

Chinese Public Procurement Law

An introductory textbook



This material was produced with the financial assistance of the EU. The contents of the materials are the sole responsibility of the members of the consortium involved in the EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation and can under no circumstances be regarded as reflecting the position of the European Union.



The EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation was led by University of Nottingham (Project leader: Professor Sue Arrowsmith) and the other consortium members are Copenhagen Business School, the University of Copenhagen, the Central University of Finance and Economics (Beijing), Xinjiang University of Finance and Economics (Wulumuqi), and the University of Malaya.

Preface

This book provides an introduction and appraisal of the legal and institutional framework of Chinese public procurement law. It is designed as a text for students at university level, but can also be of assistance to lawyers, procurement officials and policy-makers. As explained on the cover page, the book was prepared as a part of a collaborative project in higher education, the EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 2009-2011, funded by the EU. This project involved several universities in Europe and Asia and has sought to promote and support the teaching of public procurement in Europe, Asia and globally. This text is one of five books produced under the auspices of the project that are designed to be used as resources in the teaching of public procurement law and regulation. The main editor and chapter authors are listed below, but it should be recognised that the text is a collaborative effort of all the partners to the extent that it has benefited from input by, and discussions between, many different persons at the different partner institutions. In addition to the authors and editor mentioned below, the text has benefited from editing and proof reading by Gabor Soos, Debbie Yu and Eleanor Aspey at the University of Nottingham whose assistance the project would like to acknowledge gratefully.

The contents of the book are up to date as of December 2010.

Authors

Dr Ping Wang (Editor, chapter 1, 2, 3, 5)
Dr Xinglin Zhang (chapter 4)

All rights in this work and its content are owned by and reserved to the original copyright owners. Users may download or print a copy for non commercial use (which includes use for educational and research purposes). Except as expressly provided, it may not be copied, reproduced, republished, adapted, transmitted, downloaded or broadcast in any format whatsoever without the prior written permission of the copyright owner.

Chapter 1 Introduction: the Legal and Institutional Framework for Public Procurement

Regulation in China	1
1.1 Understanding Public Procurement in China	1
1.2 The Evolving Legal Framework for Public Procurement Regulation in China..	3
1.3 The Fragmented Institutional Framework for Public Procurement Regulation in China.....	6
1.4 The Big Challenge ahead: China’s GPA Accession	7
Chapter 2 Primary Chinese Public Procurement Laws	10
2.1 Introduction	10
2.2 Historical Review.....	14
2.2.1 Phase I: Introduction and Regulation of Tendering System	15
2.2.2 Phase II: Development of Government Procurement Regulations	26
2.3 Main Features of Primary Public Procurement Laws.....	37
2.3.1 Objectives and Principles	37
2.3.2 Coverage	38
2.3.3 Organisation of Public Procurement.....	44
2.3.4 Qualification of Suppliers.....	48
2.3.5 Methods of Public Procurement	51
2.3.6 Procedures of Public Procurement	53
2.3.7 Domestic Preference and other secondary policies	55
2.3.8 Public Procurement Contract	56

2.3.9	Enforcement of Public Procurement Rules	57
2.4	Concluding Remarks	58
Chapter 3 Secondary Chinese Public Procurement Regulations		60
3.1	Introduction	60
3.2	Main Contents of the GPL Implementing Regulations Adopted by MOF	63
3.2.1	The Tendering Regulation	63
3.2.2	The Publicity Regulation	78
3.2.3	The Review Regulation	81
3.3	Critical Assessment of the Regulations Implementing the Government Procurement Law	86
3.3.1	A New Episode in the “Coverage Saga”	86
3.3.2	“Government Procurement Law Plus” Obligations found in the Secondary Regulations	95
3.3.3	Inconsistencies and loopholes.....	100
3.4	GPA-Consistency of the New Government Procurement Regulations.....	108
3.4.1	GPA Rules of Non-Discrimination.....	108
3.4.2	Tendering and Award Procedure	110
3.4.3	Publicity Requirement	112
3.4.4	Challenge System	112
3.5	Conclusion	114
Chapter 4 Supplier Review in Chinese Public Procurement Law		117
4.1	Overview	117

4.2	Forum for review	122
4.2.1	Procuring Entity Review	123
4.2.2	Administrative Review	124
4.2.3	Administrative Reconsideration	126
4.2.4	Administrative Litigation	128
4.2.5	Summary and Comments	129
4.3	Standing	131
4.3.1	Provision on standing in the GPL / the MOF Review Measures	131
4.3.2	Provision on standing in the TL / the NDRC Review Measures	132
4.3.3	Summary and Comments	133
4.4	Time limits for initiating and completing the review process	134
4.4.1	Time limits for procuring entity review	134
4.4.2	Time limits for administrative review	134
4.4.3	Time limits for administrative reconsideration	136
4.4.4	Time limit for administrative litigation	137
4.4.5	Summary and comments	138
4.5	Available Remedies	139
4.5.1	Suspension	140
4.5.2	Setting aside	141
4.5.3	Damages	144
4.5.4	Summary and Comments	146

4.6	Conclusions	148
	Chapter 5 Conclusion	150
5.1	Distinctive Starting Points	150
5.2	Bureaucrats-led Legislative Process Featured with “fight under the name of the law” and “deliberate ambiguity”	152
5.3	Influence of International Institutions	154

Chapter 1 Introduction: the Legal and Institutional Framework for Public Procurement Regulation in China

1.1 Understanding Public Procurement in China

The term “procurement” generally refers to “the function of purchasing goods and services from an outside body”.¹ It is also defined as “the acquisition by any means of goods, construction or services” by United Nations Commission on International Trade Law (UNCITRAL).² The term “public procurement”³ could be very broadly defined as all acquisition by any means of goods, construction or services by procuring entities deemed “public” in accordance with the law, such as central government ministries, municipalities, public schools, hospitals or even state enterprises.

For the purpose of this book, this broad definition needs to be narrowed down in at least two aspects: (i) the means to acquire goods, construction works and services should be through purchasing, hiring or any other contractual means; and (ii) procurement should be made through market forces in a competitive market.⁴ Otherwise, especially in the case of China, it would be impossible to distinguish between the government’s purchasing of goods and services in post-reform market economy and administratively directed transactions under pre-reform central planning economy.

The terms “public procurement” and “government procurement” are traditionally used

¹ Arrowsmith, S., Linarelli, J. and Wallace, J. D. *Regulating Public Procurement: National and International Perspectives* (KLI: The Hague. London. Boston)(2000), at p. 1.

² Article 2 (a), UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereinafter UNCITRAL Model Law), United Nations Commission on International Trade Law (UNCITRAL).

³ The term “public procurement” and “government procurement” are traditionally used interchangeably in the literature, which remains the same in this thesis.

⁴ This is the position assumed by UNCITRAL Model Law and EC procurement rules. See Arrowsmith, S., Linarelli, J. and Wallace, J. D. *Regulating Public Procurement: National and International Perspectives* (KLI: The Hague. London. Boston)(2000), p. 12

interchangeably in the literature. However, due to the different Chinese translation of these two terms, there has been a misunderstanding that while “government procurement” (*zhengfucaigou*) refers exclusively to procurement by central or local government organs, “public procurement” (*gonggongcaigou*) includes procurement by public bodies and state enterprises in addition. Such a distinction will not be made in this book.

Public procurement as defined above (purchasing goods, services and works in a competitive market) did not exist in pre-reform centrally planned Chinese economy (1949-1978). The needs of public entities to provide essential services were met by goods, services and works allocated to them under fixed terms through a central plan. Since the launching of the economic reform in 1978, central planning has started to give way to market forces. The total number of commodity groups administered by the State Planning Commission under compulsory plans was reduced from more than 120 in 1979 to 60 in 1992.⁵ In mid-1980s, state manufacturing enterprises were allowed to freely use capacity in excess of planned output to produce directly for the market. This created inter-enterprise market relations and product markets.⁶ Against this background, public procurement soon emerged and the tendering system was introduced. Since then, certain procurement of public entities, especially procurement of construction works using public funds and procurement of mechanical and electrical equipments by state enterprises, have been subject to tendering requirements.

However, due to the narrow definition of “government procurement” adopted by the primary legislation as the basis for calculating the volume of China’s “government procurement”, it is hard to estimate the real size of China’s public procurement market according to official statistics. According to an internal report of the Ministry of Finance (MOF), “government procurement” by government entities and public institutions has

⁵ Perkins, D. “Completing China's move to the market” (1994)8(2) *Journal of Economic Perspectives* 23-46, at 29.

⁶ Huang, Y. P. and Duncan, R. “How Successful Were China's State Sector Reforms?” (1997)24 (1) *JOURNAL OF COMPARATIVE ECONOMICS* pp. 65-78, at 68-69

increased from 3.1 billion Yuan in 1998 to 13.1 billion Yuan in 1999; 32.8 billion Yuan in 2000: 65.3 billion Yuan in 2001: and will reach over 100 billion Yuan in 2002.⁷ However, the 2001 figure accounts for only 3.5% of the annual fiscal expenditure and 0.7% of China's GDP which is much lower than the world average of 8% of GDP.⁸ According to the OECD estimation, China's "final consumption expenditure of government service" already accounted for 12.84% of GDP in 1998.⁹ Some key infrastructure projects ongoing in China arguably reflect the real size of China's public procurement market: the planned expenditure of the project channelling water from Yangtze River to Yellow River is \$59 billion; the budget to lay seven thousand kilometers of new railway tracks is \$ 42 billion; the spending for Beijing 2008 Olympic Games is 34 billion.¹⁰ Since China's current growth model has been viewed as depending on exports to generate liquidity, on foreign direct investment to fuel export production, and on debt funding to build infrastructure, the significance and potential of China's public procurement market should not be underestimated.¹¹

1.2 The Evolving Legal Framework for Public Procurement Regulation in China

The preliminary issue to be addressed here is the position of public procurement law in the country's legal system. The answer can be found in Chinese *Legislation Law* enacted on 15 March 2000 and entered into force on 1 July 2000.¹² The *Legislation Law* has established the hierarchy of regulatory norms in the Chinese legal system. The Constitution is at the top, followed by primary legislation, namely national laws enacted by the NPC and its Standing

⁷ Treasury Department of the Ministry of Finance (hereinafter MOF), *QingKuangFanYing* [Current Survey], No. 10 2002, available at <http://www.ccg.gov.cn>, in Chinese, at pp. 1-2. 1 Yuan is roughly equal to 8 pens.

⁸ XINHUA, Beijing, 06/26/2002. For the figure of the world average see OECD, *The Size of Government Procurement Market*, offprint from (2003)1(4) *OECD Journal on Budgeting*.

⁹ OECD, *The Size of Government Procurement Market*, offprint from (2003)1(4) *OECD Journal on Budgeting*

¹⁰ Lague, D., "Public Spending Explodes" (2003)166(4) *Far Eastern Economic Review*, at p. 25.

¹¹ *Ibid.*

¹² State Council, *Notice on the Implementation of Legislative Law*, No. 11, 8 June 2000, in Chinese.

Committee. The third level consists of implementing Ordinances and Administrative Regulations enacted by the State Council. The fourth level contains not only Ministerial Regulations/Measures, but also local legislation adopted by regional People's Congress. The third and fourth levels contain so-called secondary/implementing legislation.

Article 82 of the *legislation Law* provides that a Local Legislative Act enacted by a Provincial People's Congress has the same legal force as a Ministerial Measure. Furthermore, Article 86 provides that when a piece of Local Legislation is in conflict with a Ministerial Measure, the State Council can uphold the Local Legislation in question within its own discretion; but it can only uphold the Ministerial Order after a ruling sort from the Standing Committee of the NPC. The Ministerial Measures/Regulations are strictly forbidden from stepping out of authority or being inconsistent with the national law which serves as their legal base.¹³

Since the initiation of the tendering system in the mid-1980s, public procurement regulations have boomed in the last two decades. Hundreds of regulatory documents, including two national laws, numerous ministerial regulations and provincial or sub-provincial legislative acts have been promulgated. However, as further explained in the following chapters, the competition — instead of coordination — of various procurement rules forms the theme in the evolution of the Chinese legal framework for public procurement. Chapter 2 below will analyze the primary procurement laws and chapter 3 will focus on secondary ministerial regulations.

