**CONTROLS AND LITIGATION OF PUBLIC CONTRACTS: CHINA**

by

CAO Fuguo

Professor of Law,Law School of Central University of Finance and Economics,

Dean, Chinese Academy of PPP Governance

and

GUO Feng

PHD Candidate CUFE University

1. – Introduction

This chapter reports on controls and litigation of public contracts in the People’s Republic of China (China). In 1999 and 2002, China enacted two primary laws governing public procurement, the Bidding Law (BL)[[1]](#footnote-1) and Government Procurement Law (GPL)[[2]](#footnote-2). The two laws were supplemented by various implementing regulations and measures[[3]](#footnote-3). Therefore, the current Chinese GP framework consists of two laws with their respective implementing rules, including Regulation on the Implementation of the Government Procurement Law of the People's Republic of China (2015)[[4]](#footnote-4), Regulation on the Implementation of the Bidding Law of the People's Republic of China (2012)[[5]](#footnote-5), the GP Complaint Measures (2004)[[6]](#footnote-6), the Bid Complaint Measure (2004, revised 2013)[[7]](#footnote-7), Measures for the Administration of Tenders and Invitations to Bid in Government Procurement of Goods and Services (Bidding Measure, 2004) [[8]](#footnote-8), etc. The controls and litigation of public contracts are basically the same under the two laws. Under the BL, the *status quo* of the decentralized supervision responsibility was maintained among various departments and local authorities in line with the structure of the administrative system. No formal challenge system is provided and remedies to cover loss or damage to the aggrieved suppliers are limited.

Under the GPL, Ministry of Finance takes the responsibility to supervise procurement activities. The measures provided under the GPL for such supervision include checks on the activities of the Centralized Procurement Agencies(CPAs) (Articles 59 and 65), specifying the qualifications of government procurement professionals in the CPAs (Article 62), review of the CPA’s procurement prices and effectiveness of cost-saving, reviewing service quality and supplier reputation, and regular publication of such reviews (Article 66). Ministry of Finance is also in charge of handling bid complaint and review (Articles 55–58).

Under the BL, National Development and Reform Commission (NDRC) is responsible for decisions relating to the scope of compulsory bidding projects. Throughout the project, NDRC retains overall authority of supervision over national infrastructure.

This Chapter begins in section 2 by outlining the two systems in place for challenging public authority actions in the procurement of a public contract. The following section (3) refers to the actions relating to the performance phase of the public contract. This section is comparably short because the performance of public contract in China is mainly regulated by the same laws as the civil contracts. The final section (4) introduces further controls on public procurement and public contracts in China, including anti-competitive behavior, anti-corruption and audit.

2. – Actions relating to the procurement phase of the public contract: challenging the public authority’s decisions

2.1. -  *Under the GPL*

The GPL is distinctive in establishing a bid challenge and complaint system under which the aggrieved bidders may make enquires (*xun wen*) to the procuring entity when they consider the procurement irregular (Article 51). A supplier who believes its legitimate interests have been infringed may file a challenge (*zhi yi*) to the procuring entity for redress (Article 52). When the supplier who initiates the challenge is not satisfied with the reply concerning its challenge from the procuring entity or there is simply no timely reply, the supplier may submit a complaint (*tou su*) to the competent government finance department within 15 working days of the expiry of the challenge period (Article 55). The competent financial department then acts as an administrative adjudicator to settle the dispute between the procuring entity and the complainant (Article 56) through an administrative decision. If the complainant supplier is still not satisfied with the administrative decision or the decision is not made in a timely manner, it has the right to apply for administrative review or file an administrative suit to the courts (Article 58) concerning the administrative decision, following the same procedure for redress as general administrative review or suit.

*2.1.1. Eligible complainants*

Under the GPL, the complainant can arguably be any supplier who considers its legitimate rights infringed due to the procurement documents, process, or award decision (Article 52). The GP Complaint Measure provides a narrower definition limiting the possibility to complain to suppliers who have participated in the procurement involved (Article 10). Other articles provide for a detailed list of unlawful conducts that are subject to administrative or even criminal penalties (Articles 71, 72, and 73) and this list is supplemented by the bidding measure. An aggrieved supplier may be able to bring a challenge to any of the unlawful conducts listed. For example, a supplier may file a challenge to the procuring entity or a complaint to the finance department claiming the loss of contract opportunity if the open bidding procedure is circumvented.

