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Issue:
Spring
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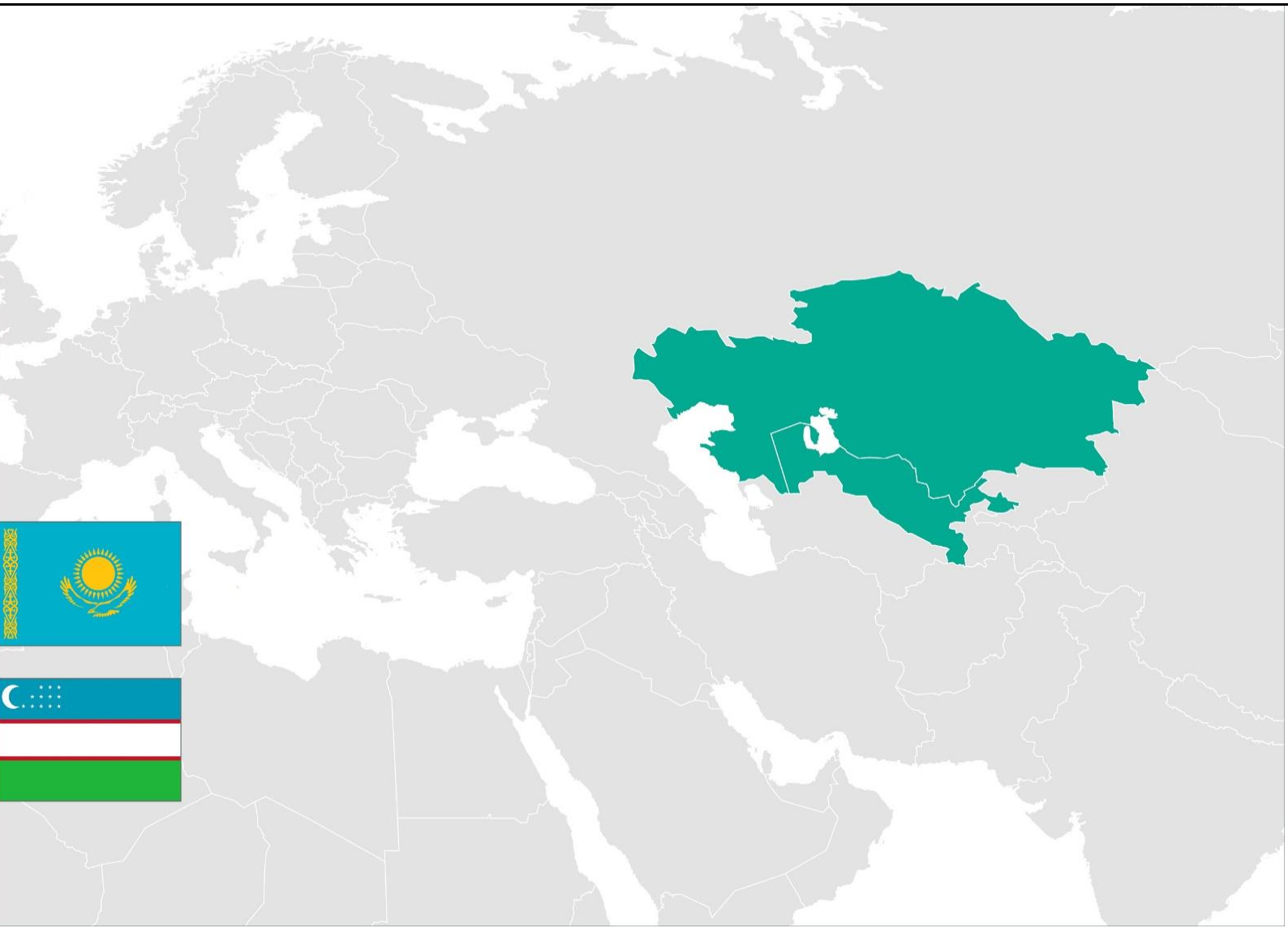

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SEIZING OPPORTUNITIES

Issue: Spring 2021

Content of this issue:

