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Administrative Litigation of Government Procurement Contract Dispute

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Abstract: Since lawmakers believe that the exercise of executive power is not involved in the process of concluding government procurement contracts, the current system stipulates that in disputes caused by government procurement, suppliers can resort to administrative litigation or civil litigation according to the difference between the pre-contract stage and the contract performance stage. However, government procurement contracts of both civil and administrative nature, even contract disputes caused in the process of performance, still involve the consideration of administrative purposes, which needs to pay attention to "power control" and the protection of public interests in the judicial review process. Therefore, administrative litigation is more suitable for judicial review of government procurement contract disputes than civil litigation because of its objective litigation nature.

1. Introduction

In accordance with Articles 52, 55 and 58 of the Government Procurement Law of the People's Republic of China (hereinafter referred to as the "Government Procurement Law"), the channel to resolve disputes arising before the conclusion of a government procurement contract is "questioning -- complaint -- administrative reconsideration or administrative litigation"[1]. Article 43 of the Government Procurement Law stipulates that "Contract Law applies to government procurement contracts". In accordance with Article 128 of the Contract Law of the People's Republic of China (hereinafter referred to as "the Contract Law") It can be seen that the disputes arising in the contract performance stage are relieved by the way of "conciliation or mediation -- arbitration -- civil litigation"[2]. It can be seen from this that when suppliers have disputes in the process of government procurement and want to seek judicial remedy, they need to resort to administrative or civil litigation according to different stages. So, for this government act, why the legislation applies this dual relief model, in this regard, Yao Zhenyan mentioned in the "People's Republic of China Government Procurement Law (Draft)" note: "Government procurement itself is a kind of market transaction behavior."[3] In the process of concluding government procurement contracts, the exercise of executive power is not involved. The legal status of buyers and sellers is equal. Besides, in the Provisions on Several Issues concerning the Trial of Administrative Agreement Cases promulgated by the Supreme People's Court in 2019 (hereinafter referred to as the "Judicial Interpretation of Administrative Agreement"), the types of administrative agreements that should be accepted in administrative litigation stipulated in Article 2 do not appear government procurement

contracts, which can further establish the legislative intention of government procurement contracts as civil contracts. The litigation system of our country is based on the different purpose and purpose of the litigation type, that is to say, the specific type of disputes should be put in the appropriate litigation track to be settled. So, based on the nature of the government procurement contract itself and the needs in practice, is the dual relief model suitable for it? Does the process of contract conclusion and performance not involve the exercise of executive power as stated in the legislative intent? In fact, due to the particularity of public interests and the involvement of administrative organs, government procurement contracts have characteristics different from general civil contracts. When disputes occur, the examination of these special points and the protection of relevant interests are more in line with the nature and characteristics of administrative litigation, and there is a realistic basis for bringing government procurement contract disputes into the track of administrative litigation in China.

2. Classification of Litigation

Based on different litigation functions and purposes, China classifies litigation and applies government procurement contract disputes to civil litigation or administrative litigation, depending on which litigation is more conducive to dispute settlement. Civil law countries divide the types of litigation into subjective litigation and objective litigation according to the division of litigation functions. Subjective litigation aims at the maintenance of rights and interests, that is, through litigation, the rights and interests of the loss are restored to a satisfactory state. Objective litigation refers to the type of litigation whose main purpose is to supervise the act of administrative public power.[4] In the specific system, the court only reviews the legality of the act of administrative public power. To explore which litigation is more appropriate, we must first clarify the nature of civil litigation and administrative litigation.

2.1. The Subjective Nature of Civil Litigation

At first glance, Article 2 of the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the "Civil Procedure Law"). It can be found that it contains multiple dimensions of litigation tasks such as settling disputes, sanctioning violations, protecting rights and interests, legal education and maintaining order, but combined with the principle of disposition in civil litigation, it is not difficult to find the core task of civil litigation. Article 13, paragraph 2, of the Civil Procedure Law stipulates that the parties have the right to dispose of their civil rights and litigation rights within the scope prescribed by law, which indicates that the parties' right to participate in civil proceedings has a strong control over the trial power of the court, and it is not difficult to conclude that there is a strong value tendency of autonomy in rights. In other words, through civil litigation, the parties' private law rights are protected, specific interests are realized, private law order is maintained, and disputes are resolved, which is essentially the legal effect that social relations with specific interests are reformed or restored through civil litigation.[5] Therefore, civil litigation focuses on the protection of the legitimate rights and interests of the parties and has the nature of subjective litigation.

