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### **Chinese law on foreign investment in the construction sector**

According to Chinese law on foreign investment in the construction field, two main fields of business may be distinguished :

1. Design conception, construction engineering, that is activities carried out by engineering companies and architect practices.
2. Construction, that is activities carried out by construction companies;

#### **I – Foreign investment in design conception and construction engineering activities:**

##### **I – 1. Legal framework**

The Ministry of Construction and the Ministry of Commerce (MOFCOM) have jointly published two basic laws regarding Foreign Invested Companies in the field of Construction Engineering and Design (here-below FIE-CED):

- The “*regulation on management of foreign-invested construction engineering design enterprises* ” (here-after decree no.114) issued on the September 27<sup>th</sup>, 2007, and
- Its implementing rules (hereafter decree no.18) issued on the January 5<sup>th</sup>, 2007,

solve two problems resulting from Decree No.114 : (i) the method of determining the newly established FIE-CED qualification level; (ii) and that of recognising the qualifications of the FIE-

CED foreign staff.

##### **I – 2. Company form**

According to the provisions of Decree No.114, a FIE-CED may be established either in the form of a wholly foreign-owned enterprise (WFOE) or a sino-foreign joint venture (JV). However, in the later case, the Chinese partner must hold at least 25% of the registered capital and must himself be engaged in this field of business.

The FIE-CED minimum registered capital varies from RMB 500 thousand to RMB 6 million depending on the qualification level obtained or aimed at by the FIE-CED .

The foreign investor(s) of a FIE-CED must be either an architect or engineering practice set up in their country of origin, or in the case of an individual investor, an architect, or an engineer specialized in the field of conceptual design and/or construction.

##### **I – 3. Approval procedure**

Depending on the desired level of qualification certificate, the setting up of FIE-CED is approved by the Trade Bureau either at provincial or national level. The Construction Bureau at provincial or national level will issue the qualification certificate.

Generally, the approval procedure for a FIE-CED requesting a grade 1 (highest grade) qualification certificate is as follows:

- Submit an application for establishment to the



provincial level of the Trade Bureau,

- Within 30 days of receiving the application, the provincial level of the Trade Bureau shall complete the preliminary examination, and shall transfer the application to the Ministry of Commerce for further approval.
- The Ministry of Commerce will, within 10 days of receiving the application, forward the application to the Ministry of Construction for review and comments.
- The Ministry of Construction will provide its opinion within 30 days of receiving the request.
- Finally, the Ministry of Commerce shall, within 30 days of receiving the response, decide whether or not to approve the application for establishment of a FIE-CED .

The whole approval procedure therefore takes at least 100 days.

The approval process for a FIE-CED requesting to obtain a lower grade qualification certificate is quicker and less complex, since only the approval of the provincial level of the Trade Bureau and Construction Bureau is required.

#### **I – 4. Establishment of an FIE-CED :**

An applicant who intends to establish a FIE-CED shall submit the following documents to the relevant authorities:

- An application form signed by the investors' legal representative;
- The project feasibility study report;
- The FIE-CED contract and articles of association (only the articles of association are necessary for the establishment of a WFOE);
- The FIE-CED notification on pre-registration of the enterprise's name;
- The foreign investors' business licence (Kbis) duly notarized, authenticated (by the Ministry of Foreign Affairs in France) and certified (by the Consulate of China in France);
- A bank credential letter
- A list of the board of directors' members and

their appointment letters;

- A list of the technicians hired by the FIE-CED and their diplomas and qualification certificates;
- The investor(s) audited balance sheets and profit and loss accounts over the past three years

#### **I – 5. Qualification Certificates**

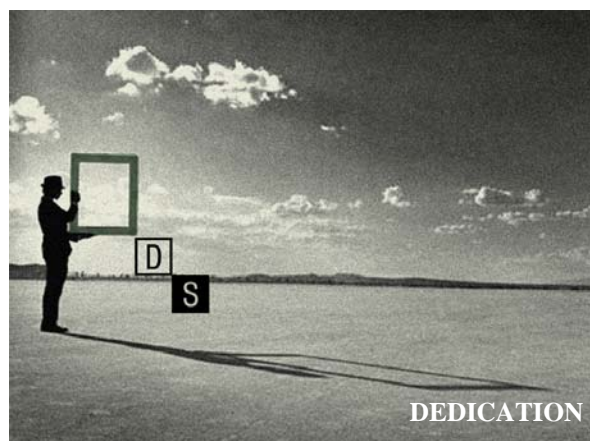
##### I.5.1) General

In order to carry out design conception and engineering business in China in the construction sector, the FIE-CED must hold one or several qualification certificates.

The FIE-CED is not authorized to develop design conception and engineering business other than within the scope of their qualification certificate. The lower the level of qualification obtained, the more restrictions there are on the FIE-CED 's activities, such as project size and location.

