

NEW LEGISLATION IMPLEMENTING THE PETROLEUM LAW

On 16 October 2015, the Government of Vietnam issued Decree No. 95/2015/ND-CP implementing the Petroleum Law (**Decree 95**), replacing Decree No. 48/2000/ND-CP, Decree No. 34/2001/ND-CP and Decree No. 115/2009/ND-CP of the Government of Vietnam.

This Legal Update provides an overview of the salient features introduced under Decree 95.

Change of control

Article 40 of Decree 95 confirms that a contractor must, within six months from the date of the change of owner of such contractor currently retaining a participating interest in a petroleum contract in Vietnam, notify such change to the Ministry of Industry and Trade (**MOIT**) and to Vietnam Oil and Gas Group (**PVN**).

It is also mandatory that if the change of owner of a contractor currently retaining a participating interest in a petroleum contract in Vietnam results in the generation of taxable income, then the contractor must declare and pay tax on behalf of such owner on income arising and relating to the petroleum contract in Vietnam in accordance with the laws of Vietnam and international treaties of which Vietnam is a member.

The Operator

The operator as a representative of the contractor participating in the petroleum contract shall conduct activities within the scope of its authorisation, and shall exercise rights and fulfil obligations in accordance with the petroleum contract, document of appointment or hire of the operator, and other provisions of the law.

Of particular note, PVN has the right to require the contractor to change the operator if the latter deliberately commits a serious breach of the laws of Vietnam or if there is clear evidence that the operator does not have sufficient operating capacity in accordance with the provisions of the petroleum contract. The procedures for changing the operator in such cases shall be implemented in accordance with provisions of the petroleum contract and any other relevant agreement with the contractor.

The Operating Office

It is expressly required that the operator must establish one operating office in Vietnam within 90 days, or within another time-limit as agreed between PVN and the contractor, as from the effective date of the Investment Registration Certificate (**IRC**) or amended IRC. The operating office shall exercise rights and discharge obligations within the authorised scope, the operating agreement and provisions of the law.

The operator may use one operating office in Vietnam to operate or manage in the capacity of contractor for one or more petroleum projects in Vietnam (if there is more than one).

A previous contentious matter which has now been settled is that the Department of Planning and Investment (**DPI**) (rather than the Department of Industry and Trade) in the proposed locality of such operating office is expressly vested with the authority to issue a certificate of registration for establishing the operating office.

The operational duration of an operating office shall be the same as the term of the IRC or amended IRC, except where the latter is extended but shall not exceed three years.

An operating office shall have a seal and is permitted to open accounts, to recruit employees, and to sign contracts in order to conduct petroleum and other activities as stipulated by law.

Retention of Gas Acreage

The contractor and PVN may prepare a letter with a proposal on the period for retention of the area where gas has been discovered, specifying the reasons for same, and shall submit the letter to the Minister of Industry and Trade (**MOIT**) for evaluation and further reporting to the Prime Minister for his decision.

If the Prime Minister has already permitted an extension of up to five years for the retention period of the area where the gas has been discovered but the contractor has not yet located a market for the sale of the gas, or the current infrastructure does not ensure that such gas discovery can be developed, then the Prime Minister may permit a further extension of two years for the retention period of the area where the gas has been discovered.

Forms of Contractor Selection

The following are the forms for contractor selection to implement a project for the exploration and production of petroleum:

- (i) open tendering;
- (ii) competitive quotation; and
- (iii) direct appointment of contractor.

Contractor selection in the form of open tendering shall be applicable based on the principle of international competition and without pre-qualification.

The form of competitive quotation shall apply in the case whereby the relevant petroleum block is not included in the approved tendering plan, and there are a minimum of two organisations and/or individuals satisfying the prescribed conditions who are interested and who propose signing a petroleum contract.

The Prime Minister shall make a decision on the direct appointment of a contractor in the case of a petroleum block for which only one organisation, individual or petroleum tendering partnership satisfying the prescribed conditions expresses interest and makes a proposal to sign a petroleum contract, or in a special case relating to national sovereignty, borders or islands.

Prescribed Conditions to Submit Tenders

Tenderers being organisations must satisfy all of the following conditions:

- (i) have registration for establishment and operation issued in accordance with the laws of the country where such tenderer is currently operating;
- (ii) are not in the process of dissolution and are not deemed bankrupt or insolvent as prescribed by law;
- (iii) are not within a period of prohibition from participation in tendering;
- (iv) have adequate financial and technical capacity and specialised experience in the exploration and production of petroleum sector; and
- (v) have participated or are currently participating in a minimum of two contracts for the exploration and production of petroleum.

Any organisation or individual not satisfying the above prescribed conditions and wishing to participate in petroleum activities in Vietnam must form a partnership with an organisation or individual who satisfies such conditions, namely one petroleum tendering partnership in accordance with the provisions of Decree 95. In such case, the organisation and/or individual satisfying the conditions shall act as a representative for all of the parties to such partnership for the purposes of submitting a tender and acting as an operator.

Tender Criteria

The following tender criteria must be set out in the tender invitation documents:

- (i) profit oil and gas sharing ratio;
- (ii) minimum work commitment and minimum financial commitment;
- (iii) participating ratio of PVN or of the member company of PVN appointed to participate as contractor; and
- (iv) cost recovery ratio.

The MOIT shall, based on the potential of each petroleum block, make a submission to the Prime Minister for decision on adding one or more tender criteria to the tender invitation documents such as the capital participation ratio of PVN or of the member company of PVN appointed to participate as the contractor, signature commission, commercial discovery commission, operational commission, expenses for data research, training expenses, contribution to the scientific research and technological development fund, or other similar criteria.

Advance notice shall be provided in the tender invitation documents of the following: royalties tax, corporate income tax, export duty on crude oil (including condensate) and on natural gas, and all types of other fees and charges payable in accordance with the law on fees and charges.

Foreign exchange balancing

Based on the foreign exchange control policy, the Prime Minister shall consider and make a decision on supporting foreign currency balancing for petroleum operations of contractors with respect to any foreign currency deficit. Such balancing must not exceed the amount of Vietnamese Dong (**VND**) which such contractor has collected from petroleum operation in Vietnam or from the sale of petroleum belonging to the contractor on the Vietnamese market after subtracting operational expenses and other financial obligations in VND.

The foreign exchange availability, conversion of VND into a foreign currency and remittance out of Vietnam are typically specified under a Government Guarantee.

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