

Chinese Government Procurement Legislation: Process, Patterns and Future Reform

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Abstract

The authors agreed with the integration of Law on Tenders and Bids and unified government procurement legislation. The idea of Improvement tries to maintain the existing project procurement system in bidding. As with previously mentioned, Law on Tenders and Bids makes the practice of private procurement activities within the adjustment range is flawed jurisprudence and should be adjusted rather than maintained. Even if the bidding is a general way to choose suppliers, purely private procurement should also be allowed to trade on the basis of bilateral consultations and selected procedures as they see fit rather than force them to apply rigid “Bidding” provisions.

Key words: Government procurement legislation; Tenders and bids; Private procurement

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INTRODUCTION

The legislative model of government procurement in China is characterized by decentralized model compared with other countries. Law on Tenders and Bids and then a comprehensive government procurement law is developed. Moreover, the latter does not absorb all of the former, with two laws existing in parallel. China's current system of government procurement laws in parallel produces a lot of

internal conflict and bring difficult to application of law, thus undermining the stability of legal system. The authors also agreed with the integration of Law on Tenders and Bids and unified government procurement legislation.

1. THE NECESSITY OF LEGISLATION FOR GOVERNMENT PROCUREMENT

In view of the characteristics of government procurement compared to private procurement, government procurement has special needs in law different from that of private procurement. More stringent constraints on procurement decisions should be required by legal norms. Specifically the special needs of government procurement in law are what the following states.

1.1 Requirement of Ensuring Normativity of Procurement Acts by Law

In the procurement process, private persons can independently decide purchase mode and procedure according to their actual needs on the basis of complying with relevant laws about fair trade and take the consequences independently. In contrast, government procurement needs more mandatory regulations to ensure the normativity of procurement activities, namely ensuring that procurement body adopts statutory purchase pattern depending on the size, object and time requirements of the procurement.

Firstly, government procurement requires reasonable division of labor and mutual checks and balances. The department for supervision over government procurement should be separated from centralized procuring agency, and centralized procuring agency should also be separated from project the procurement department. Entities of procurement management and enforcement should be separated in order to ensure fairness of procurement. The department for management over private procurement can only be the government, and purchaser of private

procurement is a private entity, so the problem of separation does not exist.

Secondly, government procurement needs to take into account benefit and efficiency at the same time and reasonably determine the scope of centralized procurement and decentralized procurement. Activities of centralized procurement agency shall meet the requirements of lower purchase price than the average market price, higher procurement efficiency, good quality and good service. Private purchases can flexibly adjust requirements of quality and efficiency according to their own needs.

Thirdly, there are laws that regulate stringently choice of procurement methods, procurement procedures and relief for suppliers for government procurement and so on. Private purchases only need to follow the principle of party autonomy in private law and then make procurement decisions according to their preferences, and its relief does not require a special procedure.

1.2 Requirement of Ensuring Openness of Procurement Procedure by Law

Private procurement is when private entity exchanges its own resources for other resources they need. The whole process does not infringe the legal rights of others. Therefore, there is no need to be responsible for others or open to others. Government procurement is when government exchange public financial resources for what she needs to provide services to the public. Most of the government revenue is collected through mandatory contributions, namely taxes. Thus, government's using taxes levied on the people to seek the maximum welfare for the people must be under the supervision of public opinion. In addition, the establishment and implementation of government procurement decisions, the setting up of specific procurement authorities, the policymaking of procurement and the relief for supply should comply with procedures prescribed by law. Therefore, government procurement process requires not only legitimacy but also openness and accepts the supervision of the people.

In addition to the supervision of the people, government has a special supervision system of its own for government procurement. The government has established an effective supervision mechanism that is based mainly on financial sector and supports from supervision, auditing and other departments, which are given full play to strengthen the constraints on government procurement, to ensure the implementation of all policies, to prevent and eliminate corruption and various acts of evading government centralized procurement in government procurement and to resolutely overcome departmentalism and local protectionism.

