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Legal News

During this May of 2010, the Government has enhanced the legal structures in Vietnam by providing detailed guidelines in market prices, obtaining land use right, and construction contracts for current businesses, and incentive programs for new businesses.

1. Guidelines on determination of market prices in business transactions between parties with affiliation relationship

The Ministry of Finance recently issued Circular No. 66/2010/TT-BTC (dated April 22, 2010) providing guidelines on determination of market prices in business transactions between parties with affiliation relationship.

Accordingly, the Circular provides guidelines on implementation of the regulations on determination of market prices in business transactions between parties with affiliation relationship, which serves as a ground for declaring and determining corporate income tax liabilities of business entities. Applicable subjects are organizations manufacturing and doing business in goods and services (hereinafter referred to as enterprises) which carry out business transactions with parties with affiliation relationship and are responsible for declaring and determining corporate income tax liabilities in Vietnam.

In addition, methods for determining market prices of products in affiliation transactions are specified and include the Method of comparison of prices of independent transactions; the method of reselling price; the method of cost-plus; the method of profit comparison; the profit split method. Depending on each specific method, the market price of a product can be calculated directly to the unit price of the product or indirectly through the gross profit ratio or the profitability ratio of the product. For indirect price calculation methods, upon determination of operating results for declaration and calculation of corporate income tax, it is not necessary to calculate the unit price of a specific product.

Besides, the circular also specifies determination of market prices for some special cases and provides guidelines on storage and provision of data and evidence on the method of determination of market prices. Accordingly, the data, evidence and documents used as the basis for analysis and comparison must indicate expressly their origin in order for inspection and verification by taxation agencies. Enterprises having affiliation transactions shall have the obligation and responsibility to store information, documents and evidence as the basis for application of the method for determination of market prices of products in affiliation transactions and present the same at the request of inspection by taxation agencies.

The circular also provides guidelines on exercising the rights and obligations by enterprises and the responsibilities and powers by taxation agencies, whereby it is expressly stipulated that the General Department of Taxation is responsible for providing guidelines on inspection of implementation by enterprises of the provisions of this circular.

This circular is effective 45 days after its issuance date.

2. New regulations on construction contracts

On May 7, 2010, the Government promulgated Decree No. 48/2010/ND-CP on contracts in construction activities under investment projects for construction with 30% or more of capital funded by the State.



For construction contracts under ODA projects, if the provisions of international treaties to which Vietnam is a member are different from the provisions in this Decree, the provisions of such international treaties shall prevail.

According to this Decree, construction contracts shall be executed after the contract awarding party has completed the selection of contractors as regulated and the parties involved have completed their contract negotiation process in the principle of voluntariness, equality, good will, cooperation, no breach of law and social ethics. The price upon execution of the contract shall not exceed the bid winning price (for bidding), or shall not exceed the cost estimate of the approved bid package (for bidder designation).

In case of addition of workload or equipment quantities beyond the quantities specified in the bidding documents resulting in the price upon execution of the contract exceeding the bid winning price but making no change to the investment objectives or not exceeding the total investment capital approved, the investor shall be entitled to make decisions; with changes made to the investment objectives or exceeding the total investment capital approved, a report thereof must be made to the person having the authority to make investment decisions to make decisions. If in a project, the investor signs contracts with various contractors for

performance of various bid packages, the contents of such contracts must be consistent in terms of progress and quality during the process of performance of each contract, ensuring the overall investment efficiency of the project.

In case the contract receiving party is an association of contractors, the members of the association must enter into an association agreement which must be signed by all the members of such association.

In case a construction contract involves the participation of a foreign party, the languages to be used are Vietnamese and English; when a construction contract is executed in two languages, the parties involved must agree on the languages to be used in the contractual transaction and the order of priority of languages to be used for resolution of dispute over the construction contract (if any).

This Decree is effective from July 1, 2010. From the date when this Decree takes full force and effect, the provisions in Decree 99/2007/ND-CP dated June 13, 2007 of the Government on contracts in construction activities shall cease to be in force and effect.

3. Hanoi: 12 cases without receipt of land use rights

From May 25, Hanoi city will apply new regulations on issuance of certificates of land use right and ownership of housing and other properties attached to land; registration on changes to land use and ownership of properties attached to land to organizations based in the city (according to Decision No. 18/2010/QD-UBND).

The Department of Natural Resources and Environment of Hanoi is responsible for supervising, speeding up and providing guidelines on the use of forms and papers for performing administrative procedures in recognition of land use right; issuing certificates; registering changes for organizations based in the area; giving instructions to the Office for Registration of Land of Hanoi on updating, correcting and managing administrative records and a cadastral database as regulated.

According to the new regulations, there are 12 cases where land use right is not certified.

