



JONES DAY
COMMENTARY

CONFLICTING LEGAL REGIMES GOVERNING CONSTRUCTION PROJECT MANAGEMENT IN CHINA

With China's continuing economic development, an increasing number of foreign companies wish to participate in the Chinese construction market, and a considerable number of foreign companies are in fact engaged in construction and design activities in China. Consequently, some foreign construction and engineering companies have acted as project managers in several large construction projects in China. Unfortunately, however, there are conflicting regulatory regimes governing project management in China. One regime is overseen by the Ministry of Housing and Urban-Rural Development ("MOHURD") as the government authority in charge of the construction industry, while another regime is controlled by the National Development and Reform Commission ("NDRC"). In this *Commentary*, we will analyze the two regimes and their impact on foreign companies undertaking project management services in China.

PROJECT MANAGEMENT UNDER THE AUTHORITY OF MOHURD

As the government authority in charge of regulating and supervising the construction industry in China, MOHURD over the past few years has made efforts to regulate the construction project management market by issuing the "Provisional Measures on Construction Project Management" ("Circular 200") on November 16, 2004, and the "Guidance Opinion on the Establishment of Project Management Enterprises by Large-Scale Engineering Supervision Enterprises" ("Order 226") on November 12, 2008.

The Intent and Scope of Circular 200. Under Circular 200, companies can undertake project management work in China if they have qualifications in one or more of the following categories: surveying, design,

construction, tendering agency, cost control, or supervision, although there is no separate qualification for “project management.” This means that all enterprises undertaking project management have to hold one or more of these qualification certificates. Circular 200 also provides that project management enterprises must improve their organizational structure, establish project management systems, employ management professionals, comply with present qualification provisions, and undertake only project management within their qualification licensing scope.

Circular 200 defines “Construction Project Management” as “professional management and service activities carried out by enterprises engaged in project management at the authorization and entrustment of the project owner, throughout the works or during an individual stage.” Project management may include:

- Assisting the owner in preparatory planning, economic analysis, ad-hoc evaluations, and determination of investment—in other words, assisting the owner with feasibility studies.
- Assisting the owner in acquiring land and obtaining planning permits.
- Assisting the owner in acquiring and managing the design process.
- Assisting the owner in procuring appropriate construction, equipment supply, and supervision services.
- Assisting the owner in negotiating and executing appropriate contracts with the construction contractor as well as suppliers of building materials, equipment, structures, and fittings, in addition to assisting with supervision of their implementation.
- Assisting the owner in managing the construction process, including budgeting, schedules, and claims management.
- Assisting the owner with post-construction management.

Professional Personnel Requirements. Those professional personnel undertaking construction project management services are required to hold qualifications in one or more of the following categories: urban planner, architect, engineer, constructor, supervising engineer, or pricing engineer pursuant to Article 4 of Circular 200. This is in line with the company qualification requirements mentioned above, and again, there is no separate personnel qualification for “construction project managers.”

The Intent and Scope of Order 226. Order 226 encourages local construction authorities to identify some large-scale engineering supervision enterprises, especially those with comprehensive supervision qualification (or Grade A level supervision qualification), as well as tendering agency and cost control qualifications, and it encourages these enterprises to establish project management companies.

The intention of the regulation is for these selected companies to undertake engineering project investment consultation, survey and design management, construction management, supervision, cost control, and tendering agency work in relation to construction and infrastructure projects. The project management companies will be contracted by the project owner, and their specific tasks will include the drafting of project feasibility study reports, management of surveying, design, procurement, construction, and implementing; testing; and taking charge of the project quality, safety, schedule, fees, contracts, information, environment, risk, etc., on behalf of the owner.

Order 226 is an indication that MOHURD tends to prefer those construction companies with supervision, cost control, and tendering agency qualifications as project management companies, and in fact some local construction authorities, e.g., the Beijing construction bureau, are only allowing companies with the above three qualifications to set up construction project management companies.

ENGINEERING CONSULTING UNDER THE AUTHORITY OF NDRC

Under Chinese law, all newly invested projects (including construction projects) need to be either approved by or lodged with the NDRC or its local counterparts before any construction of a project can actually start. According to the “Provisional Regulations on the Approval of Foreign-invested Projects” (“Circular 22”), all foreign-invested projects must be approved by the NDRC or its local counterparts (for projects under US\$100 million) as the first stage in governmental approval.

During the approval procedure with the NDRC or its local counterparts, a “Project Application Report”—which includes basic information, such as the scale, major construction activities, products, construction location, natural resource demand, raw material consumption, environmental influence evaluation, finance, and equipment import of the project—must be submitted to the authority. The “Project Application Report” is one of the engineering consulting documents that the NDRC or its local counterparts require for their decision-making on project approval and for the purpose of monitoring and regulating investment.

To further regulate the engineering consulting services market, NDRC issued the “Measures for Recognizing the Qualification for Engineering Consulting Entities” (“Circular 29”) on March 4, 2005. Also, on March 4, 2009, NDRC issued the “Notice on the Implementation of Measures for Recognizing the Qualification for Engineering Consulting Entities” (“the Implementation Notice”).

