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Discussion on Kazakhstan's Construction Laws from the Perspective of the Belt and Road Initiative

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Abstract: This article introduces the present situations of Chinese enterprises engaged in construction in Kazakhstan under the Belt and Road Initiative, analyzes the three main legal issues faced by Chinese enterprises and the related laws and regulations in Kazakhstan, and finally provides some legal advice for Chinese companies.

Keywords: the Belt and Road Initiative, construction laws and regulations, advice

1. Present situation of Chinese enterprises in Kazakhstan's construction market

With the improvement of global economic integration, the overseas construction business of Chinese enterprises has developed rapidly. Kazakhstan is an important neighbor along the Silk Road Economic Belt. China is one of the main trade and investment partners of Kazakhstan^①. In recent years, Chinese enterprises have contracted a large number of projects in Kazakhstan. According to the China Statistical Yearbook in 2017, the turnover of China's contracted projects to Kazakhstan in 2016 was 2757.79 million US dollars, and a total of 9550 people were working in Kazakhstan^②. According to the China Statistical Yearbook in 2018, the turnover of China's contracted projects to Kazakhstan in 2017 was 22.38 million

① Xi Jinping. (2017, June 7). China-Kazakhstan relations take off on the wings of dreams. *The Kazakhstani Pravda*.

② China Statistical Yearbook, 2017.

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US dollars, and a total of 6864 people were working in Kazakhstan^①. In 2016, 151 new contracts were signed by Chinese companies in Kazakhstan, with a new contract value of US\$3.4 billion and a turnover of US\$2.7 billion. From 2016 to 2018 the newly-signed large-scale project contracting projects included the first phase of the Astana Light Rail Project, the TKU section of the Kazakhstan Highway Reconstruction Project, the TKU section of the Kazakhstan Highway Reconstruction Project undertaken, the 100MW Wind Power Project in Jambyl province of Kazakhstan etc. These projects contracted by Chinese enterprises in Kazakhstan mainly focus on rail transit, power station, and highway, petroleum engineering and other fields. Chinese enterprises have actively participated in the construction market in Kazakhstan and have made important contributions to the development of Kazakhstan.

2. The main legal issues faced by Chinese construction companies in Kazakhstan

The main laws and regulations on construction in Kazakhstan are mostly reflected in the following two: the Civil Code of the Republic of Kazakhstan enforced from 1994 and the Law on Architectural, Town Planning and Construction Activities enforced from 2001. It is important for Chinese enterprises to fully understand Kazakhstan's these two laws.

In practice, Chinese construction enterprises face these issues in Kazakhstan:

2.1 Construction license

According to Article 66 of the Law on Architectural, Town Planning and Construction Activities, types and volumes of works (services), which contractor (main contractor) intends to transfer to execution to the subcontractors shall be specified in the owner-contractor agreement in a mandatory manner. Upon that the transfer to subcontract in the total of more than two-thirds value of all contractor's works (prices of contract), provided by agreement shall not be allowed."^② So the total amount of subcontracting is not allowed to exceed 2/3 of the total contracted work. Therefore, Chinese construction enterprises wanting to engage in Kazakhstan's construction projects must at least complete one-third of the total contracted work. According to Article 36 of the Law on Permissions and Notifications enforced from 2014, "Special conditions of issuance of a license for the right to engage in activity in the scope of architecture, urban construction and construction shall be determined by the Law on Architectural, Town Planning and Construction Activities. A category of a licensee shall be specified in annex to a license as special conditions for issuance of a license in accordance with the Law on Architectural, Town Planning and Construction Activities"^③. According to the Law on Architectural, Town Planning and Construction Activities, it is necessary to obtain license for construction and installation activities in Kazakhstan. Therefore, Chinese construction enterprises must obtain construction licenses and the licenses are inalienable and are not subject to transfer to third parties

2.2 Conversion of construction design standards

At present, Chinese construction enterprises engaged in Kazakhstan's construction market mostly adopt

① China Statistical Yearbook, 2018.

② The Law of the Republic of Kazakhstan "On Architectural, Town Planning and Construction Activities in the Republic of Kazakhstan"

③ The Law of the Republic of Kazakhstan "On Permissions and Notifications"

the EPC model. Therefore, for the design process, relevant construction design needs to be carried out in accordance with Kazakhstan's standards. Because the design standards of construction engineering in Kazakhstan are different from those in China. In practice, often contract Kazakhstan's construction projects, but the design standards of Chinese construction enterprises are not in conformity with Kazakhstan's legal requirements, which always bring about the delay or breach of the project.