It is noteworthy that Chinese public procurement was regulated from the beginning in a way that focused mainly on tendering procedures rather than the whole concept of public procurement. As further explained in chapter 2, the first public procurement legislation enacted in 1999 is titled *Tendering Law* (TL) which applies to tendering activities of both

¹³ (Article 87)

public and private sectors, and lacks many features of modern public procurement legislation such as a clear definition of public procurement and procurement methods other than competitive tendering procedures. From mid-1990s, the Ministry of Finance (MOF) and its local branches initiated a new wave of government procurement reform as a part of the budgetary reform. Significant improvement of this new initiative, such as using widely accepted public procurement concepts, terms and techniques could easily be identified. However, the “fruit” of this new initiative — China’s *Government Procurement Law* (GPL) enacted in 2002 — is arguably a disappointing one. The *Government Procurement Law* provided a narrow definition of “government procurement” which refers to procurement of construction works, goods and services listed in certain catalogues or above certain threshold by government agencies at all levels, institutions and social organizations using fiscal funds. Procurement of state enterprises, commonly regarded as public procurement, and subject to existing regulations including the *Tendering Law*, is not within the scope of “government procurement” defined by the *Government Procurement Law*. The conflicts between the *Tendering Law* and the *Government Procurement Law*, especially regarding coverage, will be further discussed in chapter 2.

The importance of secondary procurement rules is also noteworthy at the outset. Over the years, numerous ministerial regulations based on the TL or the GPL have been adopted to supplement and implement the primary national laws. These secondary procurement regulations form the backbone of Chinese public procurement legal framework as the primary laws are abstract and provide insufficient guidance as to how to operate a public procurement project.

1.3 The Fragmented Institutional Framework for Public Procurement Regulation in China

There are numerous state and local organs involved in regulating public procurement. As further explained in Chapter 2, while Ministry of Commerce (former MOFCOM, hereinafter MOC) started importing electronic and mechanic equipments through international tendering and still controls the procurement of imported electronic and mechanical products, it is the National Development and Reform Commission (the former State Planning Commission, hereinafter NDRC) that drafted and implemented the first piece of primary legislation on public procurement — the *Tendering Law* 2000. On the other hand, the more comprehensive *Government Procurement Law* 2003¹⁴ was drafted and implemented by Ministry of Finance (MOF).

It can be argued that the conflicts of procurement regulations at various levels, as identified in chapter 2, 3 and 4, are inevitable given this fragmented institutional framework. The MOF as the “bookkeeper” of the state, the NDRC as the “investor” of the state and the MOC as the “trader” of the state are all building their own “fortress of regulation” on public procurement. They often concurrently enact competing rules on tendering proceedings, expert database, approved procuring agencies, designated media, publicity, review procedure and so on. This has caused not only duplication and waste of resources, but also inconsistency which jeopardizes legal certainty in China’s evolving legal framework on public procurement.

It is not fair to say that the central government, i.e. the State Council, has been ignorant of this problem. The State Council issued an “*Opinion on Further Regulating Tendering Activities*” on July 12, 2004.¹⁵ On that basis, the *Interim Measure on Inter-Ministerial Coordination Mechanism on Tendering Proceedings* (“*Interim Measure on Coordination Mechanism*”) that entered into force on September 1, 2005 has established an inter-

¹⁴ Presidential Decree, No. 68, 29 June 2002, it entered into force on 1 January 2003.

¹⁵ State Council Secretariat, [2004] No. 56.

ministerial coordination mechanism. The main duties of this coordination mechanism include: [i] analyzing the status of tendering regulations and discussing possible solutions for regulating tendering activities involving multiple government organs; [ii] coordinating conflicts between different government departments regarding the administrative supervision of tendering; [iii] exchange of information; [iv] *coordinating the promulgation of tendering regulations by different departments*; [v] communicating of the enforcement of tendering rules; and [vi] joint survey and research.¹⁶

On the one hand, it is encouraging to see that all “major players” in public procurement regulation, namely NDRC, MOF and MOC, are covered by this mechanism with the NDRC playing the leading role; and coordinating the coverage of different regulations has been identified as one of the main objectives. On the other hand, it is doubtful whether the scheduled liaison meeting every six months and summit every year¹⁷ will make any real difference to the current situation, especially when MOF, instead of NDRC, has been designated as China’s negotiator for the accession to WTO Agreement on Government Procurement (GPA). Nonetheless, the mere establishment of such an inter-ministerial coordination mechanism recognizes the fact that coordination needs to be done to resolve the conflict of regulations adopted by different government organs.

1.4 The Big Challenge ahead: China’s GPA Accession

Government procurement, whilst important for international trade,¹⁸ has been largely

¹⁶ (Article 4)

¹⁷ (Article 6, 10)

¹⁸ For the OECD countries as a whole, the ratio of total procurement (consumption and investment expenditure) for all levels of government is estimated at 19.96% of GDP or \$ 4733 billion in 1998. See OECD, *The Size of Government Procurement Market*, offprint from (2003)1(4) *OECD Journal on Budgeting*. For further discussion of the importance of public procurement see Arrowsmith, S., Linarelli, J. and Wallace, J. D. *Regulating Public Procurement: National and International Perspectives* (KLI: The Hague. London. Boston)(2000), p. 7-11

excluded from the reach of multilateral regulation under the WTO.¹⁹ In the absence of a multilateral rule, China's trade partners have made considerable efforts, before and after China's WTO accession, to persuade China to become party to the plurilateral WTO Agreement on Government Procurement (GPA). After 5 years of intensive discussions, China finally submitted a formal application to become party to the GPA on December 28th, 2007.²⁰ This included an offer of GPA coverage (the so-called "Appendix I offer") and signaled the initiation of China's GPA accession process.²¹ However, China's initial offer has been regarded as "very limited" and "deeply disappointing" by China's trade partners.

It is safe to argue that China's GPA accession poses significant challenges for domestic procurement law. GPA Article XXIV:5(a) requires that each Party shall ensure, no later than the date of entry into force of the agreement for it, the conformity of not only its "laws, regulations and administrative procedures", but also the "rules, procedures and practices" applied by the covered entities with the GPA. This will involve establishing the required procedural rules by the GPA, training purchasers to use them, and monitoring their application. Even in countries with a mature public procurement regime broadly consistent with the GPA, administrative costs of adaptation are necessary. For example, it is noted by the Minister of Finance of Singapore that "[T]he GPA requirements are congruous with our principles. We have no fundamental problems adhering to the GPA requirements. Some administrative changes are however necessary."²² For states without a well-established legal

¹⁹ Government procurement was excluded from basic WTO non-discrimination obligations (national treatment and MFN) by virtue of the so-called "government procurement exclusion" contained in GATT Articles III.8, XVII.2 and GATS Article XIII.1. For further discussion on the application of GATT and GATS and other multilateral agreements to government procurement see Arrowsmith, S. *Government Procurement in the WTO* (The Hague, London, New York: Kluwer Law International)(2003), Ch. 3.

²⁰ See GPA/93 of 14 January 2008, available at www.wto.org. For news coverage of the application see <http://finance.sina.com.cn/g/20071228/18121896035.shtml>, visited on 1 January 2008.

²¹ The Chinese version of the offer is available at http://www.gov.cn/gzdt/2008-05/13/content_971032.htm. An Appendix I offer sets out the proposed commitments of prospective Parties to the GPA with respect to coverage of their various procuring entities under the Agreement and provides a basis for related negotiations with existing Parties.

²² Singapore Parliament Reports System, Parliament 9, session 1, vol. 67, sitting 18, November 19, 1997, at col. 1834. quoted after Endeshaw, A., 'Government Contracts and Procurement in Singapore' [1999] *International*

framework of public procurement such as China, the cost of adaptation is likely to be higher.

The fragmentation of the domestic legal and institutional framework for public procurement identified above will arguably have a profound impact on the future implementation of GPA in China. It will be difficult to ensure compliance with GPA obligations if the proper instrument for such implementation cannot be ascertained in the first place. Although it is theoretically possible to modify both primary laws (TL and GPL) in accordance with GPA provisions, such an approach will result in a waste of resources and will give rise to complexity and uncertainty, especially taking into consideration the fact that the *Tendering Law* applies to tendering conducted by both public and private entities and a significant number of them will not be covered by the GPA.

Chapter 2 Primary Chinese Public Procurement Laws

2.1 Introduction

As noted in chapter 1, China's public procurement regulations have developed rapidly from scratch in the last fifteen years. Two national laws (primary legislation) on public procurement have been enacted by the National People's Congress (NPC): the *Tendering Law* (TL) enacted on 30 August 1999 which entered into force on 1 January 2000; and the *Government Procurement Law* (GPL) enacted on 29 June 2002 which entered into force on 1 January 2003. The enactment of these two legislation marks the first two phases in the evolution of Chinese public procurement legal framework.¹

The primary legislation contains the main features of modern public procurement law promoted by international organizations such as the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank which aim to achieve fairness, justice and transparency, including requirements on publicity, competitive

¹ For a brief introduction of the Government Procurement Law see Cao, Fuguo and Wang, P. "The New Chinese Government Procurement Law" (2002)(6) *Public Procurement Law Review* NA133-139. For the development of Chinese public procurement regime see Cao, Fuguo, "From Tendering law to the Public Procurement Law" in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International)(2003); Tian, Jingbin, 'Public Procurement in China: The Way Forward'(2001)10 *Public Procurement Law Review* 207; Kong, Qingjiang, "Chinese Law and Practice on Government Procurement in the Context of China's WTO Accession"(2002)11 *Public Procurement Law Review* 201-214; Wang, P. "China's Evolving Legal Framework on Public Procurement" (2004)(6) *Public Procurement Law Review* 285-318.

award (tendering) procedures and review mechanisms.

The TL was drafted by the State Planning Commission (the current National Development and Reform Commission (NDRC)). It provides a set of rules on open and selective tendering procedures which mainly concern procurement of construction works. This law uses a mixture of compulsory and voluntary approaches to define its coverage. It is first stated in the TL Article 2 that the TL applies to all tendering activities conducted in China. Further, Article 3 provides that construction projects involving the public interest or public security, and works funded by the State or using loans from international organisations or foreign governments, or when required by other law or regulations of the State Council, must be procured through tendering. These provisions mean that, in the works sector, under the circumstances introduced above, the use of tendering is compulsory for most projects; in other cases and in other sectors, this law would apply only when a procuring entity, whether it is public or private, voluntarily chooses to procure through tendering. Because of these provisions, the status of this law as a piece of government procurement legislation was undermined. The TL provides detailed rules on tendering procedures; however, it puts aside many issues relating to government procurement, such as alternative procurements methods and supplier review. Therefore, it failed to set up a comprehensive legal framework on government procurement.

A basic legal framework for China's government procurement reform was established when the GPL was adopted on 29 June 2002. This Law, drafted by the Ministry of Finance (MOF), came into effect on 1 January 2003. It is the first piece

of national legislation specially dedicated to regulate government procurement in China. The GPL provides for rules on government procurement principles, procuring entities and their agencies; as well as suppliers, procurement methods and procedures, procurement contract, challenge and complaint, supervision and legal liabilities. The GPL Article 2 states that it applies to “all government procurement done within China”. Further, in order to avoid potential conflicts with the TL applying to “all tendering activities in China” under its Article 2, the GPL Article 4 stipulates that government procurement of works through tendering shall be covered by the TL. This simple provision, however, cannot draw a clear demarcation line between the two laws. One view is that only government procurement of works through open or selective tendering is covered by the TL; other government procurement activities, including government procurement of works-related goods and services through tendering, are regulated by the GPL. Another view is that not only government procurement of works through tendering but also government procurement of works-related goods or services, when conducted through tendering, are governed by the TL.