1.3 Requirement of Ensuring Consistency of Procurement Decision With Goals of Policy by Law

Private purchases generally do not affect national macroeconomic regulation with its scale. In the

procurement process, private entity can independently decide procurement targets and prices according to his actual needs on the basis of complying with relevant laws on fair trade. The policy character of government procurement means that the amount and structure of total social demand can be affected by adjusting the size, structure, technical requirements and selection criteria of government procurement, thus the role of the government procurement as a policy tool in economic regulation, industry support, policy guidance can be played, promoting the achievement of national economic and social development objectives, such as stabilizing economic operation, optimizing industrial structure, promoting regional balance and supporting energy conservation and environmental protection.

In government procurement, strengthening the police function of government procurement is an objective requirement towards establishing a scientific government procurement system. Government procurement in huge scale contributes to the realization of economic and social development policy aims. Government's playing the role of regulating economy through government procurement system is one of the tasks assigned by law to government procurement system, and it is also a necessary requirement to build a system of public financial management under the condition of socialist market economy (Zhan, 2006).

Therefore, government should not reflect personal preference in procurement, instead she must follow the requirements of laws and policies, including maximizing saving expenditure, purchasing home products, supporting small and medium-sized enterprises, supporting energy conservation and environmental protection and supporting innovation and so on.

2. PROCESS OF CHINESE GOVERNMENT PROCUREMENT LEGISLATION

2.1 Legislative Background of Government Procurement Law

China has a long history in government procurement. Back in the late primitive society government procurement has appeared (Yang & Li, 2004). As an act of trade, procurement emerged after commodities and private ownership appeared. In the late primitive society, with the development of productivity, product surplus appeared which could be used to exchange in the entire society, thus a variety of forms of procurement activities followed. State at that time as a unit of needing materials was also a procurement entity, but government procurement was only for the voluptuous life of rulers, mostly household items. In order to meet ambitious rulers' outward expansion, there were many military supplies. The purpose of government procurement was not satisfying the needs of

the people even though part of procurement was related to the public, production and government public works. It mainly met the need of developing production, enhancing national strength or maintaining the government rule as a measure of comforting the people (Yang & Li, 2004).

In the planned economy period, government managing national economy through plans. It was not necessary to establish the system of government procurement in the modern sense. Firstly, government was in an absolutely dominant position in the national political and economic life. The central government to lower levels of governments and governments to government-owned enterprises and institutions formed a vertical affiliation relationship. Various types of materials needed by subordinate units were mainly allocated by the superior units. No effective procurement requirement could be formed. Secondly, all types of businesses were only a subsidiary body of the government in the status, not owning independent accounting qualifications in financial management. Businesses interests and national interests were mixed, and their profits and expenditures were uniformly managed by the state. Industrial products of businesses were distributed and allocated by the nation. Thirdly, from the overall economic environment, planned market economy essentially excluded market. Government procurement lacked basic environmental securement.

After the reform and opening up, the desalting of planned economy and government procurement system not being established adapting to the socialist market economy led to blind and repeat government procurement by all levels of governments, inefficient use of purchasing funds and lack of constraining mechanism for government procurement (Yang & Li, 2004). In that context, government procurement legislation was put on the agenda.

However, development of Chinese government procurement law is with its own characteristics compared with governments in the western countries. Government procurement law in the western countries stemmed from regulating government purchase in the market as a entity different from ordinary civil entity, while government procurement law in our country was derived from regulating construction and operation projects be funded by public funding. In that context, regulation of tendering and bidding activities in the field of construction was on the agenda. Tender method in procurement method was first enacted alone, then the right allocation of government procurement, procurement procedures and supervision mechanisms were enacted through dispersive legislation model.

2.2 Enactment of Law on Tenders and Bids

Chinese government procurement legal system is mainly the Government Procurement Law and Law on Tenders and Bids, supplemented by a number of administrative regulations and rules. Although time of promulgating and

implementing the two laws were very near, the two laws were enacted in two completely different contexts.

Back in the era of planned economy, there was a shadow of the tendering and bidding system. Since the Third Plenary Session of the Eleventh Central Committee, with the implement of adjustment, reform, consolidation and improvement policy, and particularly with the expansion of enterprise autonomy and the function of market regulation, competition gradually unfolded and showed its impetus in economic life, promoting the development of economy and technology.