*2.1.2. Scope of Permissible Complaints*

The GPL contains a general provision that misconduct of procurement relating to the procurement document, process, or award decision (Article 52) may be challenged by the aggrieved supplier. However, this provision is so broad that it needs to be interpreted and tested. One test can be found in Articles 71 and 72, which provide a list of misconducts that are subject to administrative or criminal penalties, supplemented again by the GP Complaint Measures. In principle, all the conducts listed in these articles can be challenged by the aggrieved supplier. Another test can be found in Article 73 of the GPL (and is repeated in Article 71 of the Bidding Measure and Article 19 of the GP Complaint Measures), which provides that those listed unlawful conducts shall be dealt with either through cancellation of the procurement, annulment of the contract or damages, if they are found to have affected or might have affected the outcome of the procurement. Therefore, the aggrieved supplier may challenge at minimum those listed conducts that directly affect or have directly affected the outcome of the procurement. Still another test can be found in Article 10 of the GP Complaint Measures, which requires the complainant to be a supplier “involved in the procurement activities.” The wording is slightly problematic as it excludes suppliers who have never learned of the procurement due to unpublicized tender information.

*2.1.3. Available Remedies*

The GPL and relevant implementing rules provide administrative and criminal penalties for the conducts listed in Articles 71 and 72 of the implementing rules. These include an order of correction within a time limit, warnings, fines, criminal liability, confiscation of unlawful gains, etc, as the case may be. In addition, the GPL and the BM also prescribe remedies to the procurement process when the listed conducts are found to have or might have affected the outcome of the procurement based on three circumstances (Article 71 BM):

* When the successful tender has not been decided, terminate the procurement activity;
* When the successful tender has been decided but the contract not yet performed, annul the contract and choose the successful tender from among other qualified candidates;
* When the contract has been performed and the purchaser or supplier suffers loss, the liable party shall pay compensation to the other party.

The GPL is the first legal document in China to adopt an interim measure. The GPL provides that the supervising department may notify the procuring entity at its own discretion to suspend the procurement pending the review. It is also worth noticed that the suspension period should be no more than 30 days (Article 57). While using its discretion, the administrative review department is required to judge the merits of the complaint and other particularities and decide whether to grant this interim relief. Though the law does not specify these particularities, it could be argued that they include urgency of the procurement, public interest, and the interests of other bidders.

The GP Complaint Measures repeats the provision in the primary law and further requires that the respondent, upon the receipt of the notice, should suspend the procurement instantly and shall not proceed with the procurement before the statutory period for suspension expires or the financial department issues the notice to resume (Article 22 of the GP Complaint Measures).

The Implementation Regulation of the GPL goes even further in this aspect and provides that the purchaser shall suspend the procurement on its own initiative when it is considered that the enquires (*xun wen*) or challenges (*zhi yi*) might affect the outcome of the procurement. This means that interim measure can be decided and made directly by the purchaser rather than waiting for the notice from the supervising department.

*2.1.4. Procedural Issues*

The GP Complaint Measures provides detailed rules governing the handling of complaints. When the financial department concerned receives the complaint, it shall conduct a preliminary review on the admissibility and jurisdiction of the complaint to decide whether it accepts the complaint or not according to the conditions laid out in Article 11. If it decides to accept the complaint, the financial department shall send copies of the complaint to the respondent (the procuring entity) and other suppliers involved within the following three working days (Article 12). The respondent and other suppliers involved are required to submit written explanations and relevant supporting documents within five working days (Article 13). as a principle, the finance departments only review the records and documents. However, it may initiate an investigation to collect evidence or summon the parties involved to cross-examine the evidence when necessary (Article 14). Unless the complaint is withdrawn or dismissed, the finance department shall make a decision within 30 working days after it accepts the complaint (Article 56 of the GPL) and notifies all parties involved (Article 20). The decision shall be in written form with a printed seal and contain the decision itself, the supporting evidence and legal basis, a notice to the complainant of his right to a second review by a higher administrative authority, and his right to suit (Article 21). The GP Complaint Measures also requires the finance departments to publish the result of complaint cases handled (Article 23). GP Complaint Measures also contains an article addressing the concerns of false or malicious complaints. Th e supplier who submits false or malicious complaint would be blacklisted and subject to administrative penalties (Article 26).

*2.1.5. Notification and Standstill*

Procurement remedies differs from the other civil contracts in China depending on whether or not the performance of the contract has been started. The remedies will be limited to compensations if the winning bidder start to carry out the contract. The notification and standstill provisions provides a standstill period between the award and the signing of the contract in order to preserve pre-contract remedies.

Under Article 62 of Bidding Measure, the award notification should be published on the media designed by the financial authority. A supplier who believes its legitimate interests have been infringed may file a challenge (*zhi yi*) to the procuring entity in writing in 7 days after the notification published (Article 63). formally provide a standstill period for and aggrieved supplier to challenge an award decision, but in practice, it is generally followed that a period of 7 days is preserved to see whether there is challenge before the contract is concluded.