Deficiencies of the primary legislation are apparent. The enactment of the *Government Procurement Law* is just another episode rather than the final chapter of the evolution of China’s legal framework on public procurement. This is mainly because, firstly, the enactment of the GPL did not establish a uniform Chinese government procurement legal framework for government procurement of goods, services and works, primarily due to the coexistence of two primary laws regulating government procurement – the TL and the GPL – and the lack of a clear demarcation

line between the coverage of these two laws. The coverage of the Government Procurement Law is limited to procurement of certain (either listed or above certain threshold) goods, construction and services using fiscal funds by government departments, institutions and social organizations (excluding, notably, state enterprises)². Secondly, the tension between the Government Procurement Law and the *Tendering law*, and the tension between government ministries supervising the implementation of these laws, have not been resolved. Thirdly, many provisions of the Government Procurement Law are arguably not concrete enough to be followed and need to be further clarified; for example, the “buy national” policy contained in Article 10 of the Government Procurement Law.

There have been expectations for the regulations implementing the TL and GPL to address these issues since the Government Procurement Law contains a “built-in” mechanism for implementing further measures to be adopted.³ Over the years, numerous ministerial regulations, based on the TL or the GPL, were subsequently (especially in recent years) adopted to supplement and implement the above two laws. Most recently, two implementing regulations at the State Council level – the Implementing Regulation on the TL and the Implementing Regulation on the GPL - were drafted respectively by the NDRC and the MOF; and drafts of these two

²Article 2 of the Government Procurement Law provides, *inter alia*, that “government procurement refers to all purchasing activities conducted using fiscal funds by state organs at all levels, institutions and social organizations when the goods, construction and services concerned are listed in the Centralized Procurement Catalogue (CPC) published by the government GPRA (GPRA) or value of which exceeds the respective Prescribed Procurement Thresholds (PPT) for goods, construction or services as applicable”.

³ Article 87 of the Government Procurement Law provides that “[D]etailed procedures and measures for the implementation of this law shall be promulgated by the State Council”.

Implementing Regulations were published respectively on 29 September 2009 and on 11 January 2010 to solicit opinions. However, since these drafts have not been enacted at the time of writing, Chapter 3 will only discuss the scope and impact of the existing implementing regulations. Nevertheless, it can be noted here that these new initiatives have achieved little in reconciling the conflicts of the two primary procurement laws.

Section 2.2 will provide a historical review of the evolution of the procurement laws. Section 2.3 then critically analyses the main features of the two pieces of primary legislation. Section 2.4 draws a conclusion.

2.2 Historical Review⁴

It was argued that the tradition of government procurement regime could be found in Chinese history dated 2000 years ago and in the practice of the old government before 1949.⁵ Despite the significance and relevance of this tradition, it was undeniably interrupted by the centrally planned economy established by the People's Republic of China, since a public procurement regime can not exist without a competitive market. In the era of economic reform, tendering system has been gradually introduced in the procurement of construction works, set equipments,

⁴ For more details on the development of the Chinese public procurement regime from different perspectives and points of focus, see Cao, Fuguo, "From Tendering law to the Public Procurement Law" in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International)(2003); Tian, Jingbin, 'Public Procurement in China: The Way Forward'(2001)10 *Public Procurement Law Review* 207; Kong, Qingjiang, "Chinese Law and Practice on Government Procurement in the Context of China's WTO Accession"(2002)11 *Public Procurement Law Review* 201-214

⁵ Kong, Qingjiang, "Chinese Law and Practice on Government Procurement in the Context of China's WTO Accession" (2002)11 *Public Procurement Law Review* 201-214, at 202.

machinery, electronic equipments and scientific research service by governments, institutions as well as state enterprises since early 1980s. Over 20 years, authorities at all levels have promulgated numerous regulations concerning the coverage, procedure and enforcement of tendering system, culminating in the enactment of the *Tendering Law* in 1999. Although it might not be proper to equate the regulation of tendering activities with a public procurement regime in a general sense, it could safely be argued that the introduction and regulation of tendering system constitutes the first phase in the evolution of China's public procurement regime. Not only were public procurement projects covered by the tendering rules, the experiences and knowledge gained from tendering practice have also contributed to the acceptance of the modern concept of "government procurement" or "public procurement" by legislators, government officials and the public. On the basis of successful tendering practices and with the aid of international institutions, the second phase of the evolution — the establishment of a western-style public procurement regime — has been initiated since the mid-1990s with the enactment of the *Government Procurement Law* in 2002, symbolising a remarkable progress.

2.2.1 Phase I: Introduction and Regulation of Tendering System

2.2.1.1 Introduction of Tendering System in 1980s

Public procurement did not generally exist in pre-reform China, when all needs of works, supplies and services by state enterprises were met by central planning. The procurement of state enterprises gradually emerged while the competitive market

grew out of plan through two decades of economic reform.

In October 1980, the use of tendering in construction projects was suggested as the means to promote competition among state enterprises in the *Provisional Regulation on the Initiation and Protection of Socialist Competition* issued by the State Council. This was followed by several pilot programs in the following years. Based on the positive impacts of these experiments, a general requirement was inserted in the *Provisional Regulation on Some Issues of Reforming the Management System in the Sector of Works and Infrastructure Construction*, issued by the State Council in 1984, that “tendering should be vigorously promoted in works contracting to replace the old approach of allocating construction mission by administrative order.” With a view to implementing this policy, the *Provisional Regulation on Tendering of Construction Works* was enacted by the State Planning Commission⁶ and the Ministry of Urban and Rural Construction and Environment Protection,⁷ Laying down detailed requirements for the use of tendering in the procurement of construction works.

At the same time, tendering was also introduced to procurement of goods and services, such as set equipment procurement, import of machinery and electrical equipment by state-owned manufacturing enterprises⁸, and allocation of scientific

⁶ Its name was subsequently changed to the State Development and Planning Commission (SDPC) in 1998 and to the State Development and Reform Commission (SDRC) in March, 2003 while the key functions of the commission remain the same.

⁷ Its name was subsequently changed to the Ministry of Construction in 1998.

⁸ The Office of State Economic and Trade, *Provisional Regulation on Domestic Tendering Management in Applying for Import of Machinery and Electrical Equipment* 1986.

research projects among state-owned research institutions.⁹ It is interesting to note that tendering, in the same sense as used in public procurement, was also embraced in the auction of leasing rights and allocation of export quota.¹⁰ This illustrates the fact that tendering system was established by Chinese reformers only as a useful technique to pursue their own policy goals instead of establishing the cornerstone for a modern public procurement regime.

2.2.1.2 “Competition” of Tendering Regulations in 1990s

With the expanding use of tendering, numerous regulations, rules, orders and notices were enacted by most ministries involved in the administration of construction and state enterprises and nearly all provincial and municipal governments by the mid 1990s.¹¹ By providing more detailed procedural guidance and requirements, these mushroomed regulations could be seen as a step forward from early documents that

⁹ The Central Committee of Chinese Communist Party, *The Decision on Reforming the System of Science and Technology* 1985. The Central Committee of Chinese Communist Party and the State Council, *The Decision to Speed up the Improvement of Science and Technology* 1986.

¹⁰ *Provisional Measures on Invitation and Submission of Bid concerning Land Sale in ShenZhen*, 1987; *Measures of Shanghai Municipality on the Compensatory Transfer of Land Use Rights*, 1988; MOFTEC, *Provisional Measures on the Tendering of Export Quota*, 1994.

¹¹ For example, on works tendering: State Planning Commission & Ministry of Construction, *Provisional Measures on the Tendering of Design of Construction Works*; State Planning Commission, *Notice on Strengthening the Tendering Administration of National Key Construction Projects*; State Planning Commission, *Provisional Regulation on Application of Tendering in Large and Medium Sized National Infrastructure Construction Projects*, 1997; Ministry of Railway, *Implementing Measures on the Tendering of Design of Railway Construction*; Ministry of Electricity, *(Provisional) Administrative Regulation on the Tendering of Electricity Works*. On set equipment tendering, Ministry of Domestic Trade, *Provisional Measures on the Tendering of Equipment for Construction Works*, 1995. On tendering of machinery and electrical equipment: the State Economy and Trade Commission (SETC), *Guideline on Tendering of Machinery and Electrical Equipment*, 1992; SETC, *Regulative Measures on Tendering of Machinery and Electrical Equipment*, 1996; SETC, *Provisional Measures on Qualification of Tendering Agency for Tendering of Machinery and Electrical Equipment*, 1996;

contained only abstract policy instructions. However, in the absence of a common legal base, an institutional framework and a unified objective for the development of the tendering system, manipulation, inconsistency and uncertainty were inevitable. Bearing in mind that state enterprises were the major objects subject to tendering regulations, some line ministries and provincial governments had deliberately designed specific procedural requirements for tendering activities in order to (i) maintain bureaucratic influence or administrative jurisdiction over procurement decisions of state enterprises which were traditionally under their control; (ii) guarantee preferential treatment of state enterprises the performance of which was linked to the promotion of government officials; and (iii) grant monopoly to procuring agents established as the instrumentality of the regulatory body itself. Various techniques have been employed, such as mandatory approval of the grant of contract by competent government authorities, canalizing all tendering activities through certain “designated” or “qualified” tendering agents, granting preference to bidders who have been awarded certain honors by local governments or line ministries, publishing tendering opportunities only on local media, and so on.¹² Therefore, it could be argued that in most circumstances, “competition”, instead of coordination, symbolized the relationship between regulatory authorities. One striking example of this “competition” is the designation of official websites for the publication of

¹² These phenomenon existing pre- and pro-tendering law have been identified by a internal report of the State Development and Planning Commission, *Report on the Implementation of Tendering Law*, in Chinese, 13/08/2001, available at its official website: WWW. SDPC. GOV. CN

tendering information.¹³

The negative impacts of the decentralized regulation of tendering system could easily be identified. The nation's public procurement market was fragmented both vertically by sector protectionism and horizontally by regional block. Unchecked legislative and administrative discretion was often abused to serve the unsound, sometimes even illegal interest of individuals or small groups. The inconsistencies among tendering regulations in the context of coverage, qualification, tendering methods and remedy had significantly undermined legal certainty, making it very difficult for procuring entities and agents to observe these rules, and for suppliers to protect their interests. In turn, it damaged the authority and enforcement of these regulations.

2.2.1.3 Consolidation of Tendering Regulations: Is the Tendering Law the Right Instrument?

As the “competition” among ministries and provincial governments was evident all through 1990s, the attempt to consolidate tendering regulations with a national law was made by the supreme legislature — the National People's Congress (NPC) — at a rather early stage. In June 1994, a legislative programme of a national law on tendering was initiated by the 8th NPC, which authorised the State Planning

¹³ WWW.CHINATENDERING.COM is the official website authorized by the Ministry of Foreign Trade and Economical Corporation (MOFTEC) to publish bid invitations and other relevant information for procurement of machinery and electrical equipment. Confusingly enough, WWW.CHINATENDERING.COM.CN is the official website designated by the State Planning Commission to publish bid invitations for construction procurement.

Commission to prepare the draft.¹⁴ This reflected that, after a decade, the central government finally appreciated the importance of tendering activities to the national economy, and was aware of the pooling problems caused by decentralized and “competing” ministerial and local regulations. On the other hand, the title of the proposed national law also illustrated the extent to which legislators and administrators have interpreted the reform in the area of public purchasing: public procurement, as a concept, had not yet been accepted in China.