2.3 Permission system to employ foreign labours

The Government of the Republic of Kazakhstan has always had a restrictive attitude towards the employment of foreigners in Kazakhstan. They enforce some specific rules on the employment of foreigners as the following: the quota of foreign labour force; the adoption of educational background, professional and work experience restrictions on permission to employ foreign labours; the post of labor license is limited by the number of years. Therefore, Chinese construction enterprises faced many obstacles in sending skilled Chinese personnel and managing staffs to work in Kazakhstan. This is also the reason why the entire construction period would be delayed.

3. Introduction to Kazakhstan's related laws and regulations

3.1 Provisions on construction license

According to Article 17 of the Law on Architectural, Town Planning and Construction Activities, carrying out licensed activities in the field of architecture, town planning and construction without a license belongs to violations. According to Article 32 of the same law, "Individuals and legal entities involved in implementation of project activities and construction and installation works in the field of architecture, town planning and construction are divided into the following categories:

(1) category includes those carrying out activities, specified in this paragraph, at objects of all levels of responsibility within the scope of the existing license;

(2) category includes those carrying out activities, specified in this paragraph, at objects of the second and third levels of responsibility, as well as works at objects of the first level of responsibility within the scope of the existing license under subcontracts;

(3) category includes those carrying out activities, specified in this paragraph, at objects of the second technically uncomplicated and third levels of responsibility, as well as works at objects of the first and second levels of responsibility within the scope of the existing license under subcontracts".

"Individuals' and legal entities' assignment to a certain category is carried out by a licensor issuing a license in accordance with qualification requirements for design activities and construction and installation works in the field of architecture, town planning and construction, and is specified in special provisions of license's validity. Applicants for a license for design activities and construction and installation works, and licensees carrying out these activities, shall employ certified engineers and technicians. Certified engineers and technicians involved in the design and construction process are not allowed to concurrently work for other organizations that carry out the mentioned types of activities."

3.2 Provisions on construction design standards

According to Article 63 of the Law on Architectural, Town Planning and Construction Activities, project (design and estimate documentation) for the construction of new buildings and structures, their complexes,

engineering and transport communications shall provide town planning substantiation of the location of an object, economic, architectural, spatial-planning, functional, technological, constructive, engineering, environmental, energy-saving and other decisions in the amount required for carrying out the construction and commissioning of the completed construction projects. Construction projects also include design estimates, based on the results of conducted technical investigation and designed for:

(1) The overhaul of existing objects or restoration of buildings and structures that do not belong to historical and cultural monuments;

(2) Reconstruction, expansion, modernization or technical re-equipment of objects in operation;

(3) Post-utilization of dismantled overegged objects, except for demolition of dangerous buildings and structures;

(4) Conservation (re-opening) of unfinished objects, the construction of which was suspended.

Design solutions and indicators of a construction project approved in accordance with the procedure established by law are mandatory in the course of its performance^①.

The construction project is being developed:

(1) on the basis of a design assignment approved by a customer, materials for selection and allotment (permission for use) of a land plot (site, route), technical conditions of engineering and utility support of facility, results of engineering survey findings, other source data, including results of pre-project activities of a customer;

(2) in accordance with substantiations for investment in construction (feasibility studies, technical and economic calculations), approved by the legally established procedure, and, if necessary, with the list of building materials, products, structures, engineering equipment and devices agreed on with a contractor;

(3) in accordance with an architectural and planning assignment of local executive bodies of a city of republican significance, the capital, districts (cities of oblast significance);

(4) for facilities of the international specialized exhibition in the Republic of Kazakhstan in accordance with the architectural and planning assignment issued by a legal entity set up by the decision of the government of the Republic of Kazakhstan and carrying out activities for organizing and holding an international specialized exhibition in the Republic of Kazakhstan.

At facilities of the international specialized exhibition in the Republic of Kazakhstan, concurrent development of a construction project and pre-project documentation is allowed.

If town planning and (or) architectural projects are approved, initial documentation for the development of a construction project shall be consistent with solutions specified in them.

3.3 Provisions on permission system to employ foreign labours

According to the Law on Public Employment enforced in 2016, “quota on involvement of foreign labour force is a number of foreign labour force involved for carrying out of work activity on the territory of the Republic of Kazakhstan; permission to employ foreign labour which is a document of the established form issued by the local executive body to the employer in order to attract foreign labour to the Republic of Kazakhstan”^②.

① The Law of the Republic of Kazakhstan “On Public Employment” .

② Brief Introduction of Astana Light Rail: Kazakhstan's First Urban Light Rail Project Contracted by Chinese Standard, 7 October, 2017

“Protection of the domestic labor market by means of quoting foreign labor is one of the basic principles of the state policy in the scope of public employment of Kazakhstan. Distribute the quota within the limits and in the order established by the government of the Republic of Kazakhstan to attract foreign labour to the Republic of Kazakhstan, between oblasts, cities of republican importance and the capital belongs to the competence of the authorized body on public employment”.