→ Kazakhstan

Major problems of conducting “online” court sessions

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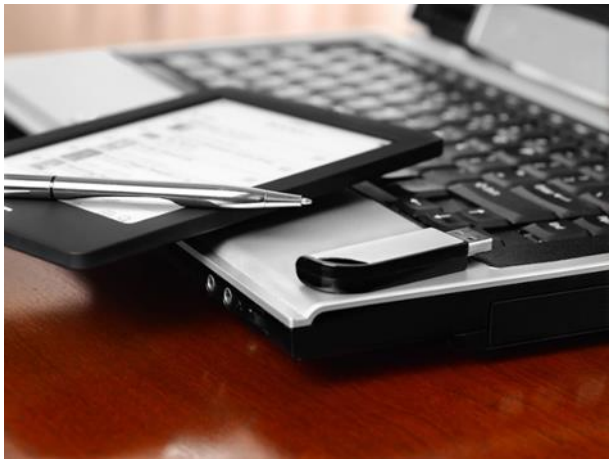
Pandemic caused by the spread of Covid-19 has considerably affected both the lives of people and system of the governmental authorities of the Republic of Kazakhstan. The system of justice is not an exception which activities have experienced a number of changes. In particular, form of the court session has been changed from the traditional (i.e. in the court room) to the online format using applications for the virtual communication. Such applications as “TrueConf”, “WhatsApp” and “Zoom” are mainly used to conduct the online court sessions (“Online Sessions”). These transformations have caused a number of problems related to the procedure for conducting the court sessions, compliance with the legislation requirements and technical capabilities of the parties of the court proceedings and the court sessions.
This publication is to highlight the issues for developing the online sessions in Kazakhstan, their legal regulation, as well as the major legal and technical problems arising during the online sessions.

History of Implementation of the Online Sessions

Decree of the First President of the Republic of Kazakhstan “On Concept of the Legal Policy of the Republic of Kazakhstan from 2010 to 2020” No. 858 dated August 24, 2009 was the initial legal basis for introducing the electronic systems in the legal proceedings. Thus, a measure for the regimentation of the procedure of keeping the electronic legal proceedings and using the information technologies in the operations of the courts has been prescribed in the sub-paragraph 7) of the Paragraph 2.7 as one of the measures for improving the civil procedural legislation. This measure provides the possibility for remote performance of a number of proceedings through the video-, TV- and video-conferences[1].

Practice of the online sessions has not been widely used before announcement of the State of Emergency in the Republic of Kazakhstan on March 16, 2020. Mainly the online sessions were used as a forced measure. For example, according to A. Sergazinova, the Court No. 2 in Kostanay city started considering the online court cases since March 2013[2] . Generally these court cases related to consideration of the petitions of convicts and applications of administration of the correctional custody facility, Public Institution “Institution UK 161/2” in Kostanay city.



Dynamics for conducting the online sessions over the last three years confirms the above-mentioned conclusion, it is as follows:

- In 2018: no more than 40 sessions per day;
- In 2019: 110 sessions per day;
- Until mid-March 2020: 150 sessions per day;
- From March 2020: 4.5 thousand sessions per day.[3]

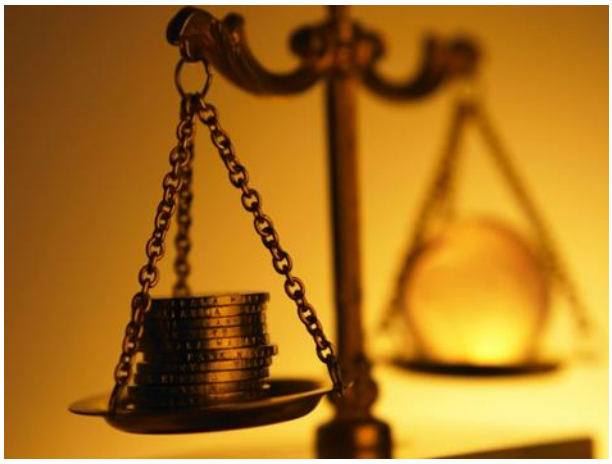
[1] Decree of the First President of the Republic of Kazakhstan “On Concept of the Legal Policy of the Republic of Kazakhstan from 2010 to 2020” No. 858 dated August 24, 2009, https://online.zakon.kz/document/?doc_id=30463139

[2] Sergazinova A.: "Technical Evolution of the Femida" / Supreme Court of the Republic of Kazakhstan, June 15, 2016.