It is noteworthy that the first national legislation which requires and regulates tendering is actually the *Construction Law* which was enacted on 1 November 1997 and which entered into force on 1 March 1998 while the *Tendering Law* was still being drafted. Some rather abstract provisions on principles, publication of bid invitations, bid openings, bid evaluations and contract award of construction tendering could be found in the Chapter titled “Contracting Out of Construction Works” requiring that “construction contracts should be awarded through tendering in accordance with the law”.¹⁵ However, such ambiguous wordings as “when necessary” or “chose the better” were used in dealing with important issues like the scope of construction contracts that could be awarded without competitive tendering and the criteria of contract award.¹⁶ It could be argued that these provisions are more policy declarations than workable legal rules. On the other hand, Article 16 of the

¹⁴ The precise translation of the law should be “the Law of Invitation and Submission of Bid (or Tender)”. But it is often quoted as the Tendering Law.

¹⁵ Article 16 and 19-23 of the *Construction Law*. The quote here on the requirement of the use of tendering in works procurement was from Article 19.

¹⁶ Article 19, 20 of the *Construction Law*.

Construction Law stipulated that “[T]he law on tendering should apply to those issues of construction tendering that have not been dealt with by this law”, which clearly gave way to the *Tendering Law* which was then being drafted. Therefore, it could be argued that the *Construction Law*, designed to regulate the construction market as a whole, could not even qualify as an attempt to consolidate regulations on construction tendering.

After 5 years of drafting which were full of interesting discussions and debates, the *Tendering Law* was enacted on August 30, 1999 and entered into force on January 1, 2000. It was argued that this painfully long process was nevertheless a “good process to learn and understand”, through which Chinese lawmakers acquired not only techniques but also the philosophy of modern public procurement system with the help of experts from international institutions.¹⁷ Consequently, the legislators finally realized that it was the common practice to have a public procurement law rather than a tendering law. However, against the ambition of the drafters and the wishes and understanding of foreign experts, the *Tendering Law* has not been turned into a government procurement law in real sense for various reasons: (i) limitations were conferred upon by the legislative mandate from the NPC; (ii) the initiation of a new legislative programme of the *Government Procurement Law* in April 1999 by the Ministry of Finance (MOF) endangered the long pending *Tendering Law* drafted by the SDPC; (iii) several serious construction accidents and scandals which occurred

¹⁷ Cao, Fuguo, “From Tendering law to the Public Procurement Law” in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International)

early in 1999, while preventing the draft of *Tendering Law* from being “swallowed”, kicked it out of preparatory process disregarding its status.¹⁸

Despite some remarkable improvements achieved by the *Tendering Law* in areas like principles, procedures and enforcement, it is arguable that the *Tendering Law* has to a large extent failed to fulfill its main task — to provide a unified legal and institutional framework of tendering regulation, let alone that of public procurement. The reason is twofold: ambiguous coverage and fragmented administrative authority.

On the one hand, it could be argued that the contradictory wording on coverage caused confusion and uncertainty that inevitably undermined the consolidating effect of the *Tendering Law vis-à-vis* existing regulations on non-construction tendering. Under Chapter 1 “General Principles” of the *Tendering Law*, although Article 2 provides that the law applies to “all tendering activities conducted within the territory of the People’s Republic of China”, Article 3 confines the subjects of mandatory tendering to only include procurement of three types of construction projects,¹⁹ important materials and equipments to be used in the construction projects, and such services related to the construction projects as ground exploration, design and monitoring. Such a limitation suggests that the focus of the *Tendering Law* is still on the procurement of works and has caused confusion on whether the law applies to the

¹⁸ Tian, Jingbin, ‘Public Procurement in China: The Way Forward’(2001)10 *Public Procurement Law Review* 207, at 212.

¹⁹ Namely, (i) construction projects vital for public interest and security such as construction of large-scale infrastructure and public utilities; (ii) construction projects fully or partially financed by State fund or fund borrowed by the State; (iii) construction projects financed by loans or financial aid from international institutions or foreign governments.

procurements of goods and services non-related to construction projects such as machinery and electrical equipments, scientific research and consultation service.

On the other hand, it could be argued that the *Tendering Law* has failed to consolidate the administrative authority held by various ministries and local governments. Even after 5 years of consultation and coordination, it still failed to answer the crucial question of which administrative organ bears the ultimate obligation and power to oversee the implementation of the *Tendering Law*; and instead left it for the future decision of the State Council²⁰. The decision of the State Council was finally promulgated on 3 May 2000.²¹ The SDPC was appointed as the general coordinator that may, *together with relevant administrative organs in charge and subject to the approval of the State Council*, promulgate supplementary regulations, general policies, the scope and threshold of projects subject to mandatory tendering and projects not suitable for tendering; may designate the newspaper, website or other media for the publication of tendering information.²² However, other ministries and provisional level governments are also allowed to promulgate detailed

²⁰Article 7 of the *Tendering Law* provides that “[A]dministrative supervision upon tendering activities and the division of duties and power among relevant organs will be decided by the State Council”. It was reported by the scholar who participated the drafting process that one ambitious attempt has been made in the early drafts to set up one higher level office to administrate and supervise tendering system but failed due to conflicts among government departments. See Cao, Fuguo, “From Tendering law to the Public Procurement Law” in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International), footnote 19.

²¹ General Secretariat of the State Council, *Notice on Promulgation of “the Opinion on the Division of Duties and Obligations among Relevant Organs of the State Council in Conducting Administrative Supervision upon Tendering Activities”*, No. 34, 3 May 2000. The opinion itself was drafted by the Organizational Office of the Central Committee of Chinese Communist Party instead of the drafter of the *Tendering Law*--SDPC.

²²*Ibid.*, Article 1.

implementing measures in accordance with the *Tendering Law*; and no hierarchy has been set up among various supplementary rules mentioned.²³ Administrative supervision and investigation of illegal conducts and complaints are still undertaken in a decentralized pattern, with sector ministries overseeing construction projects under their authority, and with tendering in import of machinery and electrical equipments overseen by the MOFTEC.²⁴ It is even more disappointing that in order to organize tendering of construction works and import of machinery and electrical equipments on behalf of their clients, procuring agencies have to apply for permit to the relevant ministry in charge.²⁵ It could be argued that this important supplementary document to the *Tendering Law* is a recognition and endorsement of “occupied territory” by competing administrative organs rather than a coherent institutional framework designed to implement unified legal rules.

Negative impacts of this failure were inevitable. An official survey conducted by the SDPC in late 2001 reported that the implementing measures of the *Tendering Law* enacted by various regions and ministries “had caused chaos in tendering system”: within 322 regulatory documents examined, 1100 provisions were found inconsistent with the *Tendering Law* for (i) strengthening regional block and sector protectionism under the name of implementing; (ii) subjecting tendering to extra administrative approval; (iii) exceeding legal competence; and (iv) setting up illegal tendering procedures.²⁶ Following the requirement and instruction of top leadership, SDPC and

²³ *Ibid.*, Article 1, 5.

²⁴ *Ibid.*, Article 3.

²⁵ *Ibid.*, Article 4.

²⁶ The SDPC, Legal Office of the State Council, SETC, Ministry of Construction, Ministry of Railway,

9 other central government organs initiated a campaign to consolidate tendering regulations according to the *Tendering Law* in October 2002.²⁷ It is submitted that any subsequent administrative measure based on the *Tendering Law* devoted to accomplish its “unfinished business” can hardly succeed with the above-mentioned shortcomings inherent in the law itself untouched. Other problems of the Tendering Law were also pointed out by commentators, such as the banning of flexible procuring methods such as competitive negotiation, ineffective legal remedy for private bidders, omission of bid bond and ambiguous definition of rights and obligations of procuring agents.²⁸ In so far as the development of public procurement is concerned, the biggest disappointment remains that the *Tendering Law* was not especially designed for public procurement, but rather covers all tendering activities with no demarcation line between tendering rules applying to public and private procurement. It is still arguable whether or not the *Tendering Law* qualifies as a public procurement law.

Nevertheless, the *Tendering Law* represents the first attempt of Chinese government to consolidate tendering regulations with national legislation and deserves to be seen as a milestone in the development of the public procurement regime. Supplemented by a set of implementing rules,²⁹ the *Tendering law* has at least managed to

Ministry of Transportation, Ministry of Information Industry, Ministry of Water Conservancy, MOFTEC, General Bureau of Civil Aviation, *Opinion on the Consolidation of Tendering Regulations and Regulatory Documents*, 9 October 2002.

²⁷ *Ibid.*

²⁸ Cao, Fuguo, “From Tendering law to the Public Procurement Law” in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International) and Tian, Jingbin, “The New Tendering Law of the People’s Republic of China”(2000)9 *Public Procurement Law Review* CS5- CS8, at CS7-CS8.

²⁹ SDPC, *Regulation on the Scope and Threshold of Construction Projects Subject to Compulsory Tendering*, Ministerial Order No.3, 2000; SDPC, *Provisional Regulation on the Publication of Bid*

standardize the tendering rules applicable to works procurement. More implementing rules were jointly issued by ministries is also an encouraging sign of coordination.

2.2.2 Phase II: Development of Government Procurement Regulations

2.2.2.1 Initiation of Government Procurement Reform

With plan allocation ceased and acquiring goods and services from the emerging market becoming the norm, government organs at all levels started choosing suppliers separately and independently in accordance with commercial norms. However, for nearly a decade in the development of tendering activities, procurements of goods and services by government organs with budgetary funds had not been subject to compulsory tendering or any kind of open, transparent, competitive procedure.³⁰ With little democratic and institutional mechanism checking administrative organs, government procurement projects have been suffering from irrational — even illegal — conduct such as local protectionism and corruption. It could be argued that

Notice, Ministerial Order No.4, 2000; SDPC, *Regulation on Self-organized Tendering*, Ministerial Order No.5, 2000; SDPC, SETC, Ministry of Construction, Ministry of Railway, Ministry of Transportation, Ministry of Information Industry, Ministry of Water Conservancy, *Provisional Regulation on the Bid Evaluation Committee and Methods of Bid Evaluation*, Ministerial Order No.12, 5 July 2001; SDPC, Ministry of Construction, Ministry of Railway, Ministry of Transportation, Ministry of Information Industry, Ministry of Water Conservancy, General Bureau of Civil Aviation, *Measures on the Tendering of Works in Construction Projects*, Ministerial Order No.30, enacted on 8 March 2003 and will enter into force on 1 May 2003.

³⁰ It is noteworthy that above-mentioned tendering regulations developed since mid-1980s have been focusing on construction projects and projects of importing machinery and electrical equipments to build or upgrade state enterprises in various sectors in which the state is investing mainly with extra-budgetary fund, such as fund raised by treasury bonds and loans. Large-scale infrastructure projects involving government budgetary expenditure were also covered.

uncontrolled public purchasing power was the main contributor to the price rising and inflation which occurred in 1990s.

The situation has started to change since mid-1990s when nation-wide fiscal and taxation reform was initiated, which has granted more discretion to local governments in fiscal expenditure and tax retention.³¹ It could be argued that it was this new incentive for seeking the value for money, together with the pressure on local governments to provide accountable and clean public service, which has encouraged provincial and sub-provincial governments to initiate experiments on government procurement in compliance with international conventional norms. It was officially reported that Shanghai Municipality of China has led the move since 1995; and by the end of 1998, altogether 29 provinces, autonomous regions, municipalities directly under the State Council and cities with independent budgetary status have, to a varied extent, conducted pilot practices of government procurement and made “noticeable achievements”.³²

2.2.2.2 *Local & Ministerial Regulations on Government Procurement*

The attempt to regulate new government procurement practices naturally followed. In October 1998, the People’s Congress of Shenzhen Special Economic Zone adopted *Government Procurement Regulation* regarded by commentators as “the first legal

³¹ This reform is generally referred to as “division of national and local tax” (*guoshui dishui fenkai*).