On October 17, 1980, the Interim Provisions for the Development and Protection of Socialist Competition provided that there should not be monopoly in economic activity in addition to those products exclusively operated by relevant departments and units designated by the state. Those manufacturing projects and business projects suitable for contract could try to bid. Because that regulation broke monopoly and enhanced competition, it was later applied to foreign loans, mechanical and electrical equipment import, construction work, distribution of research projects and quota allocation of export products and other fields.

The success of the tendering and bidding system in practice attracted attention from the State Commission for Restructuring, State Economic and Trade Commission, the Department of Materials, and some departments also promulgated relevant rules on after another. On June 7, 1983, the former Ministry of Urban and Rural Construction and Environmental Protection issued and implemented Trial Procedure for Construction and Installation, which was also China's first department rule regulating tenders and bids, being the precedent of Tendering legal system for construction. On September 18, 1984, Interim Provisions of the State Council on Several Issues about the Construction and Infrastructure Management System Reform put forward project bidding contract system. Assignment of building task purely by administrative means should be reformed. Tenders and bids should be used. Contracting units make the preferred choice in survey and design units, construction and installation business. Competition should be encouraged, and monopoly should be prevented. No matter it is state-owned or collective units, regardless of region and department, all can participate in bidding after being reviewed with tendering qualification. Project authority and local government should not make obstacles to units from external sector or outside region and provide convenience. Under that context, in November 1984, the former State Development Planning Commission and Ministry of Construction jointly formulated Interim Provisions on Tendering and Bidding for Construction Projects. At the same time, local legislation was orderly being promoted. Seven local governments in Henan, Shandong, Shanghai, Shantou and other places established the same provisions on construction project

one after another. Later 20 local governments in Qingdao, Shenyang, Yunnan, Hubei and other places introduced more detailed regulations for tendering and bidding. All of those laid a solid foundation for the formulation of Law on Tenders and Bids.

From years of practice, the implementation of this system has important significance in promoting investment and financing system, creating a fair competitive market environment, improving economic efficiency, ensuring project quality and preventing corruption in tenders and bids. When China implemented policy of increasing investment and accelerating infrastructure construction to stimulate sustained growth of national economy in 20th century, in order to improve efficient capital use, to ensure project quality and to solve the contradiction between modernization construction and vacancy of tendering and bidding regulation in national level, introduction of Law on Tenders and Bids became a practical need (Xiao, 2009). In that context, the National People's Congress promulgated Law on Tenders and Bids on August 30, 1999.

According to the law, all tendering and bidding activities conducted within the People's Republic of China shall apply the law. However, what activities must carry out tenders and bids went back to the construction field. Article III of the law regulates that the following construction projects in the territory of the People's Republic of China, including surveying and prospecting, design, engineering and supervision of such projects as well as the procurement of major equipment and materials related to the construction of such projects, must be subject to tenders: (a) projects such as large-scale infrastructure facilities and public utilities involving the social and public interests and public safety; (b) projects which are, completely or partly, invested by the State-owned funds or funded through State financing; and (c) projects using loans or aid funds from international organizations or foreign governments.

2.3 Enactment of Government Procurement Law

Although tendering and bidding system is capable of regulating methods of all government procurement ways, it cannot cover the entire government procurement process. After all, other procurement methods exist in addition to tender. More importantly, Law on Tenders and Bids only regulates the choice of suppliers, which are only part of government procurement that law should regulate. The scope of government procurement is larger than transaction. It includes planning, supply and management before and after procurement transaction. The procuring entity should not only be responsible for the behavior of achieving raw materials and supplies needed, but also be responsible for source of supply, planning, scheduling of materials, research and selection, ensuring proper delivery and tracing of goods and quantity and quality inspection (Liu & Li, 2004).