[3] Zhanna Khabdulkhabar: In Kazakhstan courts are held online. Does not it violate the law and the rights of the Kazakhstani people? // Infopolis LLP: Informational and analytical portal Informburo // https://informburo.kz/stati/v-kazahstane-sudy-prohodyat-onlayn-ne-narushaet-li-eto-zakon-i-prava-kazahstancev.html

Legal Regulation of the Online Sessions and Problems of their Conduct

Issue of conducting the online court sessions is mainly governed by the Rules on Use of the Communication Technologies which Enable to Participate in the Court Session, and their Requirements approved by the Order of the Head of the Department for the Support of Courts at the Supreme Court of the Republic of Kazakhstan No. 7 dated October 15, 2019 (hereinafter referred to as the "Rules"). Considering the forced increase in the number of the online sessions, some omissions in the course of using the Rules mentioned above are observed nowadays, and as a practical matter this raises a number of issues and complications.



Firstly, it is relevant to note that the Rules are developed in accordance with the Paragraph 4 of the Article 133-3 of the Civil Procedural Code of the Republic of Kazakhstan and do not contain any respective references to the Criminal Procedural Code of the Republic of Kazakhstan and the Administrative Offense Code of the Republic of Kazakhstan which does not allow the courts directly (without the legal analogy) applying the Rules in the administrative and criminal proceedings.

Secondly, pursuant to the Paragraph 9 of the Rules, the online sessions are carried out on the petition of a party to a session, and pursuant to the Paragraph 10 of the Rules, a party can use the personal communications means, but only when filing a petition to the court through the "Judicial Office" platform and attaching a photograph in order to identify the party who acts as a chairman in the court session.

However, currently these standards are observed by the courts and parties to the court proceedings in very rare cases and not considered during the preparation for the court proceedings.

Thirdly, pursuant to the Paragraph 12 of the Rules, in order to conduct the online session, not later than three (3) business days the Secretary of court session must forward an application request for the online session according to the resolution of the Judge. Currently, this requirement of the Rules is observed with little to no.

This non-compliance is explained by the expansive growth in the number of online sessions due to the changed situation and lack of the practical experience of both the courts themselves and parties of the online sessions. These reasons go to prove that it is difficult both for the courts and parties of the online sessions to observe the requirements of the Rules in the present-day developments.

Fourthly, a matter of legality and reliability of the applications used to have the online sessions, and respect for the constitutional rights of the citizens those taking part in the online sessions is another major problem.

According to the Rules, when conducting online sessions, the courts may use the Video-conferencing and Technical communication means, which definitions are prescribed by the sub-paragraphs 1 and 2 of the Paragraph 1 of the Rules. Pursuant to the Paragraph 3 of the Letter of the Supreme Court of the Republic of Kazakhstan No. 6001-20-3-1-7/75 dated March 16, 2020 (serve as guidelines); online sessions for consideration of cases need to be carried out through remote participation of the parties to a case in the court session using a mobile phone, online video-conferencing. Thus, it is permitted by the Supreme Court of the Republic of Kazakhstan and the Rules to use any available application for conducting online sessions, which in turn raises another number of questions.

Technical Capabilities of Applications

For example, during one call, the most frequently used application WhatsApp allows only four users to join the video-conferencing, in case of need to connect one additional user to the video-conferencing, it requires to temporarily remove one user from a video-conferencing. This may lead to infringement of the right to judicial protection, as the user (party) who left the video-conferencing would not be able to participate in the online session, and in consequence of which he/she would not have full information on the proceeding.

Moreover it is relevant to note that application of the "Judicial Office" service which was used before increase in the number of online sessions did not stand up to any criticism either from the judges or from other parties to a proceeding .

In particular, it turned out that this software (application) does not provide for the possibility for conducting a "group video call" where more than two persons could participate. Therefore, in those proceedings which involved more than two persons, parties to a proceeding had to join the application one-by-one.

Technical Inequality

Currently, a fact that the technical capabilities and skills of participants of the legal proceedings can be significantly different is not unimportant. This means that the so-called "technical inequality" of the parties may be the reason for the impossibility of observing the principle of equality of the parties. In turn, this fact may prevent from full exercise of the parties' rights to judicial protection and unprejudiced conduct of the online sessions.