2.2. - *Under the BL*

Under Article 65 of the BL and Article 60 of the Implementation Regulation of the BL, a bidder or any other interested person has the right to challenge the decision of the procuring entity or to complain to the relevant administrative supervision department, NDRC or other line ministries who supervise bidding activities in their relevant sectors, if he believes there has been a violation. However, neither effective challenge and review procedures nor remedies for loss or damage for the aggrieved suppliers are provided. The legislators of the BL took the view that bidders could rely on strict administrative sanctions to readdress any breach. The gap was filled to some degree by an implementing measures, the Bid Complaint Measure, issued four years later dealing with procedural issues for handling complaints, and the Implementation Regulation of the BL, issued in 2012 with a chapter about how to handle complaints.

*2.2.1. Eligible Complainants*

The Bid Complaint Measure (Article 3) reiterates the provision in Article 65 of the BL. It clarifiesfurther clarifies the meaning of the “other interested persons” and refers them as “legal persons, other organizations and individuals other than the bidders that are directly or indirectly related to the interest of a bidding project or bidding activity.”

*2.2.2.* *Scope of Permissible Complaints*

A complaint can be made in relation to any phase of the bidding activities including bid invitation, submission of bids, opening of bids, evaluation of bids, determination of the successful bid, and conclusion of the contract (Article 2 of the Bid Complaint Measure).

*2.2.3.* *Available Remedies*

A complainant’s preferred remedy will usually be the rectification of the breach by the procuring entity. Procurement remedies in many legal systems include damages, annulment of an unlawful act or decision, or annulment of a contract, although this may cause serious disruption of procurement and may deserve special consideration. The BL relies heavily on administrative sanctions for enforcement. Meanwhile, it does provide some limited remedies for an aggrieved bidder to redress its grievance. The most important one is the requirement of correction of the unlawful acts and where these unlawful acts lead to an award decision, the annulment of the award, in which case a new successful bidder may be chosen from the other bidders, or alternatively a new bidding procedure must be reopened. While these measures might serve as effective remedies for the aggrieved bidder, they rely heavily on the effectiveness of the administrative review body.

The Implementation Regulation of the BL also provides an interim measure in Article 62 that the supervising department may notify the procuring entity at its own discretion to suspend the bidding.

*2.2.4. Notification and standstill*

In contrast with the GPL, the Implementation Regulation of BL provides a standstill provision( Article 54 ) which requires that the winner candidate ranking list be published before a final award decision is made for at least 3 days during which an aggrieved bidder or other interested parties can file a challenge to the competent authority.

3. – Actions relating to the performance phase of the public contract

The GPL and BL both focus on the actions relating to the procurement phase of the public contract. Article 43 of the GPL provides that the contract concluded is governed by the Contract Law[[9]](#footnote-9). This clearly indicates that the government contract under the GPL is treated as a civil contract. Contract concluded under the BL is also taken as governed by the general contract law. Therefore the actions relating to performance phase of the government contract is regulated under the Chinese Contract Law and further regulated under the Civil Procedure Law of the People’s Republic of China[[10]](#footnote-10) in terms of civil proceedings.

3.1. - *Available remedies*

Article 128 of the Contract Law provides that the parties may resolve a contractual dispute through conciliation (*he jie*) or mediation (*tiao jie*). Where the parties do not wish to, or are unable to, resolve such dispute through conciliation or mediation, the dispute may be submitted to the relevant arbitration institution for arbitration in accordance with the arbitration agreement between the parties. Parties to a foreign related contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration. Whereas the parties do not conclude an arbitration agreement, or the arbitration agreement is invalid, either party may bring a suit to the People's Court. The parties shall perform any arbitral award or mediation agreement which has taken legal effect; if a party refuses to perform, the other party may apply to the People's Court for enforcement.

3.2. - *Contract Amendment, Suspension and Termination*

The contracting parties are not allowed to substantially alter, suspend or terminate the contract without statutory reasons according to Article 50 of the GPL, which is different from the provisions under the Contract Law where parties can amend a contract with mutual agreement. It would be unfair to the other suppliers or bidders if the contracting parties can alter, suspend or terminate the contract during performance without a sound justification. As a result, the supplier has to fully perform the contract without any change unlessa statutory reason is satisfied.

The GPL emphasizes the importance of public interest by regulating that the contract should be altered, suspended or terminated if it is detrimental to the state interest or public interest which can be seen as the statutory reasons required. In this case, the party at fault is liable to the other for indemnification; when both parties to the contract are at fault to some extent, they are liable to each other for the consequences caused by themselves.

3.3. - *Performance Bond*

Under both the Chinese public procurement system, including the GPL and BL, it is the public purchaser’s discretion to use performance bond or not. Thus a procurer may require the winning supplier to submit performance bond, and this should be stated in the bidding documents, and when it is so stated, it is a substantive responsive condition. When performance bond is required, it shall not be more than 10% of the contract value.