In conformity with the “Circular on the standards of classification of qualifications where land, design and engineering expertise in the field of construction are concerned” (Decree No. 22) promulgated by the Ministry of Construction on the January 20<sup>th</sup>, 2001, applicable to wholly chinese owned enterprises as well as to wholly foreign owned enterprises, the FIE-CED can apply for a general qualification certificate for all types of design and engineering works, and/or a specific qualification certificate (or several) for one (or several) specific fields of business amongst the 21 fields as outlined in the circular:

- 1-Coal; 2- Petro-chemicals, chemicals and pharmacy; 3- Petroleum and natural gas; 4- Electricity; 5- Metallurgy; 6- Military industry; 7- Mechanical industry; 8- Trade, equipment and cereals production ; 9 – Nuclear industry; 10- Electronic, communication, radio and television; 11- Textile and light industry; 12 – Construction





materials; 13- Rail; 14- Road; 15- River transport; 16- Aerospace; 17- Public infrastructure; 18- Maritime industry; 19- Hydraulics; 20- Agriculture and forestry; 21- Buildings.

### I.5.2 Qualification certificate application request

The qualification certificate application request for one (or several) certificates shall consist of the following:

- An application form;
- The FIE-CED 's establishment approval certificate;
- The FIE-CED 's business licence;
- The foreign investors' business licence (Kbis) duly notarized, authenticated (by the Ministry of Foreign Affairs in France) and certified (by the Consulate of China in France);
- A bank credential letter;
- The foreign investors' professional qualification certificates and work references carried out by the foreign investor. These references must be issued either by an organization or professional association (such as the Association of Architects) or by a notary office.

The references of work carried out by the foreign investor must concern finished construction projects of which the quality has been judged to be conform to the standards and design as set out in the contract signed by the foreign investor. Furthermore, for each project, the name, location and size of the project must be indicated and pictures of the construction project must be attached, etc.

- The professional qualification certificates of the foreign architects and engineers registered with the FIE-CED, id est: copies of diplomas, architect or engineering certificates, certificate from the Association of Architects (or any other professional association) certifying the respect for regulations and professional code of ethics of the profession, and copy of the work permit issued by the Chinese authorities.

### I.5.3 Qualification certificate levels

The Qualification certificates are sub-divided into two to three levels depending on the field, and the criteria fulfilled by the FIE-CED in terms of:

- ☞ Experience : projects already carried out in China (1), and the total amount of registered capital;
- ☞ The number of employees and their qualifications (2);
- ☞ The technology, know-how and patents held;
- ☞ Professional equipment owned and size of the office;
- ☞ Quality of the management system;
- ☞ Results and rewards obtained.

(1) Decree no. 18 states, henceforth, that projects carried out by the foreign investor outside of China will be taken into account in the process of obtaining a qualification certificate. As opposed to considering only projects carried out within China (as stated in Decree no. 114), which was very restrictive for foreign investors, who could only qualify for the lowest level of qualification certificate.

At the time of the initial qualification application, the foreign investor must include at least two projects carried out overseas, of which at least one was in his/her country or origin. Moreover, when filing a subsequent application to upgrade during the qualification certificate renewal process, he/she can also include projects carried out overseas and / or in China, provided that at least two projects completed in China are also included.

These new arrangements enable the FIE-CED to obtain a higher level of qualification certificate upon establishment and, thereafter, to upgrade to a higher level with greater ease.

(2) In accordance with article 15 of Decree No.114, the conditions of qualification for all WFOE, no matter the field or the desired qualification level, are the ratio of foreign engineers registered in China against the total number of engineers registered in China.

The number of foreign engineers having obtained the qualification of engineers / architects registered in China cannot be less than a quarter (for each category) of the total number of professionals employed by the WFOE, as provided in the qualification certificate standard. The number of foreign technicians who have professional experience in the field of design conception must not be less than a quarter of the total technicians employed

by the WFOE, as provided in the qualification certificate standard. This ratio of one quarter is reduced to one eighth in the case of a joint venture. Furthermore, these foreign engineers / architects registered in China must (for each of them) live for more than 6 months per year in China (article 16 of Decree 114).

Now, as no convention bilaterally recognizing the engineer' qualification exists between France and China, Decree no. 114 could not be put into action.

This problem is, however, resolved by the provisions of Decree no.18. It is, henceforth, provided that at the time of the qualification certificate application, the title of "engineer / architect registered in China" will no longer be taken into account, but the education (4+ years of university study), the years of experience in the field of design conception / engineering (10+ years), qualifications obtained abroad (architect/engineer), projects carried out (abroad) and the reputation of the engineer / architect. However, each engineer/architect can only be employed by one FIE-CED, and must hold a Chinese work permit issued by the local labour bureau. (Consequently, even if the foreign engineer/architect spends less than 186 days in China, he will be liable for individual income tax in China.)

Finally Decree no.18 indicates that the FIE-CED that cannot temporarily meet the required conditions of article 15 of Decree No.114, regarding the ratio between the number of foreign and Chinese engineers/architects, may employ Chinese-licensed engineers / architects instead. Likewise foreign engineers/architects employed by a FIE-CED may "provisionally" not meet the six month residency requirement as set out in article 16 of Decree no. 114. However, Decree no.18 does not give any clear indication as to the definition of "provisionally".

More than four years after Decree no.114, the promulgation of Decree no.18 shows the Ministry of Constructions' willingness to open the Chinese market to foreign investors in design conception and engineering in the field of construction. All we can do now is to wait and see whether these new provisions will be applied by the Chinese authorities.

For further information on the above or any other laws, regulations and investment issues, please contact

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