High Risk of Breach of Confidentiality

Apart from the above, open-access applications are used when conducting the online sessions, this increase the risk of hacking the video-conferencing or connecting of unauthorized persons to it. Intruders that know the technical features of operation of such applications, can easily hack the online session, and gain possession of information which for example makes the trade secrets or concerns the private lives of participants of the legal proceedings.

Flagrant case of Facebook (owner of WhatsApp) in 2018 regarding leak of the users' personal data, as well as a scandal where Zoom Video Communications Company was involved which illegally sold the personal data of their customers to the third-party companies can serve as an evidence of unreliability of such platforms .

Thus, the use of the open-access applications when conducting online sessions constitutes a risk for illegal and unauthorized dissemination of the personal data of the parties involved in the online sessions.

Conclusions

The global pandemic and quarantine have become a kind of "trigger" for the active development of e-justice and the use of information technologies in the activities of courts. However, despite the seeming advantages of E-justice at a first glance, as a practical matter it is fairly problematic for the most significant reasons, as follows:

– The Rules are not adapted to the present-day developments and not observed. Due to this reason, we are of the opinion that the Rules must be modified and amended accordingly, considering the current workload of the Kazakhstani courts.

– Technical inequality of the parties and lack of reliable platforms for the virtual communication impede the conduct of online sessions and exercise of the constitutional rights of the citizens. Solution to this problem is more global, as it does not completely depend on the courts. Due to this reason, we believe that a staged return of the court sessions to the traditional way of conduct would be the most optimal solution to the problem, subject to compliance with the sanitary-and-epidemiologic requirements.

– Besides the incomplete exercise of the constitutional rights of the citizens when conducting the online sessions, another problem arises related to protection of the personal data. To mitigate the risks, we believe it would be necessary to develop the restricted-access applications to be used for the online sessions only and that can be joined using the invitation on the restricted link only.

Our team has a great experience both in the traditional and online legal representation in court. We would be happy to support in the judicial litigations or arbitration proceedings in any format permitted by the law.

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→ Kazakhstan

Considerations for attributing expenses for deductions in terms of the business travel expenses

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In the new financial year, it is important for the companies to note and ensure the proper execution of their expenses in order to avoid risks arising from the tax authorities in the future.

The following aspects will be covered in this Article:
– The concept of tax deductions;
– Considerations of the tax legislation when attributing compensation for business trips to deductions;
– current changes in tax law from April 1, 2021.

A tax deduction or deductible expense means a reduction in the tax burden, in other words it is an amount the extent of income is reduced by, which is used to calculate and assess the corporate income tax.

Examples of tax deductions: cost of the goods and services, transportation costs, office rent costs, utility services, business travel compensation costs, employer's costs for employee income, tax costs, etc.

Based on our practical observations, the travel expenses are difficult to understand. That's why we will focus on the deductions on compensation for business trips in more details.

The following compensation costs in case of business trips are deductible[4]:

1. Travel expenses to the business trip destination and back, including payment of the booking expenses against the documents confirming travel and booking expenses. If an electronic ticket or electronic travel document has been issued for travelling, the documents confirming travel and booking expenses are, as follows:

– Electronic ticket, electronic travel document;
– Document that confirms the fact of payment of the cost of electronic ticket, electronic travel document;
– Document that confirms the fact of travelling (including a boarding pass) issued by the transport operator or an entity that sold an electronic ticket or electronic travel document in hard-copy or in electronic form.

N.B.: Travel expenses do not include the travel expenses for travel within the same locality, as well as travel expenses to the airport and back by taxi within the same locality. This means that the taxi costs are not included in the list of the deductible expenses when calculating the corporate income tax. For this reason, there are two options where the companies may attribute to the deductions in case of taxi expenses, as follows:
– Taxi expenses can be accounted in the amount of the daily allowances;
– Such expenses can be recognized as additional income of an employee.

