investment less than 50% but technically difficult to be implemented by Chinese construction enterprises alone.
- Chinese invested construction projects which are difficult to be implemented by Chinese construction enterprises alone jointly undertaken by Chinese and foreign construction enterprises with the approval of the provincial government.

It can be seen that the Guidelines still anticipate joint venture type arrangements in one-half of the types of projects authorised. Thus contractors with experience in joint venture contracting in China will be familiar with the context for the new Guidelines and whether they might be interested in taking the plunge.

It is also anticipated that traditional joint venture contracting as envisaged under the Joint Venture Law will still continue to be the most popular form of foreign investment vehicle for contractors for some time to come for at least two reasons. Firstly, it will take a period of time for a sound understanding of the Guidelines to be gained at the provincial level such that applications for approvals can be dealt with efficiently. Secondly, there are simply not that many projects which are wholly financed by foreign investment and loans. Most projects instead offer a mix of both foreign and local participation in practice. Quite apart from these reasons the traditional JV route also offers some advantages from both a tax and liability point of view.

All in all it is anticipated that the Guidelines will still broaden the international contractor base in China over time. Coupled with the wide range of projects that are upcoming with both the Olympics and lately the award of the World Expo in 2010 to Shanghai the Guidelines will continue to feed the interest which is apparent in doing additional work in the PRC. While foreign contractors would have preferred across the board rights to enter China and work on projects independently it was not going to happen until the Government thought that the industry could withstand that level of competition. Thus it is a go slowly approach with opportunities for the PRC construction to learn from their overseas counterparts for the moment. Some of these companies are of course very quick learners as can be seen from the success of the larger PRC construction firms now operating in Hong Kong and internationally. China's intention is obviously to increase their number. The Guidelines became effective on December 1<sup>st</sup>.

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