Specifically, land areas which are unused, used improperly and irresponsibly resulting in encroachment or loss of land; land unlawfully leased or lent for use by other organizations or individuals or for joint venture or partnership; land not continuously used after being dealt with according to Decision No. 09/QD-UBND; land currently used for manufacturing, business and service facilities subject to decisions on relocation as a result of causing environmental pollution; land subject to decisions on recovery by competent authorities for implementation of projects under planning; land used for public purposes and put under the management of the People's Committees of communes, wards or townships; land used for construction of transport works, water supply and drainage systems, irrigation works, dykes, squares; agricultural land belonging to the public utility land fund managed and used by the People's Committees of communes.

Organizations assigned to manage land for implementation of investment projects in the build-transfer form; organizations using land through lease or sublease of properties attached to land from other people other than the State and such land is not located in industrial parks, hi-tech parks, economic zones, etc. are also not entitled to certification of land use right.

Also according to the new regulations, three cases where certification of land use right is not provided include the cases where land has been being used since before July 1, 2004 without being issued certificates and requiring inspection and review prior to issuance of certificates, etc.

For certification of housing ownership, ownership to housing and other properties attached to land shall only be exercised to land parcels falling within the category with entitlement to certification of use right as stipulated by laws. There are seven cases of properties attached to land without entitlement to certification.

Types of properties attached to land entitled to certification of ownership include housing, construction works, perennial plants, planted production forests. Ownership of properties attached to land shall only be certified when such properties belong to the person requesting for certification and have been formed in reality at the time of issuance of the certificate...



4. Investment and tax incentives for newly established administrative units

The Government has promulgated Decree No. 53/2010/ND-CP dated May 19, 2010 providing for the areas with investment incentives and corporate income tax incentives for newly established administrative units due to modification of administrative boundaries by the Government.

According to this Decree, in the case where a newly established administrative unit has been stipulated specifically by the Government as the area with difficult or especially difficult socio-economic conditions, such administrative unit will enjoy policies on investment incentives and corporate income tax incentives as applicable to such type of areas.

In the case where a newly established administrative unit results from arrangement or modification of administrative boundaries of commune-level administrative units in the areas with difficult or especially difficult socio-economic conditions but without regulations on investment incentives and corporate income tax incentives, such administrative unit shall enjoy investment incentives and corporate income tax incentives calculated by the majority (over 50%) of the number of commune-level administrative units currently enjoying such incentives; in the case where the number of commune-level administrative units in the area with difficult and especially difficult socio-economic conditions is equal, the newly established administrative units will enjoy the investment incentives and corporate income tax incentives applied to the area with especially difficult socio-economic conditions.

In the case where modification of administrative boundaries results in modification of administrative units of commune level which fall within the List of areas with higher investment incentives and corporate income tax incentives (areas with especially difficult socio-economic conditions) into areas with lower investment incentives and corporate income tax incentives (areas with difficult socio-economic conditions) or vice versa, the modified administrative units of commune level will enjoy the investment incentives and corporate income tax incentives applied to the areas receiving such administrative units.

This Decree is effective as from July 15, 2010.

Legal Advice

QUESTIONS:

Is a guarantee by a third party to a loan agreement valid and enforceable under Vietnamese law? If yes, please advise the procedures for the performance of guaranteed obligation of the guarantor?

Yes, it is. Guarantee is one of the forms of security. It means an undertaking made by a third person (the guarantor) to an obligee (the beneficiary) to perform an obligation on behalf of an obligor (the principal) if the obligation falls due and the principal fails to perform or performs incorrectly the obligation. The parties may agree that the guarantor shall only be obliged to perform the obligation if the principal is incapable of performing it.

At law, a guarantee agreement must be made in writing, either in a separate document or incorporated in the principal contract. In some cases, the law further requires the guarantee agreement must be notarized or certified (e.g. guarantee using the land use rights).

Regarding the performance of a guarantee, Vietnamese law provides for the following procedures:

- The beneficiary shall provide notice to the guarantor about performance of the guaranteed obligation when: (i) the obligation falls due and the principal fails to perform or performs incorrectly the obligation to the beneficiary, (ii) the principal must perform the obligation owing to the beneficiary in advance as a result of breach of such obligation, but the principal fails to perform or performs incorrectly such advance performance of the obligation, (iii) the principal is incapable of performing its obligations in a case where the parties agree that the guarantor must perform the guaranteed obligation only when the principal is incapable of performing it, (iv) and other bases stipulated by law.
- The guarantor must perform the guaranteed obligation within the time-limit as agreed by the parties; if there is no agreement, then the guarantor must perform the guaranteed obligation within a reasonable time as from the time it is notified that it must perform the guaranteed obligation.
- If the guarantor fails to perform or performs incorrectly the guaranteed obligation on behalf of the principal when it falls due, the guarantor must provide property under its ownership in order to pay the beneficiary, the parties shall agree on the property, the time-limit, the location and method of realization of property of the guarantor. If the parties are unable to agree, the beneficiary shall have the right to institute court proceedings.

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