2. Expenses for renting accommodation outside the place of regular work of an employee during the period of stay on a business trip, including payment of the booking expenses against the documents that confirm the expenses for renting accommodation and for booking. Such expenses include, but not limited to the expenses for renting accommodation for the days of temporary disability of a seconded employee on business trip (except for cases when a seconded employee is under hospital care);

3. Daily allowance in the amount established by the decision of a taxpayer.

Daily allowance is paid to an employee for the time spent on a business trip, including the

[4] According to the Article 244 of the Tax Code of the Republic of Kazakhstan

days of temporary disability of a seconded employee. In this case, amount of the daily allowance must not exceed 6-multiple of the monthly calculation index within the Republic of Kazakhstan and 8-multiple of the monthly calculation index for each calendar day[5]. Amount of 2,651.00 KZT must be used in 2020 as the monthly calculation index (MCI), this means that within the Republic of Kazakhstan the amount of daily allowance must not exceed 15,906.00 KZT, and 21,208.00 KZT outside the Republic of Kazakhstan.

In order to avoid any additional potential questions from the Tax Authorities, it is recommended to prescribe the amount of daily allowance in the Company's Accounting Policy.

4. Expenses incurred by the taxpayer when issuing permits for entry and departure (visa) (the cost of visa, consular services, and compulsory medical insurance) against the documents that validate such expenses.

In order to make it possible to attribute expenses for deductions when assessing the corporate income tax, the Company must have the original documents that validate such expenses[6]. These expenses must be related to the activities of your business aimed at generating income. In this case, since April 1, 2021 the expenses for the purchase of goods, works and services are recognized and deducted from CIT, provided there is an electronic invoice (ECF).[7]

Who is obliged to issue electronic invoices from April 1, 2021:[8]

– taxpayers who are not value-added taxpayers, in case of sale of goods, which were received in the module "Virtual warehouse" of the information system of electronic invoices to such taxpayers;

– resident legal entities (except for state institutions and state organizations of secondary education), non-residents carrying out their activities in the Republic of Kazakhstan through a branch, representative office, individual entrepreneurs, persons engaged in private practice, not registered as a value added tax payer in the Republic of Kazakhstan, on a civil law transaction, the value of which exceeds 1000-times the amount of MPI.

- Taxpayers on international cargo transportation services.

In the new fiscal year, it is important to take such specifics about expenses and deductions into account when preparing reports for the tax authorities. Our team of experts is always glad to answer your questions and queries on accounting and other aspects of doing business in Kazakhstan.

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[5] According to the Article 319.1.2 of the Tax Code of the Republic of Kazakhstan

[6] According to the Article 242.3 of the Tax Code of the Republic of Kazakhstan

[7] From April 1, 2021 the Law of the RK № 382-VI of December 10, 2020 amended article 242 of the Tax Code)

[8] According to the Article 412 of the Tax Code of the Republic of Kazakhstan

→ Kazakhstan

Investment Property – business adaptation to the changing environment

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Economic life of countries of the world, including the Republic of Kazakhstan is influenced by the consequences of both the Covid-19 Coronavirus pandemic, and actions taken by the countries in the form of quarantine measures. For the purpose to adapt to the new business environment, and for the need to endure the current changes, many businesses change their way of doing business which may involve using of new standards which have not been used by the companies before. Lend lease of premises in the buildings which have been used for the company own purposes is one of the options for the business activity restructuring.

As defined in the IAS 40, **the Investment Property** is a property (land or a building (or part of a building), or both) held (by the owner or by the lessee as a right-of-use asset) to earn the rentals or for capital appreciation or both, rather than for[9]:

- (a) use in the production or supply of goods and services, or for administrative purposes; or
- (b) sale in the ordinary course of business.

Therefore, the investment property generates the cash flows largely independently of the other assets held by an entity. This distinguishes the investment property from the owner-occupied property.

According to the definition stated in the IAS 40, **the owner-occupied property** is a property held (by the owner or by the lessee as a right-of-use asset) to be used in the production or supply of goods or services, or for administrative purposes.[8]

Examples of the investment property in the form of the assets are provided in the Standard, as follows:

- Plot of land held to gain from the long-term capital appreciation, rather than for short-term sale in the ordinary course of business;
- Plot of land held for a currently undetermined future use. (If an entity has not yet determined that it will use this plot of land as the owner-occupied property or for short-term sale in the ordinary course of business, then this plot of land is regarded as held for the capital appreciation);
- A building owned by the entity (or a right-of-use asset relating to a building held by an entity) and leased out under one or more operating leases;
- A building that is currently vacant but is held to be leased out under one or more operating leases;
- Property that is being constructed or developed for future use as an investment property.[8]