Against that context, in order to strengthen financial expenditure control and regulate government procurement practices, on the basis of drawing on international experience, China had started carrying out experimental work of government procurement since the end of 1995 in accordance with international practice in Shanghai, Hebei, Shenzhen, Chongqing and other places. The area of experiment gradually expanded in 1998, and by the end of 1998, financial, culture, education and executive department in 373 cities in 23 provinces (cities, districts) had carried out government procurement. In response to those government procurement activities, many provinces and cities such as Beijing, Shanghai, Anhui, Shanxi and Yunnan promulgated local regulations on government procurement. On December 24, 1998, Shanghai Municipal People's Government issued Procedures of Shanghai Municipality on the Administration of Government Purchasing. On April 22, 1999, Beijing issued the Procedures of Beijing Municipality on Government Purchasing and Beijing Municipal Government Procurement Catalog. On November 3, 1998 and April 13, 1999 Yunnan Province respectively issued Interim Provisions on Government Procurement of National Institutions at Provincial Level and Rules for the Implementation of Yunnan Provincial Government Procurement. On February 12, 1999 Zhejiang Province issued Measures for the Administration of Issuing and Contracting in Key Projects in Zhejiang and so on.

In 1999, procurement of the central organs gradually expanded, and Ministry of Civil Affairs, Ministry of Health, Government Offices Administration of the State Council, the National Mapping Agency, the State Administration of Taxation, Customs Department and other departments made attempts of government procurement of goods. Government Offices Administration of the State Council and other departments also developed specific regulations.

In order to promote and regulate government procurement pilot work, the Ministry of Finance enacted in 1999 Interim Measures for the Administration of Government Procurement in accordance with provisions of Budget Law and other relevant laws, which was China's first national regulation on government procurement. Based on Interim Measures for the Administration of Government Procurement, Ministry of Finance developed Interim Measures of the Administration of Tenders and Bids in Government Procurement, Interim Measures for the Supervision of Government Procurement Contracts, Interim Measures for Administration of government procurement Information Announcement, Interim Provisions of the Procedures of Government Procurement and Interim Measures of the Administration of Directly Appropriated Funds by Finance in Government Procurement and a series of rules and regulations.

In 2000, pilot rapidly spread across the country. With the pilot orderly and effectively promoted, government

procurement funds grew substantially year after year, government procurement expanded rapidly, and a variety of government procurement rules and regulations were gradually improved. Role of government procurement system to play in the political, economic and social life of was increasingly being perceived by departments. Therefore it became a necessary reality to lift the government procurement regulations gradually improved into law.

Thus, the NPC Financial and Economic Committee founded the Government Procurement Law Drafting Group. Under the leadership of the NPC Financial and Economic Committee of the National People's Congress and the Budget Committee, Ministry of Finance, the State Development Planning Commission, the State Economic and Trade Commission, Ministry of Foreign Trade, Government Offices Administration of the State Council, the PLA General Armament Department, the Group organized staff and experts and started drafting government procurement law. In September 2000, Government Procurement Law (draft outline) was drafted. In August 2001, Government Procurement Law (fifth draft finalized) was formed. On October 22, 2001, Government Procurement Law (Draft) was deliberated on the 24 Session of Standing Committee of the Ninth National People's Congress for the first time. On December 24 of the same year, Government Procurement Law (Draft) was deliberated on the 25 session for the second consideration. On June 24, 2002, Government Procurement Law (Draft) was deliberated on the 28 session for the third time. On June 29, 2002, Government Procurement Law was formally promulgated and came into effect from January 1, 2003.

Government Procurement Law is constituted by nine chapters, which are the general provisions, government procurement parties, government procurement methods, government procurement proceedings, government procurement contract, query and complaint, supervision and inspection, legal liability and supplementary provisions. The law outlines the general framework of Chinese government procurement system, incorporating government procurement activities into legal norms.

On January 30, 2015, Chinese Premier Li Keqiang signed State Council Order and announced, promulgating Regulations of Implementation for Government Procurement Law of People's Republic of China, which provided more detailed provisions in the mainly following aspects.

Firstly, in improving transparency it states that project information must be open to public. Procurement information should be published in the designated media. Procurement budget amount should be disclosed in procurement documents. Procurement using single-sourced shall publicize the sole supplier name in the designated media. Procurement documents such as tender documents, competitive negotiation documents, notices

and other procurement documents should be disclosed simultaneously as the result of the bid was announced. The bid and auction shall be open. Government procurement contracts should be announced in two working days from the date of signing of contract with media specified by financial department of the provincial people's government and above. Complaint handling results resolved by financial sector should be announced in the designated media.