4. – Actions relating to controls over public contracts

4.1. - *Anti-competitive behaviour*

Predatory pricing is generally not taken as a good public policy and thus is generally prohibited under the Chinese laws. A bid below cost is regulated by the procurement laws, competition laws and even in some sector regulations. Under the BL, a bidder is prohibited from submit a bid price that is below cost(Article 33). When a bid is taken as price below cost, it will be rejected (Article 51 of the Implementing Regulation of BL).When a bid price of a winner candidate is considered as below the cost, a written justification with supporting documents should be requested from the candidate before an award can be made(article 51 of the Bidding Measure for Government Procurement of Goods and Service, 2004).

The Anti-Unfair Competition Law of the People's Republic of China [[11]](#footnote-11)  also regulates below-the-cost bids to safe guard fair competition. Under Article 11 of the Anti-Unfair Competition Law, an operator shall not sell its or his goods at a price that is below the cost for the purpose of excluding its or his competitors. Tenderers shall not submit tenders in collusion with one another to force the tender price up or down, and a tenderer shall not collaborate with the party inviting tenders to exclude competitors from fair competition according to Article 15. Remedies for the conducts listed above include compensation, warnings, fines, nullify the bid, criminal liability, confiscation of unlawful gains, etc, as the case may be.

4.2. - *Bribery and corruption*

The publicity of government procurement information is an efficient method against bribery and corruption. The Implementation Regulation of the GPL requires the procurer to publish most of the information of its procurement online including the Contract itself (Article 32, Article 43). This outstanding and leading measure is considered to work well for anti-corruption and increase the transparency of the procurement although a formal evaluation of the result of this measure has not been made.

In accordance with the Implementation Regulation of the GPL, purchasers shall protect national interests and public interests in government procurement activities, be impartial and integrated, keep good faith, comply with the government procurement policies, establish internal management rules for government procurement, be frugal, and scientifically and reasonably determine procurement demands. Purchasers shall not ask for or accept gifts, kickbacks, or other commodities or services irrelevant to procurement activities from suppliers.

Under Article 14, procurement agencies shall not get government procurement agency business by illicit means or maliciously collude with purchasers or suppliers to manipulate government procurement activities. The employees of procurement agencies shall not accept the treats, travels and entertainment activities organized by purchasers or suppliers, shall not accept gifts, cash and negotiable securities, and shall not apply to purchasers or suppliers for reimbursement of expenses that should be paid by them.

4.3. - *Audit*

The National Audit Office of the People’s Republic of China (NAO) has the role of scrutinizing public spending. NAO audits the accounts, including the government procurement accounts, of all government departments and a wide range of other public bodies including the stated-owned enterprises (SOE).

NAO publishes an annual national report every year and states the problems related to government procurement as a part of it according to the requirements of the Audit Result Publicity Measure (2002). The report is submitted to the National People’s Congress (NPC) and reviewed by the NPC. For example, Liu Jiayi, the Chief Auditor of NAO submitted the 2015 Audit report to the NPC in June 29, 2016[[12]](#footnote-12). This report is then published on the website of NAO. The local Audit Office also publish such kind of audit reports every year.

1. http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content\_5004749.htm [↑](#footnote-ref-1)
2. http://www.npc.gov.cn/wxzl/gongbao/2014-11/18/content\_1892150.htm [↑](#footnote-ref-2)
3. In China the Constitution has the highest legal validity. State laws have greater force than administrative regulations and others. The NPC and its Standing Committee exercise the state power to make laws. The State Council formulates administrative regulations in accordance with the Constitution and other laws and reports them to the NPC for records. The government angencies works out different measures. [↑](#footnote-ref-3)
4. http://www.gov.cn/zhengce/content/2015-02/27/content\_9504.htm [↑](#footnote-ref-4)
5. http://www.gov.cn/zwgk/2011-12/29/content\_2033184.htm [↑](#footnote-ref-5)
6. http://tfs.mof.gov.cn/zhengwuxinxi/caizhengbuling/200806/t20080602\_44440.html [↑](#footnote-ref-6)
7. http://www.weiyuan.gov.cn/zwgk/show/20150814130205-234718-00-000 [↑](#footnote-ref-7)
8. http://www.ccgp.gov.cn/zcfg/hongtou/201410/t20141022\_4653570.htm [↑](#footnote-ref-8)
9. http://www.gov.cn/banshi/2005-07/11/content\_13695.htm [↑](#footnote-ref-9)
10. http://www.npc.gov.cn/wxzl/gongbao/2012-11/12/content\_1745518.htm [↑](#footnote-ref-10)
11. http://www.gov.cn/banshi/2005-08/31/content\_68766.htm [↑](#footnote-ref-11)
12. http://www.audit.gov.cn/n5/n26/c84918/content.html [↑](#footnote-ref-12)