As it is stated in the Standard above, in some cases, some properties comprise a portion that is held to earn the rentals or to gain from the capital appreciation, and another portion that is held for use in the production or supply of goods or provision of services, or for administrative purposes. If these portions can be sold separately (or leased out separately under a finance lease), an entity accounts for these portions separately. If these portions could not be sold separately, then the relevant property is an investment property, only if an insignificant portion is held to be used in the production or supply of goods or provision of services or for administrative purposes.

Due to the Covid-19 Coronavirus pandemic, some private companies which owned the buildings and occupied the entire area for their production, storage or office space could have decided to lease out a part of the building. Due to the quarantine introduced throughout the territory of the Republic of Kazakhstan, part of personnel has been transferred to the online operating mode – home-based remote work.

Moreover, the companies' turnover has decreased which consequently requires less storage space. Due to these factors, a part or half of the area previously occupied by the companies has be-

[9] International Financial Reporting Standards: Investment Property // Financial Accounting // https://fin-accounting.ru/ifrs/ias40

come vacant, and some companies may use the vacated space for leasing out. Thus, designation of an asset may change, and consequently the companies must use the appropriate accounting standards in order to account the asset.

It is relevant to note that it is stated in the Standard IAS 40 "Investment Property" that when an asset is transferred from the category of the owner-occupied property to the category of the investment property, IAS 16 must be applied prior to the date of transfer. Prior to the date of transfer, the property must be depreciated and impairment losses must be recognized, to the extent applicable. As of the date of transfer, any difference between the book value of asset according to the IAS 16 and its fair value (which is the new book value according to the IAS 40) shall be regarded as a revaluation in accordance with the IAS 16.[10]

Decisions made by the entities must cover all the accounting risks, and consider the need for reliable interpretation and application of the appropriate standards.

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[10] International Financial Reporting Standards: How to properly honor the reclassification of a building as investment property? // IAS 40 Financial Accounting, March 18, 2019.

→ Uzbekistan

Private investment in the renewable energy sources

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Rödl & Partner Tashkent

Uzbekistan has determined the wide use of renewable and alternative energy sources as one of its main priorities for the next years. The goal is to increase the share of electricity generation to more than 20% (percent) by 2025 with the involvement of private capital[11]. The Ministry of Energy has been established to coordinate a unified state policy on the use of renewable energy sources[12]. One of the important goals of the Ministry is to attract foreign capital. Therefore, in order to attract private capital, special attention is paid to public private partnership ("PPP") projects.

The renewable energy industry has a great potential for development in the country due to a large number of sunny days in Uzbekistan, the significant insufficiency of energy and the dynamics of economic growth. To date, several tenders have already been held for renewable energy projects. A large number of applications were submitted for participation in the tenders, which confirms the interest of investors in the renewable energy field. The Uzbek government actively negotiating with global companies specializing in the construction and operation of renewable power plants. It is expected to develop new projects in accordance with the introduced concept and further tenders.

General issues of implementation of projects in the field of renewable energy are regulated by the Laws "On the use of renewable energy sources" ("Law on renewable energy") and "On public-private partnership»[13] (the "PPP Law"), as well as more detailed by-laws, in particular the Regulation on the procedure for implementing public private partner projects[14] (the "Regulation») which will be discussed in this overview.

In accordance with the Regulations the implementation of PPP projects can be divided into the following stages:

1) Preliminary assessment of the project

At this stage, the state partner, potentially the Ministry of energy, conducts a preliminary assessment of the project for the feasibility of implementing the project using the PPP mechanism. The preliminary assessment is based on various criteria. The main criteria are the priority of the project focus, the financial security of the project, the experience of foreign countries in implementing similar projects, the use of advanced and innovative experience, etc. At the same time, the priority of the project is determined on the basis of approved state sectoral development programs and investment programs.

2) Initiating a PPP project

A PPP project can be initiated by either a public or private partner. The project initiator develops the project concept and prepares a project evaluation document based on the form approved by the regulations, and then coordinates them.