Secondly, in strengthening policy function of government procurement and playing regulatory role, the Regulations define clearly the entity of making government procurement policy. It requires procuring agency and procuring entity shall prepare procurement documents in accordance with government procurement policy, and procurement requirements should be consistent with government procurement policy. To implement government procurement policy, procurement can legally adopt methods other than public invitation for approval.

Thirdly, in assessment rules, the regulations provide that government procurement evaluation experts should use dynamic management mechanism and random choice mechanism. It makes sure accreditation requirements and responsibilities of experts, stressing independent review of experts. Experts take responsibility for their own review comments. It strengthens punishment over experts' crack of credit. Their bad behavior would be documented and included in the unified credit information platform. It sets corresponding legal responsibility with experts' different violations, including invalid review comments, zero assessment fee, prohibition of participating in government procurement assessment activities, administrative penalties like warning, fines and confiscation of illegal gains, civil liability and criminal responsibility.

3. CAUSE AND DISADVANTAGES OF DISPERSIVE LEGISLATION

The legislative model of government procurement in China is characterized by decentralized model compared with other countries. Law on Tenders and Bids and then a comprehensive government procurement law is developed. Moreover, the latter does not absorb all of the former, with two laws existing in parallel. China adopted a decentralized model legislation is historic rational. As some scholars have proposed, disperse of government procurement market is from a no unified system, which comes from many reasons, one important of which is the legislative history.

Firstly, Law on Tenders and Bids was first developed in response to a major problem existed at that time. In the beginning of reform and opening up, corruption in engineering was a serious problem, then introducing in the field of construction an effective competition mechanism

and regulating the selection of contractors led to bidding system, which was subsequently extended to other goods and services procurement. Due to the fact that tenders and bids are the core process and an important way of public resources, a separate legislation was made. This course is consistent with the proposition of the times. After all, in the 80s of tendering and bidding evolving, China's tax system reform had not yet commenced, and modern financial system was far from being established, there was then no necessity of establishment of government procurement system. Secondly, it also follows the regular of easier first harder later. Law on Tenders and Bids just provides procurement methods, belonging to specific procedural contents, with an operating nature, which is relatively simple. A complete Government Procurement Law includes both procurement procedures, details of procurement design, adjustments of purchase rights, convergence with budget system, coordination with national industrial and social policy and supervision and relief system. Its complexity is far beyond the rules of procedure. Therefore, it is reasonable by enacting Law on Tenders and Bids and then complex comprehensive Government Procurement Law according to empiricism.

It is a common phenomenon in our country that a single legislation is made before comprehensive legislation. Building socialism with Chinese characteristics is an unprecedented undertaking, with a lot of things in the exploration and not mature, but still needs laws to regulate. A comprehensive law is not easy to come in short period, which should be made step by step. Develop a single law in order to meet the needs of reform and opening up and development. As some scholars have pointed out that the interpretation of paradox in law sometimes should go to its history, without having to find its logic. However, the decentralized legislation model does create a conflict between laws, causing implementation costs difficult to avoid. Conflicts on specific legal norms exist throughout the whole legal system after examining the Government Procurement Law and Law on Tenders and Bids.

4. DIRECTION OF FUTURE REFORM: CENTRALIZED LEGISLATION AND ITS CONDITIONS

4.1 Debate Over Reform Scheme

China's current system of government procurement laws in parallel produces a lot of internal conflict and bring difficult to application of law, thus undermining the stability of legal system. However, about how to improve the existing legal system, there are different views.

Some scholars noted that centralization of legislation is a common pattern after examining legislative modes over Law on Tenders and Bids around the world. There

are two legislative models for tenders and bids, and one is independent legislation, the other is providing bidding system in the government procurement law. Most countries adopt the latter. Few countries like Egypt and Kuwait use the former one. Even so, their issuing Public Tender Act is only targeted at government tender project.

Some scholars have analyzed the cost caused by dispersive legislation. Firstly, decentralized procurement legislation artificially separates out the bidding, resulting two times of investments of legislative resources, which inevitably increases cost. Secondly, conflict of contents of two laws stops law providing stable expectations for how to understand and apply law, which could lead to both improvement of government procurement costs and kinds of judicial and enforcement controversies.