2.2. The Objective Nature of Administrative Litigation

Similarly, Article 1 of the Administrative Procedure Law of the People's Republic of China (hereinafter referred to as the "Administrative Procedure Law") also establishes diversified litigation tasks such as settling disputes, protecting rights and interests, and supervising power. However, considering the provisions of Article 6, the scope of examination of administrative

litigation is the legality of administrative acts, it can be seen that the focus of administrative litigation falls on power supervision. Therefore, the scope of examination is not limited to the litigation claims of the parties. Therefore, although the scope of accepting cases in the Administrative Procedure Law reflects the appearance of subjective litigation, it does not hinder the objective litigation nature of administrative litigation.

3. The Dispute of Government Procurement Contract Should be Settled in Administrative Litigation

In order to explore which litigation track should be included in government procurement contract disputes, we should first disassemble the characteristics of government procurement contracts and analyze the proportion of subjective interests and objective interests. Article 43 of the Government Procurement Law says that “the contract Law applies to government procurement contracts”. So whether the interests involved in government procurement contracts are subjective interests or whether the contract law alone can resolve all disputes over substantive rights? In fact, there are a considerable number of administrative law rules in the Government Procurement Law. First, government procurement should follow the principles of fairness and transparency, fair competition, justice and good faith. Second, government procurement shall purchase domestic goods, construction and services. Third, the finance department is responsible for government procurement and performs regulatory duties. Besides below, there are plenty of other examples. The legislator attributed this public law nature to the phase before the contract was concluded, rather than the contract itself. According to the characteristics of the contract conclusion stage and the contract execution stage, the legislator intends to use the two-stage theory (**Zweistufentheorie**). However, government procurement contracts are different from civil contracts in terms of contract authorization, content and functions.[6] As for the government procurement contract in Chapter V of the Government Procurement Law, some provisions provide for the special issues related to the government procurement contract. Whether these particular issues are appropriate for civil litigation remains to be considered.

Controlling administrative power should be considered when dealing with government procurement contract disputes. From the perspective of the establishment of contract terms, on the macro level, Article 45 of the Government Procurement Law stipulates: "The government procurement supervision and administration department of The State Council shall, together with the relevant departments of The State Council, stipulate the terms that must be included in the government procurement contract", while microscopically the contract terms are determined according to the bidding documents of the purchaser. Since the functions of government procurement are both to improve the efficiency of the use of funds and to achieve the national economic and social development policy objectives, the terms of government procurement contracts contain the procurement needs and administrative purposes of administrative organs. If the procurement needs are civil issues, the realization of administrative purposes cannot be completely solved by civil means. The English scholar T.Daintith divided the means of government to achieve desired ends into the "**imperium**" (embodied in the general orders of the law) and the "**dominium**" (the exercise of power to distribute benefits to those who abide by the aims of the government). [7] Because the executive agencies that use the distribution of benefits are limited by the authorization, it is desirable to use the contract power to achieve administrative regulation. Because the form of contract to achieve administrative purpose is different from the traditional administrative way and has clear legislative constraints, it must play an effective role in the judicial review, and effective supervision of administrative power is the core of administrative litigation.

It is more important to consider public interests when dealing with disputes over government

procurement contracts. In the process of contract performance, according to the provisions of Article 50 of the Government Procurement Law, if the continued performance of the government procurement contract will harm the national interests and public interests, the parties shall modify, suspend or terminate the contract, which is one of the special features of the government procurement contract. Based on the public purpose of government procurement, the function of public policy and the reason that it is a positive fiscal policy to promote economic growth, social public interests or national interests are always the basic criteria for the change, suspension and termination of government procurement contracts.[8] Different from general civil contracts, the law requires government procurement contracts to hold a higher standard for the protection of public interests, and the focus of civil litigation is ultimately to safeguard the interests of the parties, if it is handled by administrative litigation, it will be more conducive to the protection of public interests.