According to article 33 of the Law on Public Employment, “the foreign labour force shall be engaged by employers to carry out work in the Republic of Kazakhstan on the basis of authorizations to attract foreign labour issued by the local executive body to the relevant Administrative and territorial unit. Local executive body in the territory of the respective administrative unit issue and/or renew permits or refuse extradition, extension of permits to employers to attract foreign labour, the exclusion of persons determined by the Government of the Republic of Kazakhstan to work within a quota distributed by the authorized body for employment and to suspend and withdraw these permissions. The permit issued by the local executive body for the attraction of foreign labor is not transferable to other employers, it only acts on the territory of the relevant administrative-territorial unit, except for the sending by the employer of foreign workers on whom permits have been obtained, on business trips to enterprises, organizations located on the territory other administrative-territorial units, for a period that does not exceed ninety calendar days in total during one calendar of the year. The number of foreign labor employed by the employer on permits should correspond to the percentage ratio to the number of Kazakhstani personnel, determined by the authorized body on public employment. Level of education (professional training) and experience (length of service) of practice work of foreign labour force involved for carrying out of labour activity on the territory of the Republic of Kazakhstan shall satisfy the qualified requirements presented to the profession of workers and positions of heads, specialists and servants in accordance with qualified reference book of works and professions and qualified reference book of positions of servants”^①.

4. Legal advice on how Chinese construction enterprises further expand Kazakhstan's construction market

In view of the above-mentioned three issues, combined with the current situation of Kazakhstan's construction laws and regulations, Chinese construction enterprises would take the following advice: First, by setting up a branch in Kazakhstan to transfer the construction qualification of the home construction enterprises to Kazakhstan, the problem of obtaining construction license in Kazakhstan can be solved.

In view of the fact that the construction engineering qualifications obtained by Chinese construction enterprises cannot be directly recognized and used in Kazakhstan, after the Chinese construction enterprises contracted Kazakhstan's projects, the construction and installation works in Kazakhstan must have the corresponding level recognized by Kazakhstan law.

According to the Law on Architectural, Town Planning and Construction Activities, a branch established in Kazakhstan by a foreign company, as a permanent establishment established by the company in Kazakhstan, is a non-independent legal entity and therefore can use the construction qualification of the

① <http://adilet.zan.kz/eng/docs/Z1600000482>

foreign company. In view of the fact that China's qualification certificate cannot be directly recognized and used in Kazakhstan, it can be subject to the first-level (or special) qualification of the foreign company, subject to the series of conditions stipulated by Kazakhstan law, through the Department of Foreign Affairs both of China and Kazakhstan. On the basis of this, the Kazakhstan licensing authority re-issued Kazakhstan's construction qualifications consistent with Chinese construction enterprises. With this qualification, Chinese construction enterprises in Kazakhstan can carry out construction activities approved by the Chinese construction enterprises.

Second, conversion of construction design standards in Kazakhstan.

Chinese construction enterprises can look for a Kazakhstan design company to complete the design standard conversion of the Kazakhstan project. Such as the design, procurement and construction of the EPC project in the international project is integrated, and the contractor is responsible for the whole process. Kazakhstan has different requirements for the initial design and detailed technical specifications, and the requirements for design depth are different. Therefore, the applicable standards are issues that need to be clarified in the design of subcontracts. After clearing the design standards, it is recommended that the Chinese general contractor or design subcontractor can actively engage with the Kazakhstan design unit and convert the original Chinese designs according to the Kazakhstan design standards in accordance with the requirements specified in the design contract.

In addition, it is important that Chinese standards should be tried to introduce into Kazakhstan. The Astana Light Rail Project is a typical example of success. Astana Light Rail Project is the first urban light rail line in Kazakhstan constructed by Chinese enterprises using a full set of Chinese standards and Chinese equipment. It is also the first unmanned light rail line designed and constructed by Chinese enterprises overseas. It is expected to be completed and opened to traffic in two years. After the completion of the project, it will become the most technically representative urban transportation project in Kazakhstan and even in Central Asia. The opening of Astana Light Rail will promote the upgrading of Kazakhstan's infrastructure, greatly improve the travel efficiency of Astana residents, and promote the economic development of the whole city.^①

Third, in solving the problem of labor licensing for Chinese personnel should plan and arrange personnel in advance in human resource management, and try to use local employees in Kazakhstan. If there are many foreign employees involved in large-scale projects, it is necessary to allocate sufficient labor quotas in advance or provide certain exemption quotas as a key point of negotiation when negotiating with the owners; the qualifications of foreign employees are required to do professional training and related certification for employees.

(Editor: Chen Jie)

① https://www.sohu.com/a/156089325_180330