The Intent and Scope of Circular 29 and the Implementation Notice. According to Circular 29 and the Implementation Notice, any company engaging in engineering consulting services in China must legally hold an “Engineering Consulting Enterprise Qualification Certificate” issued by the NDRC and must practice within the profession and service scope stipulated by the Certificate. For the purpose of Circular 29 and the Implementation Notice, “Engineering Consulting” is defined as:

the act of providing government organs, project owners and other kinds of clients with intelligence services relating to the decision-making and execution of social economic construction and engineering projects for the purposes of enhancing the economic and social benefits, and realizing sustainable development by following the principles of independence, justice, and science, and employing multidisciplinary knowledge and experiences, modern science and technology and management skills.

The detailed engineering consulting service scope under Circular 29 and the Implementation Notice includes:

- Planning consulting, including the formulation and consulting of industrial, special, and regional development plans.
- Compilation of project proposals, including research on project investment opportunities and preparatory feasibility study reports.
- Compilation of project feasibility study reports, project application reports, and fund application reports.
- Appraisal consulting, including project proposals, feasibility study reports, project application reports, and preliminary design appraisals, post-evaluation of projects, and budget examination.
- Engineering design.
- Tendering agency.
- Project supervision and equipment supervision.
- Engineering project management, including the management services for the whole course or several phases of an engineering project, with the following subcategories:
 - overall planning, requiring planning consultation, and project feasibility study report compilation qualifications;

- overall planning and preparation phase management, requiring planning consultation, project feasibility study report compilation, and engineering design qualifications;
- overall planning and execution phase management, requiring planning consultation, project feasibility study report compilation, and engineering supervision (or equipment supervision) qualifications; and
- overall management, requiring planning consultation, project feasibility study report compilation, engineering design, and engineering supervision (or equipment supervision) qualifications.
- Planning construction project investment, participating in investment opportunity research.
- Organizing feasibility research and project evaluation, offering suggestions.
- Participating in and initiating financing plans.
- Setting up management systems and working procedures for construction projects.
- Selecting survey, design, supervision, construction, equipment installation, equipment, and material supply companies through bidding, and drafting and signing contracts in accordance with law.

While no definition of “engineering project management” has been given in either Circular 29 or the Implementation Notice, the last three subcategories under “engineering project management,” above, certainly have some overlap with “project management” as prescribed in Circular 200 by MOHURD.

Professional Personnel Requirements. Circular 29 requires that all engineering consulting companies retain a certain number of Registered Consulting Engineers, and all engineering consulting documents submitted to the NDRC need to be drafted and endorsed by one or more of these Registered Consulting Engineers.

Construction Project Investment Manager. The NDRC has also established a professional qualification system for “Construction Project Investment Managers.” This was set up in 2004 for the purpose of regulating the management of construction project investment and improving project quality and investment efficiency, as well as the management skills of project management personnel. This is a separate qualification from the engineering consultation system, which recognizes “Registered Consulting Engineers” as its key professional personnel. However, to date, this qualification is not mandatory for any type of project or certification. Nevertheless, it is still an important qualification, since the service scope of a construction project investment manager clearly includes some elements of project management. For example, the service scope is as follows:

- Managing information and contracts for construction projects, managing and controlling quality, schedules, and investment to realize the proposed quality, schedule, investment, safety, and environmental protection targets.
- Organizing production operating preparation and staff training.
- Organizing preparation for completion tests and transferring to operation.
- Evaluating the whole project after completion.

Thus, the service scope of “Construction Project Investment Managers” clearly has some overlap with the concept of project management as regulated in Circular 200 and Circular 29 and the Implementation Notice. The first examination for a “Construction Project Investment Managers” qualification took place in 2007, and the system is still subject to further experimentation and development by the NDRC.

SUMMARY

It is not clear how the overlap between MOHURD's requirements under Circular 200 and the NDRC's requirements under Circular 29 and the Implementation Notice is being managed. Although it is not uncommon for there to be some ambiguities in scope of responsibility among different Chinese authorities, this duplication is far from satisfactory. On one hand, MOHURD is the authority traditionally in charge of the whole construction industry, from survey, design, and construction to supervision, cost control, and tendering agency activities, and that remains the case. On the other hand, the NDRC is in charge of all investments in fixed-assets, including planning, consultation, and evaluation throughout the entire investment process, including design, construction, and project management.

As a practical matter, neither of the two authorities require the filing of a project management contract, and for most privately funded construction projects, including foreign-funded construction projects, the owner has the freedom to engage virtually any project management company it chooses. Nevertheless, in practice, we strongly suggest that enterprises that wish to undertake project management in China apply for both the qualifications required by MOHURD and the NDRC.

We offer this suggestion because we have recently been advising a client in an arbitration where our client (an engineering consulting company with a construction qualification) was pursuing the owner for unpaid fees in relation to the project management (and other consulting) services provided by our client to the owner's project in China. The owner raised the issue of whether our client had the required project management qualification to undertake the services as a reason for not making payment under the contract. In this case, the arbitrators were confused by the conflicting regimes, and although, at the end of the day, the arbitrators did not have to address this issue, it does show that some owners might resort to "muddying the water" when disputes arise by calling into question the validity of project management qualifications.

In our view, the ambiguity of the various qualification regimes under MOHURD and the NDRC only adds to the uncertainty, and it seems to us that if companies undertaking project management are not properly qualified, there is a risk that their performance may be challenged, even where they have provided good consulting services to their clients.

LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Ashley M. Howlett

86.10.5866.1113

ahowlett@jonesday.com

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