4. The Feasibility of Including Government Procurement Contract Disputes into the Scope of Administrative Litigation

4.1. Government Procurement Contracts Themselves are Administrative Agreements

In theory, government procurement contracts should be administrative agreements. The civil contract emphasizes equality and voluntalism, but the government procurement contract cannot implement it all the time. Due to the characteristics of government procurement contracts advocating public interests, the contract counterpart is often unable to freely control his own will in some cases. Because of the goal of public interest first, the law gives the purchaser the right of administrative advantage, which leads to the substantial inequality between the two sides of the contract.

The principle of equality means that civil subjects have equal status when engaged in civil activities, and neither party may impose its will on the other. Although the Government Procurement Law clearly requires that the principle of equality must be followed when signing government procurement contracts, it is often difficult for suppliers to achieve substantive equality. First of all, from the perspective of contracting qualifications, suppliers should have the specific conditions stipulated by law or set by the procurement body, otherwise they cannot participate in procurement activities. In other words, not any supplier can participate in the procurement activities. Secondly, from the perspective of the contract content, the purchaser can set certain terms and related policies in advance and require the other party to comply with the contract, and establish a certain supervision mechanism to urge the supplier to comply with the contract. Thirdly, from the perspective of the process of contract formation, the purchaser can formulate the rules for selecting suppliers, and the suppliers can only accept them. Finally, the intervention of the executive power makes the subject status of the parties unequal. Government procurement contracts pursue efficiency, if there is a dispute between the two parties due to the government procurement contract, the administrative organ makes an administrative decision, which can solve the dispute in a relatively short time. [9]

Due to the openness, fairness and competition of the signing process, government procurement breaks through the traditional principle of autonomy of will and freedom of contract. The principle of voluntoriness refers to the principle that any civil subject must abide by the principle of voluntary consultation in market transactions and civil activities, and has the right to independently choose and decide on transaction objects and trading conditions according to its true will, establish and change civil legal relations, while respecting the will of the other party and social public interests, and cannot impose its will on the other party or any third party. The breakthrough of the voluntary principle of government procurement contract is as follows: First, the subject of government procurement contract cannot freely choose the transaction party. Because the public welfare of

procurement funds determines that the procurement subject must choose suppliers in accordance with the legal way, even if the purchaser can use ways other than bidding, but also subject to strict restrictions. Second, the content of government procurement contracts cannot be completely autonomous. Government procurement contracts are standard contracts, the main terms of which are prescribed by the relevant administrative authorities. Third, the form of government procurement contracts is regulated by law and is a formal contract. The forms of contracts include open bidding, invitation to bid, competitive negotiation, single-source procurement, inquiry, agreed supply stipulated by The State Council, fixed-point procurement and other forms. Without legal procedures, government procurement contracts shall not be legally effective. Fourth, the parties to a government procurement contract are not free to change or terminate the contract. Article 50 of the Government Procurement Law stipulates that the parties shall not alter, suspend or terminate the contract without authorization unless there are legal reasons. Even if a dispute arises between the supplier and the purchaser over the modification, suspension or termination of the contract, it shall be referred to the supervisory authority of government procurement representing the public interest.

Therefore, the government procurement contract should be an administrative agreement based on the public welfare of the contract purpose, the inequality of the subject and the administration of the content.

4.2. There is a Viable Institutional Basis

It is feasible to solve the dispute of government procurement contract through administrative litigation. First of all, in the statement on the Government Procurement Law of the People's Republic of China (Draft), Yao Zhenyan pointed out that "government procurement contracts should generally be regarded as civil contracts", that is to say, there is also the possibility of treating government procurement contracts as administrative agreements in legislation. Moreover, the "other administrative agreements" clause in the judicial interpretation of administrative agreements also contains the possibility of government procurement contracts. Judge Liang Fengyun held that the nature of the agreement should be comprehensively judged according to the elements of the administrative agreement, and it is not appropriate to include all government procurement contracts in civil litigation to prevent the occurrence of "public law into private law" and the loss of state-owned assets.[10] Finally, after the promulgation of the Civil Code of the People's Republic of China, the Contract Law lost its effect, and the contents of Article 128 of the Contract Law were not inherited by the Civil Code. In other words, from the legislative point of view, although the Contract Law applies to government procurement contracts, disputes over government procurement contracts do not necessarily need to be resolved through civil law channels.