³² Long Yongtu, Vice Minister of MOFTEC, *Speech at the opening of APEC Workshop on Government Procurement Practices*, July 14, 1999 Kunming, available at www.apec.org. It was reported that the Procurement Office of Beijing Municipality Government was established in November 1995 and the pilot practice of procuring medical equipment, airport repairing service, trees and government cars through open tendering started in April 1998.

decree in the field of government procurement in China”.³³ It was noted that this document, while making progress in regulating service procurement and offering a range of procuring methods including manifestly preferred open tendering, has omitted works procurement and failed to define conditions for the use of procuring methods other than open tendering.³⁴ Following the practice of Shenzhen, other provincial governments also adopted their own government procurement regulations covering wide aspects such as procuring catalogue, qualification of suppliers and procuring agency, procuring methods and tendering procedure, legal liabilities and so on.³⁵ At the same time, the MOF also tried to promote government procurement regulations at central government level since 1998 though the practice of government procurement at central government level did not exist until early 1999.³⁶ After a failed attempt to get a draft government procurement regulation enacted by the State Council,³⁷ MOF started to promulgate on its own the first set of national government procurement rules in 1999, albeit in the form of a ministerial order, the authority of

³³ Huang, Zhiqi, “The Development of Public Procurement through Tendering in China”(2000)9 *Public Procurement Law Review* CS1-CS4, at CS1.

³⁴Tian, Jingbin, ‘Public Procurement in China: The Way Forward’(2001)10 *Public Procurement Law Review* 207-228, at 212.

³⁵ For example, *Measures on Administration of Government Procurement of Shanghai Municipality Government* was enacted on 24 December 1998 and entered into force on 1 January 1999; *Measures on Procurement of Beijing Municipality Government and Procurement Catalogue* was enacted on 22 April 1999 by Municipality Government Order 26 and entered into force on 1 June 1999.

³⁶ “Government Procurement Starts from here”, *Economic Daily*, 27, January, 1999. Quoted after Kong, Qingjiang, “Chinese Law and Practice on Government Procurement in the Context of China’s WTO Accession” (2002)11 *Public Procurement Law Review* 201-214, footnote 7, at 202.

³⁷ It was suggested that this failure has largely resulted from the tension between MOF and the Organizational Affairs Bureau of the State Council on the matter of who should conduct the procurement for the State Council organs.

which is lower than the State Council regulation and which does not necessarily prevail when in conflict with Local Legislations enacted by the provincial level People's Congress.³⁸ These ministerial orders issued by MOF include *Provisional Measures on the Administration of Government Procurement*,³⁹ 1999; *Provisional Measures on the Supervision of Government Procurement Contracts*,⁴⁰ 1999; *Provisional Measures on the Administration of Tendering in Government Procurement*,⁴¹ 1999; *Measures on the Administration of the Publication of Government Procurement Information*, 2000; *Provisional Measures on the Operation of Government Procurement*, 2000; and *Provisional Measures on Direct Disbursement of Fiscal Funds for Government Procurement*, 2000.

It is noteworthy that, in contrast with the “hot competition” found in the development of tendering regulations, government procurement regulations adopted by the MOF and provincial governments have to a large extent followed the same pattern in such aspects as definition and coverage of government procurement, division between centralized and decentralized procurement and procuring methods. MOF rules interacted well with local legislations by accumulating provisions, proving workable and pointing out the direction for implementation and enactment of supplementary rules.⁴² It could be argued that the improved coherence and

³⁸ Article 86(2) of the *Legislation Law* as further discussed below in section 4.2.3.2.

³⁹ It was promulgated on 17 April 1999 and entered into force on 21 April 1999.

⁴⁰ It entered into force on 3 July 1999.

⁴¹ It entered into force on 3 July 1999.

⁴² A range of supplementary rules adopted Beijing Municipality Government, such as *Regulation on Administration of Publication of Procurement Information* (2001) and *Provisional Regulation on*

coordination in the development of government procurement regulations in comparison with that of tendering regulations was the direct result of a more simplified institutional framework behind the legislative move. Unlike the tendering system involving the overlapping administrative jurisdictions of sector ministries and local governments over construction projects and procurement of state enterprises, the issue of budgetary expenditure of government organs at different levels is to a large extent under the control of the MOF and its branches - financial departments attached to provincial governments. It was noticed that MOF has been actively promoting and coordinating initiatives of government procurement regulation nationwide right from the beginning through issuing directions to and organizing national conference for its branches.⁴³ In order to strengthen the institutional framework, offices specialized in the administration of government procurement and centralized procurement agencies were established in the regional governments, most of which are part of relevant financial departments.⁴⁴

The above-mentioned MOF rules were viewed as a “significant step” and obvious effort “to bring China’s public procurement into conformity with international

Administration of Government Procurement Contract (2001), stated at the beginning (Article 1 respectively) that they were adopted after and according to relevant MOF rules.

⁴³It was noted that following one of these conferences, government procurement gained its popularity through headline propagandas in national newspapers and on TV in April 1998, see Cao, Fuguo, “From Tendering law to the Public Procurement Law” in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International).

⁴⁴ It was reported that by the end of 2001, 25 out of 36 regional governments had established special offices for the administration of government procurement; 43 centralized procurement agencies had been established at provincial level, among which 24 were attached to the provincial financial departments. See Treasury Department of MOF, *QingKuangFanYing* [Current Survey], No. 10 2002, available at <http://www.ccg.gov.cn>, in Chinese.

practices”.⁴⁵ Several major breakthroughs should be noted in this wave of government procurement legislation by MOF and local governments. (i) The term “government procurement” was widely used and clearly defined in a modern style to mean any procurement of construction works, goods and services by government agencies, institutions and societies under budgetary control with fiscal funds in the form of purchasing, leasing, trust or hiring.⁴⁶(ii) Modern procuring methods other than open tendering and restricted tendering such as competitive negotiation, requests for quotation and single source procurement, as well as the circumstances for them to be used, were provided.⁴⁷(iii) In order to guarantee the application of government procurement rules, it was provided in these regulations that government procurement should be divided into centralized and decentralized procurement; centralized procurement of items listed in the Centralized Procurement Catalogue should be conducted by Centralized Procuring Entities.⁴⁸ (iv) The issue of foreign purchases was overtly tackled although the basic rule was “[P]rocuring entities are refrained from procuring foreign goods, construction works and services without approval”.⁴⁹ Foreign suppliers may apply “single-entry” access to the government procurement market from MOF and relevant provincial level governments, or enjoy “multiple-

⁴⁵ Tian, Jingbin, ‘Public Procurement in China: The Way Forward’(2001)10 *Public Procurement Law Review* 207, at 213.

⁴⁶ Article 2 and 3, *Provisional Measures on the Administration of Government Procurement*, MOF, 1999.

⁴⁷ *Ibid.*, Chapter 3 (Article 20-24).

⁴⁸ *Ibid.*, Article 18.

⁴⁹ *Ibid.*, Article 6 where “Foreign goods” are defined to mean finished goods that are imported as well as locally produced or assembled products with less than 50% local value-added content.

entry” market access according to conventions, treaties and bilateral agreements entered into by China.⁵⁰ (v) Besides the protection of national industry, other secondary policy objectives such as industrial policy, protection of infant industry, promotion of economic development, and facilitating welfare of disabled people, environmental protection was also incorporated into some regulations.⁵¹

Commentators also pointed out problems of these government procurement regulations. The first concern expressed was the insufficient legal authority or lack of supremacy of MOF rules vis-à-vis local regulations, which undermined the unification of government procurement rules.⁵² However, it could be argued that, with a largely unified and coordinated institutional framework with MOF and its local branches behind the regulatory process, more similarity and coherence than diversity and competition should be found. The second concern mentioned was the way in which government procurement was defined. It was suggested that the definition of government procurement in these regulations was too narrow in the sense that only works, supply and services directly required by government entities in relation to their

⁵⁰ *Ibid.*, Article 10-12.

⁵¹ Article 7 of *Measures on Administration of Government Procurement of Shanghai Municipality Government* provides that the composition of government procurement catalogue should take into consideration the requirement of national industrial policy and economic development. Article 18 provides that government procurement should comply with requirement of environmental protection; and under the same circumstances, preference should be given to goods and works that are less polluted, less energy consuming, promoted by national industrial policy and belonged to infant industry. However, no margin of preference was specified.

Article 24 of MOF *Provisional Measures on the Administration of Government Procurement* provided that single source procurement could be used to purchase from enterprises consists of disabled people or belong to charity even if the value of the contract has reached the threshold for open tendering.

⁵² Kong, Qingjiang, “Chinese Law and Practice on Government Procurement in the Context of China’s WTO Accession”(2002)11 *Public Procurement Law Review* 201-214, at 204-205.

administration work, such as office facilities and whether infrastructure projects covered were not clear.⁵³ However, the wordings of these legislations may suggest the opposite: procurements of works, goods and services both for undertaking daily administrative activities and for providing service to the society and public, which clearly include infrastructure projects, were covered.⁵⁴ Although it is true that most government procurement contracts still mainly involve computers, photocopiers, vehicles and office furniture, it could be argued that this is a problem of implementation instead of definition, taking into account that the scale of Chinese government procurement is growing in such a dramatic speed as described in the introduction. It is submitted that the coverage of local and ministerial government procurement regulations developed in the late 1990s was indeed narrow in the sense that Chinese state enterprises that are spending billions from public funds invested by the government have been excluded, since state enterprises are not under budgetary control by financial authorities. It is also noteworthy, and perhaps disappointing, that these regulations have devoted major efforts in laying down rules on open and selective tendering which were already covered by *Tendering Law*, rather than providing detailed and workable procedural guidance for other procuring methods

⁵³ *Supra*, n.50.

⁵⁴ Article 2 of *Measures on Administration of Government Procurement of Shanghai Municipality Government*, 1998 and Article 2 of *Measures on Procurement of Beijing Municipality Government*, 1999. And it is clear that, in the definition provided by MOF *Provisional Measures on the Administration of Government Procurement*, there is no limitation of coverage according to the purpose of procurement. The *Procurement Catalogue of Beijing Municipality Government* is ambitious enough to cover any procurement of equipments, labor, service and public works valued above 100,000 Yuan (around £ 10, 000).

such as competitive negotiation. Nevertheless, it is safe to argue that this wave of government procurement regulation at ministerial and regional level has paved the way, and, to a large extent, shaped the future national government procurement law.

2.2.2.3 *Government Procurement Law: The Final Curtain or Just a New Episode?*

In April 1999, several months before the enactment of *Tendering Law*, the legislative programme of *Government Procurement Law* (hereinafter GPL) was initiated by the NPC. A drafting group led by Financial & Economic Committee of the NPC was set up, consisting of senior members of the committee, officials from relevant ministries and academic scholars. The initial draft was made in October 2000, with the first reading on 22 October 2001, the second reading on 24 December 2001 and the third reading on 24 June 2002. Finally, GPL was enacted on June 29 2002 and entered into force on 1 January 2003, which marked another milestone for the development of Chinese public procurement regime.

GPL inherited the main features of MOF *Provisional Measures* such as the definition of government procurement, division of centralised and decentralized procurement, procurement methods and the designation of administrative authority (MOF and financial departments of various levels of local government), which will be analysed in detail below in section 4.3. Therefore, most of the above-mentioned comments on MOF rules apply to GPL as well.⁵⁵ While appreciating the significance

⁵⁵ The one clearly not applicable is the omission of detailed procedure for other procuring methods such as competitive negotiation and request for quotation. Unlike MOF rules, GPL has provided relevant procedural guidance in Articles 38-40.

of GPL, the failure of GPL to harmonise China's public procurement regime should also be noted. When the country's supreme legislative authority — the NPC — had two clearly interconnected law-making processes on board, a compromise of coexistence was provided to be the solution instead of efforts to harmonise them. The development of government procurement regulations in the late 1990s and even the drafting process of *Tendering Law* itself suggested that tendering system is just one aspect of the broader concept of public procurement which needs to be regulated by law. However, it is clear from the current situation that both the attempts to turn *Tendering Law* into the real government procurement legislation and to incorporate tendering regulation in GPL have failed. This led to the uncertainty of the scope of China's public procurement regime. A striking example is the procurement of state enterprises, which is clearly subject to compulsory regulated tendering procedure, is excluded from the definition of government procurement provided by GPL at least so far as their construction projects funded by the state are concerned.⁵⁶

It should be noted that efforts have indeed been made by GPL to tackle the issue of its relationship with *Tendering Law*: it was provided that “*Tendering Law* shall apply when tendering procedure is conducted in the *procurement of works*”.⁵⁷ The legislative intention of GPL is clear: *Tendering Law* shall by no means apply to government procurement of goods and services, regardless of whether open and selective tendering procedures are followed therein; and so far as government

⁵⁶ This will be further discussed below in section 4.3.1.