Depending on the project cost, directly with the state partner, the PPP Agency or the Cabinet of Ministers of the Republic of Uzbekistan:

- up to 1 million US dollars-concept independently by the state partner;
- more than 1 million but not more than 10 million US dollars - the concept is approved by the state partner after approval by the PPP Agency;
- 10 million US dollars or more - the concept is approved by the Cabinet of Ministers of the Republic of Uzbekistan after approval by the PPP Agency.

[11] Presidential decree no. UP-5544 "On approval of the strategy of innovative development of the Republic of Uzbekistan for 2019-2021" dated September 21, 2018
[12] The law "On the use of renewable energy sources" dated May 21, 2019.
[13] The law "On public-private partnership" dated May 10, 2019.
[14] The Cabinet of Ministers decree No. 259 "On improving the procedure for implementing public-private partnership projects" dated April 26, 2020.

Each of the above-mentioned state bodies is obliged to review and give its opinion within 10 working days.

3) The tender procedure

After necessary approval of the PPP project concept, the state partner is required to prepare the tender documentation and draft PPP agreement.

If the project cost is up to one million dollars, a one-stage tender is held. In a one-stage tender, the tender Commission reviews the bidders proposals and evaluates them within at least 30 calendar days. In case of exceeding the specified cost of the project, the tender must be carried out in two stages. In a two-stage tender, the tender Commission pre-qualifies and evaluates the technical proposals of the bidders. In accordance with the PPP Law, a period of at least 30 calendar days is given for collecting applications for participation in pre-qualification in a two-stage tender, and applicants who have passed pre-qualification have the right to submit tender proposals within at least 45 calendar days. The regulation, summarizing this period, provides the tender Commission with a period of at least 45 calendar days for conducting and pre-qualifying and evaluating proposals.

As well as the terms of tenders are not regulated by the Regulations, so it is assumed that the state partner itself determines the procedure and terms of the tender. However, the deadline for submitting bids must be at least one month from the date of the announcement of the tender.

It is also should be noted that the draft PPP agreement is an integral part of the tender documentation, which is provided to applicants on a paid basis. The amount of the fee is determined by the state partner.

The term for which the PPP agreement is concluded (3-49 years) depends on the indicators of net profit, return on capital investment, the terms of use of fixed assets and other property. The parties have the right to extend or shorten the term of a specific PPP agreement within the specified time frame.

In addition to a tender procedure, the Regulation also provides the possibility for direct negotiations to conclude a PPP agreement. The direct negotiations are allowed in next exceptional cases:

- if the project concerns ensuring the security and defense capability of the state;
- exclusive rights to intellectual property, land plots, other real estate or other property belong to the PPP participant itself;
- if there is a decree or decree of the President of Uzbekistan on conducting direct negotiations.

At the same time, direct negotiations can be initiated by both public and private partners.

According to the Regulation, when calculating the costs of production and sale of products based on the PPP projects, it is necessary to follow the provisions of the legislation of Uzbekistan, which prescribes calculation formulas.

An important point is a procedure for determining the price (tariff) for products (works, services) for PPP projects. In accordance with the current rules, the tariffs are set by the state partner in agreement with the private partner. Prices (tariffs) for products (works, services) produced under monopoly and natural monopoly conditions are either approved by the Ministry of Finance at the request of the state partner or set by the President's decision as the fixed or limited prices (tariffs). So far no limit tariffs have been set for electricity generated from renewable sources.
The private partner has the right to apply for 10 years the legislation which was in force at the time of signing of the PPP agreement, in case of changes to the legislation that worsen the conditions for investing in a PPP object.

Our team is always glad to share our expertise with you and answer your questions regarding the renewable energy projects and other questions about PPP.

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→ About us

Rödl & Partner – The agile caring partner for Mittelstand shaped world market leaders

As attorneys at law, tax advisers, management and IT consultants and auditors, we are present with 109 own offices in 49 countries. Worldwide, our clients trust our 5.120 colleagues.

Rödl & Partner assists you in Kazakhstan and Uzbekistan from our offices in Almaty and Tashkent. Our team of Kazakh, Uzbek and German attorneys at law, auditors and tax consultants has successfully supported our clients since 2009 in all investment and project-related matters in the two largest and promising markets of Central Asia – in German language and from a single source.

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