Although China's administrative litigation system started late, the Administrative Litigation Law was amended in 2014 to clarify the administrative agreement litigation system, and the subsequent judicial interpretation further enriched its connotation. In the past, because the legislation did not clearly recognize the administrative attributes of administrative agreements, and according to the provisions of Article 79 of the Government Procurement Law, disputes over government procurement contracts were usually resolved through civil litigation. But now the current law has established the litigation system of administrative agreement, which can fully accommodate the disputes of government procurement contracts through administrative litigation.

4.3. There are Precedents outside the Region

The GPA (Government Procurement Agreement) requires member countries to establish a judicial review system to conduct judicial review of government procurement and government procurement contract disputes. In France, the government procurement contract is one of the typical

administrative agreements. Article L551-10 of the French Code of Administrative Procedure clearly stipulates the causes of the government procurement remedy system.[11] The United States, which does not distinguish between public and private law, also deals with government procurement contract disputes with the nature of administrative litigation. It can be seen that the exclusion of government procurement contracts from the scope of administrative litigation in our country is inconsistent with the development trend of administrative rule of law. In the future improvement of relevant laws, government contract disputes should be included in the scope of administrative litigation.

To sum up, based on the provisions of the current law, China can first incorporate some government procurement contracts with strong administrative attributes into the track of administrative litigation as "other administrative agreements" in Article 2 of judicial interpretation of administrative agreements. When the time is ripe, the legislation will be amended to explicitly include government procurement contracts in the scope of accepting cases of administrative agreement litigation.

5. Conclusions

Because of the full coverage of administrative power in the government procurement stage, the two-level theory, which classifies government procurement disputes according to the pre-contract stage and the contract stage, has obvious defects. The inclusion of government procurement contract disputes in civil litigation is bound to be slightly weak in the examination of administrative power and public interests. Government procurement contracts are both civil and administrative, and the objective litigation positioning of administrative litigation has functional advantages such as more comprehensive protection of legitimate rights and interests, more comprehensive supervision of public power and more active role in balancing public interests and personal interests. This enables administrative litigation to pay attention to the administrative characteristics of government procurement contract disputes and at the same time protect the civil rights of the parties. At present, there are some theoretical and institutional basis of administrative agreement. It is worth a try to make government procurement disputes resort to administrative litigation in practice.

References

[1] Kai Wang. Application of two-stage Theory in Government Procurement [J]. Journal of Yunnan Administration College, 2010, 12(05):147-149.

[2] Jihua Hu. Interpretation and Practical Guide of Government Procurement Law of the People's Republic of China [M]. China Democratic and Legal Publishing House, 2002:28.

[3] Fengyun Liang. Some theoretical preconditions for the revision of Administrative Litigation Law (from the perspective of objective litigation and subjective litigation) [J]. Journal of Law Application, 2006(05):72-75.

[4] Xiaogang Ma, Yatao Chai. The Reconstruction of the Theory of Litigation Purpose in the Context of the Culture of Right [J]. Journal of Northwest University (Philosophy and Social Sciences Edition), 2016, 46(02):102-106.

[5] Beigeng Xiao. The Defects of Government Procurement Act Concerning the Scope of Accepting Cases in Administrative Litigation [J]. Administrative Law Review, 2005, (02):111-115.

[6] Yu Lingyun. Administrative Contract Treatise [M]. Tsinghua University Press, 2022:264-265.

[7] Xiao Beigeng. Principles of Government Procurement Law [M]. World Book Publishing Corporation, 2026:182.

[8] Hongfeng He. Further analysis on the legal nature of government procurement contract [J]. China Government Procurement, 2017(02):18-21.

[9] Fengyun Liang. Handouts of judicial interpretation of administrative agreement [M]. People's Court Press, 2020:44.

[10] Tianhao Chen. The improvement of government procurement relief system from the promulgation of the Regulations on the Implementation of the Tendering and Bidding Law: Taking the experience of France as a reference [J]. Western Law Review, 2012, (06):72-82.

[11] Xiezhong Cheng. On the Objective litigation orientation of Administrative litigation in China [J]. Contemporary Law Review, 2020, (02): 75-86.