⁵⁷ Article 4 of the GPL, author's translation, emphasis added.

procurement of works is concerned, if no tendering procedure is to be conducted, GPL should apply. Although the doctrine of *lex posterior derogat priori* has been established in legal interpretation by *Legislation Law* effective from 1 July 2000,⁵⁸ it remains hard to reconcile the limitation conferred by GPL with the directly conflicting provision of *Tendering Law* which proclaims *Tendering Law* to be applicable to “all tendering activities within the territory of People’s Republic of China”.⁵⁹ On the other hand, detailed tendering procedures embodied in the MOF rules disappeared in GPL; and although new procuring methods provided by GPL have the potential to be applied in procurement of works, provisions in GPL on the condition for use of such methods only mention circumstances in procurement of goods and services, which could be seen as an obvious compromise.⁶⁰ It is argued that, although it is not ideal to have two somehow overlapped public procurement laws, certain rationales could be found from the motivation to expand the coverage of public procurement regime.⁶¹ Doubting whether that is the true intention of lawmakers, it is submitted that GPL is just a new episode rather than the final curtain of the development of China’s public procurement regime, since it provides more compromise than harmonisation.

⁵⁸ Article 83 of *Legislation Law* provides, *inter alia*, should conflicts be found between laws enacted by the same institution, *lex posterior derogat priori*.

⁵⁹ Article 2 of *Tendering Law*, emphasis added.

⁶⁰ It was suggested that, in order to keep *Tendering Law* alive, senior regulators reached a compromise to confine the coverage of *Tendering Law* to only works and works-related goods and service procurement, leaving the others to be regulated by the new procurement law . See Cao, Fuguo, “From *Tendering law* to the *Public Procurement Law*” in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International)

⁶¹ Rothery, R., procurement expert of Asian Development Bank (ADB), “Legal Framework of China’s Public Procurement”, in Chinese, available at www.Chinatendering.com

2.3 Main Features of Primary Public Procurement Laws

One senior official of MOF has proudly declared the formation of China's government procurement legal framework at the end of 2002 by referring to the enactment of GPL and a set of MOF rules developed since late 1990s. This proposition can stand up only when the boundary of public procurement legal framework is confined to the narrow definition adopted by the GPL. However, it is clear from the historical review above that public procurement in China has a much wider content than the coverage of GPL. Bearing in mind that a mature legal framework involves not only comprehensive government procurement rules but also other legal rules regarding contracts, the judiciary as well as a supportive institutional structure, it could safely be argued that China's legal framework of public procurement is still evolving although some significant progress has been achieved. The following discussion of Chinese public procurement framework will be conducted in a broad sense through analysis of main rules in force with focus on two national legislation in this field — *Tendering Law and GPL* — and with special attention to those ministerial and local regulations that have filled in the gaps left by national laws in relevant subjects.

2.3.1 Objectives and Principles

Due to the better awareness and understanding of the modern concept of public procurement during the legislative process, the objectives of *Tendering Law*, in contrast with the previous regulations, emphasise the protection of national and public

interests and rights of participant of tendering activities, as well as the promotion of economic efficiency rather than government administration.⁶² Principles of openness, fairness, impartiality and integrity need to be complied with.⁶³ Policy objectives for GPL are “to regulate government procurement behaviour, to enhance the efficiency of government procurement fund, to maintain the national and public interests, to protect the legitimate rights and interests of the parties involved in government procurement and to promote the clean government.”⁶⁴ GPL similarly requires that government procurement should be conducted in conformity with principles of openness and transparency, fair competition, impartiality and integrity.⁶⁵ Though bearing little significance in practice, the objectives and principles as embraced in the two major public procurement legislations do illustrate the trend towards modern public procurement.

2.3.2 Coverage

Tendering Law defines its coverage by a combination of compulsory and voluntary coverage. On the one hand, Article 3 of *Tendering Law* requires works concerning public interests or public security, works fully or partially invested or financed by the state, and service and equipment related to these works, to be procured by tendering. On the other hand, Article 2 of *Tendering Law* provides that it should apply to all tendering activities within the territory of China; which means that, if any

⁶² Article 1 of *Tendering Law*.

⁶³ Article 4 of *Tendering Law*

⁶⁴ Article 1 of GPL

⁶⁵ Article 3 of GPL

procurement entity, including state enterprises, governmental or quasi-governmental institutions, “voluntarily” binds itself to procure goods, services or works through open or selective tendering, the procedures specified in *Tendering Law* must be followed. Since it is highly impossible for any public or private procuring entity to follow the rigid procedural rules voluntarily, it could be argued that *Tendering Law*’s coverage practically remains within its own compulsory requirements about works projects and those procurements required to be conducted through tendering by other ministerial or local legislations, such as those on import of machinery and electrical equipment.⁶⁶ However, it is noteworthy that Article 3 of *Tendering Law* provides that compulsory tendering requirements made by law or the State Council should be applied. It is not clear whether this has effectively outlawed numerous compulsory tendering requirements contained in ministerial and local regulations. Tendering procedures specified or required by international institutions or foreign governments are applicable in projects sponsored or funded by these institutions providing that no damage will be caused to public interests.⁶⁷

In order to clarify its coverage, a Article 2 of the GPL defined government procurement as “all of the purchasing activities conducted with fiscal funds by state organs at all levels, institutions and social organizations when the goods, construction and services concerned are listed in the Centralized Procurement Catalogue *or* the value of which exceeds the respective Prescribed Procurement Thresholds for goods,

⁶⁶ MOFTEC, *Measures on the Administration of International Competitive Tendering of Machinery and Electrical Equipment*, Ministerial Statute No. 1, 1999.

⁶⁷ Article 67 of *Tendering Law*

construction or services as applicable”. Several significant points need to be noted regarding this definition. (i) Conductors of government procurement were confined to be government organs, institutions and social organisations. Previous MOF *Provisional Measures* further defined institutions and social organisations as those under budget control such as public hospitals, state schools and universities, cultural organisations, state-owned news agencies, sports organisations, and scientific research institutes. It is clear that state enterprises are excluded from this definition of government procurement in conformity with China’s WTO commitment. (ii) Government procurement has to use fiscal funds. MOF *Provisional Measures* made it clear that fiscal funds consist of budgetary and ex-budgetary funds. For unknown reasons, this clarification was omitted. It is not clear whether fiscal funds in GPL means only budgetary funds. However, it is almost certain that private finance initiatives such as BOT are excluded from this definition. (iii) The objects of government procurement, be it goods, service or works, must either have been listed in the Centralized Procurement Catalogue *or* exceeded the respective Prescribed Procurement Thresholds. Since the Centralized Procurement Catalogue and the Prescribed Procurement Thresholds of procurement projects funded by central and provincial budgets are to be determined by central government and provincial governments respectively, the scope of government procurement will certainly vary among different provinces.⁶⁸ (iv) Defence procurement is not covered by GPL; and

⁶⁸ Articles 7 and 8 of GPL.

military authority is authorized to make special regulation in this regard.⁶⁹ (v) Provisions in agreements on government procurement with loans from international institutions or foreign governments which are different from GPL are applicable providing that no damage will be caused to national and public interests.⁷⁰

“All tendering activities” and “all government procurement” overlap when government procurement is conducted through tendering procedure. As mentioned above, GPL has tried to resolve this clash by one simple sentence in Article 4 that limits the application of *Tendering Law* vis-à-vis government procurement to works procurement conducted through tendering procedure. However, since Article 27 of GPL on threshold of tendering only refers to procurement of goods and services, while Article 3 of *Tender Law* requires that procurement of construction projects entirely or partly financed by the state-owned or borrowed fund *must* be conducted through tendering, it could be argued that all government procurement of works with fiscal fund will have to go through open or selective tendering, and therefore will always be subject to *Tendering Law* through Article 4 of GPL. If this is the case, the inclusion of procurement of works in GPL is practically meaningless! One possible way out may be found in Article 3 of *Tendering Law* which provides that the detailed scope and threshold of works projects subject to compulsory tendering should be drafted by SDPC and approved by the State Council. As long as the relevant scope

⁶⁹ Article 86 of GPL.

⁷⁰ Article 84 of GPL

and threshold is not all-covered in nature, which has proved to be the case,⁷¹ there will be some government procurements of works left for GPL. At the same time, it is not clear whether *Tendering Law* as a whole (including provisions of publication, supervision, challenge, remedy and enforcement which are different from GPL and supplementary rules thereof adopted by SDPC) or only tendering procedures therein should apply to those government procurements of works undertaking tendering procedure. Since GPL has not provided detailed tendering procedure as MOF *Provisional Measures* did, and since the application of *Tendering Law* in government procurement of goods and services have been ruled out, it is not clear whether tendering procedures contained in *Tendering Law* or MOF *Provisional Measures* should be followed in government procurement of goods and services.

If the boundary of public procurement legal framework were to be expanded further to include other ministerial and local regulations targeting tendering activities or procurements that are outside the compulsory coverage of *Tendering Law* and the definition of government procurement adopted by GPL, the issue of coverage becomes even more complicated and confusing. Procurement by state enterprises serves as a typical example in this regard. According regulations promulgated by various ministries, (i) procurement of works by public enterprises including state enterprises and collectively-owned enterprises has been required by ministerial

⁷¹ SDPC, *Regulation on the Scope and Threshold of Construction Projects Subject to Compulsory Tendering*, Ministerial Order No.3, 2000.

regulation to be conducted through competitive tendering since 1980s;⁷² (ii) procurement of large infrastructure construction projects by state enterprises funded or monitored by the state was subject to tendering procedure by SPC rules and subsequently by *Tendering Law*;⁷³ (iii) imports of machinery and electrical equipment by state enterprises have been required to go through domestic tendering before application for import licence;⁷⁴ (iv) procurement of goods by state-owned industrial enterprises have been vaguely required to be conducted through certain decision making processes, to choose from at least two different suppliers and to be conducted through tendering procedure “when a significant sum of money is involved and conditions allow”;⁷⁵ (v) procurement of works, goods and services such as offices, vehicles, surveillance system, computers and photocopiers valued more than 1 million Yuan (around 100,000 pounds) by state-owned financial enterprises are required to be conducted through open or selective tendering.⁷⁶ Should these regulations be deemed as public procurement rules and part of public procurement legal framework? If the answer is affirmative, then the coverage of the legal framework becomes significantly broader and the gap between the coverage of GPL and the real boundary of China’s

⁷² Ministry of Construction, *Measures on the Administration of Tendering for Procurement of Works in Construction Projects*.

⁷³ State Planning Commission, *Provisional Regulation on Application of Tendering in Large and Medium Sized National Infrastructure Construction Projects, 1997*.

⁷⁴ MOFTEC, *Measures on the Administration of International Competitive Tendering of Machinery and Electrical Equipment*, Ministerial Statute No. 1, 1999.

⁷⁵ SETC, *Provisional Regulation on the Administration of Procurement of Goods by State-owned Industrial Enterprises*, Ministerial Order No 9, effective 1 May 1999.

⁷⁶ MOF, *Regulations on Strengthening the Administration of Centralized Procurement of State-owned Financial Enterprises*, Document of MOF No. 209, 20 September 2001. See Articles 5 and 10.

public procurement regime is even wider.