For specific unified scheme, scholars who support centralized legislation also proposed alternatives. Option one is repealing Law on Tenders and Bids, incorporating Law on Tenders and Bids as part of Government Procurement Law. Option two is regarding Law on Tenders and Bids as the special law of Government Procurement Law, and Law on Tenders and Bids only regulates the range of fiscal investment projects.

Centralized legislation faces a problem that is the differences in the adjustment range between Law on Tenders and Bids and Government Procurement Law. In the present practice, what the Law on Tenders and Bids provisions regulates must through tenders and bids is beyond the scope of government procurement law. As long as the project is in line with the scope of Article III of Law on Tenders and Bids, it shall apply the method in the bidding process of the law, which exceeds the entity limit of main state organs, institutions and public organizations and which include state-owned enterprises and the private sector. Under this system, once the two methods were combined, and its scope was limited to the main provisions of the existing scope of the Government Procurement Law, general tendering and bidding activities will loss fundamental legal basis. Therefore, some scholars believe that two laws do not need to merge but only need to be improved. Specific ideas include these.

An idea is that classification should be done to what Article III of Law on Tenders and Bids lists that must through tenders and bids for construction projects, having what belongs to the scope of government procurement law stripped out of Law on Tenders and Bids, namely government departments, institutions and public organizations at all levels conducting with fiscal funds in the centralized procurement catalogue or exceeding the respective prescribed procurement thresholds, thus ensuring a uniform system of government procurement so as to realize procurement goals. Like this, a view that what meet the definition of government procurement in Law on Tenders and Bids should be separated from the Law on Tenders and Bids and incorporated in Government Procurement Law. The existing Law on Tenders and Bids

was changed to Business Bidding, regulating bidding behavior apart from government procurement.

There is still an idea that a dedicated management approach should be developed aimed at the intersection of two laws, solving the application problem of government procurement projects, which refers to “government procurement of goods and services bidding management approach”, specially develop a or in accordance with characteristics of government procurement projects as part of the legal system of government procurement.

4.2 View of the Author

The authors also agreed with the integration of Law on Tenders and Bids and unified government procurement legislation. The idea of Improvement tries to maintain the existing project procurement system in bidding. As what previously mentioned, Law on Tenders and Bids makes the practice of private procurement activities within the adjustment range is flawed jurisprudence and should be adjusted rather than maintained. Even if the bidding is a general way to choose suppliers, purely private procurement should also be allowed to trade on the basis of bilateral consultations and selected procedures as they see fit rather than force them to apply rigid “Bidding” provisions.

However, the unified Law on Tenders and Bids and the Government Procurement Law need to solve a premise problem, that is state-owned enterprises into the scope of government procurement issue. Currently, under the Government Procurement Law, procurement activities of the state-owned enterprises are not adjusted by the law. However, according to Law on Tenders and Bids Article III, whoever uses state funds in the project must apply Law on Tenders and Bids. Since then, the construction project bidding scope and scale of the standards” made this clearer with the provision of Article IV that using a state-funds investment projects include projects using of state-owned enterprises and institutions funds and investor actually have control over the project.

Therefore, under the current system, although procurement activities of the state-owned enterprise are not bound by the Government Procurement Law, its engineering procurement practices were bound by Law on Tenders and Bids with the nature of the government procurement law. Once the Law on Tenders and Bids was incorporated into the “Government Procurement Law” and adjustment range of Government Procurement Law does not change, the purchasing behavior of project of state-owned enterprises will lack control. While purchasing behavior of purely a private is not bound by Law on Tenders and Bids, its own choice is in line with jurisprudence. Procurement funds of state-owned enterprises are still public funds in nature, there are also agency problem in economic sense in its procurement. Independent choice of procurement methods especially in the field of construction procurement where huge amount of funds will be use is prone to corruption and other issues.

Therefore, although the Law on Tenders and Bids being incorporated into “Government Procurement Law” has a legal basis, specific implementation depends on the systematic arrangement of Government Procurement Law on whether and how state-owned enterprises procurement is incorporated into government procurement law.

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