2.3.3 Organisation of Public Procurement

The organisation of tendering activities is relatively simple in *Tendering Law* where a two-layer structure consisting of procuring entities and tendering agencies was provided. A tendering agency was defined as a lawfully established social medial organisation undertaking tendering business and providing relevant services, and is required to have a suitable place of business, capital and expertise.⁷⁷ Procuring entities are free to choose whether or not they utilize tendering agencies to conduct tendering activities; and no unit or individual is allowed to force the procuring entity to use procuring agencies or to designate the procuring agency for procuring entities in any way.⁷⁸

On the contrary, GPL requires that procurement of goods, services and works listed in the Centralized Procurement Catalogue *must* be entrusted to Centralized Procurement Institutions; and those outside of the catalogue may be entrusted as well.⁷⁹ Centralized Procurement Institutions are procurement intermediaries with the status of a not-for-profit institutional legal entity, independent from the supervisory authority of government procurement — the finance department — and which can be established by local governments higher or at the levels of autonomous prefectures or

⁷⁷ Article 13 of *Tendering Law*.

⁷⁸ Article 12 of *Tendering Law*.

⁷⁹ Article 18 of GPL.

prefectures with districts based on their own necessity.⁸⁰ GPL also provides that procuring entities may entrust procurement intermediaries approved by relevant organs of the State Council or provincial governments to conduct government procurements that are presumably outside of Centralized Procurement Catalogue.⁸¹ It is interesting that GPL has made no attempt to unify the approval of the qualification of procuring agencies, which is a sensitive issue among government organs; but has left it to be decided by existing administrative authorities. Therefore, existing procuring agencies are put in a position to compete with Centralized Procurement Institutions established by local governments so far as decentralized procurement is concerned. GPL has not made it clear that Centralized Procurement Institutions could further entrust the work to other profit-seeking procuring agencies as MOF *Provisional Measures* did; but no restriction in this regard was conferred.⁸²

The complication of the organizational structure for government procurement could arguably be justified on the following grounds. (i) By accumulating large quantity of goods into one procurement contract, better burgeoning position therefore value for money could be achieved. (ii) By canalising procurement activities through a relatively limited number of institutions which are financially and administratively independent from supervisory authorities, better supervision and enforcement of government procurement rules could be achieved. (iii) With the status of not-for-profit institutional legal entity, the Centralized Procurement Institution would be able to

⁸⁰ Articles 16 and 60 of GPL.

⁸¹ Article 19 of GPL.

⁸² Article 13 of MOF *Provisional Measures on the Administration of Government Procurement*.

stand up against circumvention and distortion of rules required by clients that often lead to corruption.

However, the system of centralized procurement also has its loopholes, drawbacks and weaknesses. First of all, it is arguably an easy task to circumvent the centralized procurement requirements. Article 18 of GPL provides that procurements listed in the Centralized Procurement Catalogue may be centrally procured by sector ministries provided there are *special requirements*, or by individual organs approved by provincial level governments where there are *special requirements*. However, no further clarification was given to the term “special requirements” which, is left entirely to the interpretation and will of sector ministries and provincial governments. Since sector ministries have not been entitled by GPL to establish Centralized Procurement Institutions, it is hard to see how this “sector centralized procurement” could work. Secondly, bearing in mind that provincial level governments have the power to formulate the Centralized Procurement Catalogue as well as exempt single government procurement contracts from centralized procurement, and that Centralized Procurement Institutions are affiliated to sub-provincial level governments, it could be argued that the system of centralized procurement has provided another “handy tool” for local government to reinforce regional blocks, which therefore undermines the goal to establish the unified national public procurement market. Thirdly, it is not without doubt whether those newly-established Centralized Procurement Institutions can cope with the demanding task set up by

GPL.⁸³ Procuring agencies have played an important role in the development of Chinese public procurement.⁸⁴ A significant number of them are operating on a national scale and have accumulated years of experiences and trained personnel capable to conduct international competitive tendering.⁸⁵ By contrast, Centralized Procurement Institutions have just emerged in regional governments after the promulgation of MOF Provisional Measures in 1999. It was reported that 43 Centralized Procurement Institutions have been established at regional level by the end of 2001, among which 24 were attached to the provincial financial departments.⁸⁶ Furthermore, these not-for-profit institutions are by no means in a position to compete with tendering companies in attracting trained experts, since the salary of their employees are similar with that of civil servants. It is hard to see how bribery and corruption could be deterred in centralized government procurement when conducted by inexperienced and poorly paid personnel. Last but not the least, since in practice these institutions have been established by or attached to local financial departments and are still under the budgetary control, it is hard to see how the clear cut between supervisory authority and centralized procurement institution can be achieved.

⁸³ Article 17 of GPL requires Centralized Procurement Institutions to guarantee lower-than-average procuring prices, higher efficiency and good quality of goods and services.

⁸⁴ For detailed discussion see Tian, Jingbin, 'Public Procurement in China: The Way Forward'(2001)10 *Public Procurement Law Review* 207, at 209-210.

⁸⁵ For example, China National Tendering Centre of Machinery and Electrical Equipment set up in 1985, tendering companies affiliated to national state trading companies such as the China National Technical Import-Export Corporation, China National Machinery Import-Export Corporation, and China National Instruments Import-Export Corporation.

⁸⁶ See Treasury Department of MOF, *QingKuangFanYing* [Current Survey], No. 10 2002, available at <http://www.ccg.gov.cn>, in Chinese.

2.3.4 Qualification of Suppliers

Qualification of suppliers for public procurement contracts refers to the process of deciding which supplier meets the minimum requirements to participate in government procurement; and can normally be done by pre-qualification undertaken before the procurement procedure, post-qualification undertaken after bid opening, and maintaining qualification lists.

Articles 18 and 26 of *Tendering Law* provide that procuring entities may require *potential bidders* to submit proof of qualifications acquired, to report on performance, and may examine their qualifications on that basis in a reasonable and non-discriminative manner. Qualifications required by “*relevant national regulations*” should also be met by suppliers. Article 19 of *Tendering Law* provides that standards employed to examine the qualification of bidders should be incorporated in the solicitation document; but no further detailed guidance was provided.

GPL deals with the qualification of suppliers in a general manner as well. According to Article 22 of GPL, suppliers must meet a list of conditions, which includes (i) the capability to assume civil liabilities independently; (ii) the maintaining of good commercial reputation and sound financial and accounting management; (iii) the acquiring of equipments and professional expertise needed to perform government procurement contract; (iv) a clean record of paying taxes and making financial contributions to social security funds; (v) the absence of material breaches of law in its business operation in the three years prior to participation in the present

procurement; and (vi) other requirements provided for in laws and administrative regulations. A procuring entity may also define additional qualification requirements for suppliers in accordance with the special needs of a particular procurement, provided that they are not unreasonable requirements that result in discriminatory treatment of potential suppliers. However, it is not clear in which stage and how the inspection of qualification should be conducted. Although it is provided in the procedure of competitive negotiation and request for quotation that three suppliers should be selected from the list of qualified suppliers for the purpose of negotiation and request, the absence of further instructions in GPL leaves it unclear how this list of qualified suppliers is to be constructed and maintained, let alone whether it should be optional or compulsory.⁸⁷

It is noteworthy that in *Measures on the Tendering of Works in Construction Projects*, a supplementary regulation for the implementation of *Tendering Law* promulgated jointly by SDPC and seven other ministries in March 2003, the issue of qualification has been regulated in more detail.⁸⁸ It provides that qualification includes “pre-qualification” and “post-qualification”. “Pre-qualification” is defined as the examination of potential bidders’ qualification before submission of bid, and “post-qualification” as examination of bidders’ qualification after bid opening. When pre-qualification has been undertaken, post-qualification is to be used in exceptional

⁸⁷ Para 3 of Article 38, Para. 2 of Article 40 of GPL.

⁸⁸ SDPC, Ministry of Construction, Ministry of Railway, Ministry of Transportation, Ministry of Information Industry, Ministry of Water Conservancy, General Bureau of Civil Aviation, *Measures on the Tendering of Works in Construction Projects*, Ministerial Order No.30, enacted on 8 March 2003 and will enter into force on 1 May 2003.

cases.⁸⁹ Public notice for pre-qualification has to be given in the same form of tendering notice. Conditions, standards and measures for both qualifications should be specified in the pre-qualification document and solicitation document respectively, and should not be changed subsequently.⁹⁰ Notice should be given to successful bidders through pre-qualification; and a bidder's failure in qualification will cause the loss of its bidding right or the voiding of the submitted bid.⁹¹ The main conditions for qualification process contained in this document are similar to those in Article 22 of GPL with some special requirements regarding construction procurement added.⁹²

Special regulations regarding qualification of suppliers have also been adopted at regional level. For example, the Financial Bureau of Beijing Municipality Government issued the *Regulation on the Qualification of Government Procurement Suppliers* in 2000, which provides that the qualification certificate issued by Beijing Government Procurement Centre is a prerequisite for suppliers wishing to participate in government procurement in Beijing.⁹³ Suppliers inside and outside of Beijing may apply in the Centre or electronically. Conditions for qualification include: (i) the maintaining of a valid business license and the capability to assume civil liabilities independently; (ii) the maintaining of a valid taxation registration; (iii) the maintaining of a certificate of legal entity code issued by technical administration; (iv)

⁸⁹ Ibid., Art 17.

⁹⁰ Ibid., Art 18.

⁹¹ Ibid, Article 19.

⁹² Ibid. Article 20. Such as no major accidents of the quality of construction projects occurred in 3 years prior to the bid.

⁹³The Financial Bureau of Beijing Municipality Government, *Regulation on the Qualification of Government Procurement Suppliers* , No. 1407, 2000., Article 3(4).

the maintaining of an annual audit report by an independent accountant; (v) special certificates when goods in question involves sole representative right or special standard; and (vi) for accommodation service providers, certificate of fire safety and health and so on. Qualified suppliers will be listed in a database of government procurement suppliers, reviewed every two years, and exempted from future pre-qualification. Contrary to SDPC Measures, the Beijing approach of qualification is one close to compulsory qualification list. It is submitted that since GPL has failed to provide detailed guidance in this regard, and since the legal authority of ministerial regulation is limited, the diversification of rules in qualification of suppliers will remain.

2.3.5 Methods of Public Procurement

A range of modern procurement methods has been provided by the GPL, which could be seen as a major progress in comparison to *Tendering Law*. Government procurement can use open tendering, selective tendering, competitive negotiation, single source procurement, request for quotation or any other method approved by MOF. Open tendering has been identified as the main government procurement method; and possible justifications for the use of other procurement methods are provided.⁹⁴ Justifications given to the use of selective tendering in government procurement of goods and services include the special nature of procurement subjects

⁹⁴ Article 26, 27, 29, 30, 31 and 32 of the GPL

and the percentage of cost.⁹⁵ However, according to *Tendering Law*, use of selective tendering in the procurement of key projects must be approved by SDPC or provincial governments.⁹⁶ For competitive negotiation, failure of tendering procedure, technical complexity, urgent need or impossibility to count contract value are provided as acceptable justifications.⁹⁷ Single source procurement could be used when there is only one possible supplier, in cases of unpredictable emergency or supplementary procurement with a value lower than 10% of the original contract.⁹⁸ This practice has clearly followed the instruction of the UNCITRAL Model Law.⁹⁹

However, it is noteworthy that all these provisions regarding the threshold for open tendering, and conditions to use selective tendering, competitive negotiation, single source procurement and request for quotation, only refer to procurement of goods and services. As discussed above in section 4.3.2, with the ambiguity and uncertainty surrounding the scope of application of *Tendering Law* in government procurement of works, it is not clear whether there will be any works procurement left for the application of GPL. Now, with no reference made to works procurement in conditions for the use of other methods, even if there are any government procurement of works not subject to tendering procedure, it is still uncertain what procurement method should be used therein.

Methods of procurement by state enterprises have more diversity than unity. Other

⁹⁵ Article 29 of GPL.

⁹⁶ Article 11 of Tendering Law

⁹⁷ Article 30 of GPL.

⁹⁸ Article 31 of GPL

⁹⁹ Articles 21-22, 49-51 of Model Law.

than competitive tendering, methods of procurement of goods by state-owned industrial enterprises also include “procurement by comparing quality and price”, which means to choose from at least two different suppliers.¹⁰⁰ Procurement by state-owned financial enterprises are required to be conducted principally through open or selective tendering. It can also be conducted through competitive negotiation, request for quotation and single source procurement when there are no qualified bidders or for other special reasons; but a written report must be submitted to competent financial department in advance.¹⁰¹

2.3.6 Procedures of Public Procurement

With nearly two decades of experience, the procedural regulation of competitive tendering including open and selective tendering is probably the most developed part of China’s public procurement framework. Modelled after western procurement legislation and international stands, detailed rules were provided in *Tendering Law* on all aspects, including the publication of procurement notice, specification, bid opening, bid evaluation and award system; and which was further clarified in supplementary rules adopted by SDPC.¹⁰²

Because extensive rules regarding competitive tendering have already been laid down by *Tendering Law* and its implementing regulations, GPL added little to the

¹⁰⁰ SETC, *Provisional Regulation on the Administration of Procurement of Goods by State-owned Industrial Enterprises*, Ministerial Order No 9, effective 1 May 1999. Article 3.

¹⁰¹ MOF, *Regulations on Strengthening the Administration of Centralized Procurement of State-owned Financial Enterprises*, Document of MOF No. 209, 20 September 2001. See Article 10.

¹⁰² *Supra*, n.34.

existing legal framework of tendering. GPL provides that “information of government procurement shall be published timely in the media designated by the supervisory authority of government procurement.”¹⁰³ Although there is no further clarification as to what kind of information should be published, the procurement standards and the result of procurement are mentioned in another article.¹⁰⁴ Compared with the *Tendering Law*, GPL enhances the record requirement of procurement process. Purchasers and procuring agencies are obliged to properly keep all procuring documents for at least 15 years from the end of the procurement activities.¹⁰⁵ However, it is not clear whether these records are accessible to suppliers and the public.

GPL has contributed by laying down the procedure for competitive negotiation and request for quotation, which is much needed since MOF rules were silent in this regard. One identifiable inconsistency between *Tendering Law* and GPL is arguably the award criteria. The award criteria provided by *Tendering Law* in the context of competitive tendering is either the lowest price bid or the best bid based on comprehensive evaluation factors. As to the award criteria of competitive negotiation procedure, GPL provides that the procuring entity shall choose, from qualified candidates recommended by the negotiation group, the supplier offering the lowest price while with quality and service level equal with others.¹⁰⁶ However, price is

¹⁰³ Article 11 of GPL

¹⁰⁴ Article 63 of GPL

¹⁰⁵ Article 42 of GPL.

¹⁰⁶ Article 38 of GPL.

normally not the decisive factor to award contracts in competitive negotiation; and it is hard to see how this criterion could apply when “quality and service level” is not equal among candidates. The award criterion for request for quotation is the same as that of the competitive negotiation procedure.¹⁰⁷ The award criteria for single source procurement is “based on the quality of the procurement and reasonable price negotiated by the parties.”¹⁰⁸

2.3.7 Domestic Preference and other secondary policies

Buy national policy first appeared in MOF rules, and was confirmed by GPL. Article 10 of GPL provides that Domestic goods, construction and services shall be procured for government procurement except (i) when the needed goods, construction or services are not available within the territory of People's Republic of China; or though available, cannot be acquired on reasonable commercial terms and conditions; (ii) when the items to be procured are for use abroad; or (iii) in other circumstances provided for by laws and administrative regulations. The definitions for the domestic goods, construction or services mentioned above refer to the relevant regulations issued by the State Council.¹⁰⁹ However, it could be argued that this policy does not operate effectively, since one of the exceptions to the implementation of this policy is based on the impracticability to procure the needed goods, construction and service on “reasonable commercial terms”; and the phrase is general and flexible enough to be

¹⁰⁷ Article 40 of the Government Procurement Law of PRC

¹⁰⁸ Article 39 of the Government Procurement Law of PRC

¹⁰⁹ Article 18 of the Government Procurement Law of PRC

manipulated by procuring entities in order to acquire cheaper supplies. It may well be the case that this buy national policy can only be complied with when domestic and foreign suppliers are offering goods, services and works on similar terms and conditions.

Following the trend of government procurement regulations in late 1990s, GPL also seeks to promote industrial, social and environmental policies. It provides that “government procurement should assist the achievement of such national policy objectives of economic and social development as environment protection, the development of less developed and minority-populated areas, and the development of small-and-medium sized enterprises, etc.”¹¹⁰ As mentioned above regarding qualification of suppliers, GPL requires suppliers to have good records of taxation payment and social security contribution.

2.3.8 Public Procurement Contract

In the legislative process of GPL, there was a debate on the nature of government procurement contract. Some argued that government procurement contract should be civil contract; while others argued that it should be administrative contract. Apparently GPL has resisted the latter and provides that *Contract Law* applies to government procurement contract.¹¹¹ Nevertheless, government procurement contract has signification distinctions from normal civil contract since it must be written,¹¹²

¹¹⁰ Article 9 of the Government Procurement Law of PRC

¹¹¹ Article 43 of the Government Procurement Law of PRC

¹¹² Article 44 of the Government Procurement Law of PRC

signed to be effective 30 days after the issuance of the award notice to the winner,¹¹³ and sub-contracting is subject to the prior agreement of the purchaser.¹¹⁴ There is no provision in GPL on the issue of transfer of contract, however by the *Tendering Law*, the transfer of contract is prohibited.¹¹⁵ Additional contract of less than 10% of the value of the original contract is allowed. Above all the law authorizes the supervisory and management department to make standard terms and conditions for government procurement.¹¹⁶

2.3.9 Enforcement of Public Procurement Rules¹¹⁷

As further explained in Chapter 4, the enforcement of the public procurement rules in China relied heavily on administrative supervision. According *Tendering Law*, the responsibility of supervision is decentralized among the relative ministries and local authorities, consistent with the structure of the administrative system. Disciplinary sanctions are still the main form of deterrence. It is believed that this decentralized supervisory system, among others, is the cause of poor tendering practice. Private enforcement mechanism finds very little role to play under the *Tendering Law*. No formal challenge system is provided; and remedies to cover loss or damage for the aggrieved suppliers is also limited. GPL has made some progress by including a

¹¹³ Article 46 of the Government Procurement Law of PRC

¹¹⁴ Article 48 of the Government Procurement Law of PRC

¹¹⁵ Article 48 of the Tendering Law of PRC.

¹¹⁶ Article 45 of the Government Procurement Law of PRC

¹¹⁷ For detailed discussion see Tian, Jingbin, "The Enforcement in China's Public Procurement" in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International)

chapter on challenge mechanism. Certain secondary legislation implementing TL and GPL also addressed issues of supervision, challenge and remedies. However, the overall assessment is that the current regulations on enforcement are far from adequate in the sense that aggrieved bidders are discouraged from lodging complaints by many features of the current system. This issue is further considered below in Chapter 4.

2.4 Concluding Remarks

Public procurement has developed in China in the wave of economic reform towards market economy during the last fifteen years, and has made significant progress in the context of legal framework in the past few years. The modern concept of public procurement has been primarily accepted; and new objectives such as efficiency and value for money have gained more and more momentum than the old consideration of administrative convenience. Most, if not all, aspects of public procurement have been covered by two national laws on bidding activities and government procurement, as well as numerous ministerial and local legislations. A legal framework is clearly emerging.

On the other hand, like other areas of economic and legal reform, development of public procurement regime has also been driven mainly by administrative organs in a piecemeal manner. Chinese administration has shown their expertise in adopting practical solutions and making compromises which can be seen as one of the key factors of the economical success. However, as manifested in the public procurement

regime, those practical solutions and compromises have scarified legal consistency and legal certainty — the cornerstones of the rule of law. Much has been done, but more needs to be done.

It could be argued that the imminent task is to seek the harmonisation of existing legal rules which overlap and their relevant institutional framework that are still operating on two parallel tracks. Chapter 3 will look at this issue further by reference to secondary legislations adopted or to be adopted by the central government (State Council) and various ministries. Since China has committed herself to the negotiation of accession for the GPA since 2004, it is all the more important to consolidate the domestic legal framework before effectively undertaking international responsibilities of trade liberalisation.

Chapter 3 Secondary Chinese Public Procurement Regulations

3.1 Introduction

As noted in chapter 1, China's public procurement law consists not only national laws (primary legislation) enacted by the National People's Congress (NPC), i.e. the *Tendering Law* (TL) and the *Government Procurement Law* (GPL); but also secondary legal measures adopted by various ministries, local governments and even state enterprise groups. Over the years, numerous ministerial regulations, based on the TL or the GPL respectively, have been adopted to supplement and implement the primary national laws. These secondary procurement regulations form the backbone of Chinese public procurement legal framework as the primary laws are abstract and provide insufficient guidance as to how to operate a public procurement project.

The most important secondary regulation implementing a national law is supposed to be adopted by the central government - the State Council - instead of the ministries. However, it has been difficult for the State Council to act on such a mandate¹ due to the fragmented institutional framework for the formulation, implementation and enforcement of public procurement rules, as noted in chapter 1.

¹ Article 87 of the Government Procurement Law provides that “[D]etailed procedures and measures for the implementation of this law shall be promulgated by the State Council”.

Nevertheless, recently progress has finally been made. Two implementing regulations at the State Council level – the Implementing Regulation on the TL and the Implementing Regulation on the GPL - drafted respectively by the NDRC and the MOF, were published respectively on 29 September 2009 and on 11 January 2010 to solicit opinions. Since these drafts have not been enacted at the time of writing, this chapter will only deal with the scope and impact of the existing implementing regulations. The preliminary assessment suggests that these new initiatives have achieved little in reconciling the conflicts of the two primary procurement laws identified above in chapter 2.

This chapter will focus on three ministerial regulations adopted by the MOF for the implementation of the GPL in 2004. On August 11, 2004, the Ministry of Finance (“MOF”), instead of the State Council as required in the *Government Procurement Law*, enacted three ministerial regulations for the implementation of the Government Procurement Law: (i) *Measure on the Administration of Tendering in Government Procurement of Goods and Services* (“*Tendering Regulation*”); (ii) *Measure on the Administration of the Publication of Government Procurement Information* (“*Publicity Regulation*”); and (iii) *Measure on the Handling of Complaints Submitted by Suppliers Participating in Government Procurement* (“*Review Regulation*”). These regulations became effective on September 11, 2004. While other government ministries, in particular NDRC and MOC, have also enacted secondary regulations for the implementation of the Tendering Law and other purposes, these will only be discussed in the context of their coverage conflict with MOF regulations since other

technical aspects are similar.

After elucidating the basic contents of these regulations in section 3.2, section 3.3 will critically assess the extent to which these regulations have accomplished the domestic objectives, namely to achieve harmonization and coherence and to provide guidance for implementing the *Government Procurement Law* in practice. Section 3.4 will assess the extent to which these technical provisions are complying with the GPA. Section 3.5 concludes.

It is argued that despite the fact that certain detailed technical rules have been included in the implementing regulations, such as time limits, tender evaluation procedures and a procedure for challenging bid awards, the new regulations implementing the *Government Procurement Law* have failed to address the fundamental problems of the Chinese public procurement regime, namely the fragmentation of rules and institutional tension as the result of the co-existence of two pieces of primary public procurement legislation. Furthermore, these regulations contain provisions that are arguably outside of the authority conferred by the *Government Procurement Law* and are inconsistent with each other, which have brought more confusion rather than clarity in practice. The overall conclusion is that the third phase in the evolution of Chinese public procurement legal framework has to date failed to prepare China for the “big challenge” ahead—to join the GPA with a coherent domestic public procurement regime consistent with GPA policies and procedures.

3.2 Main Contents of the GPL Implementing Regulations Adopted by MOF

3.2.1 The Tendering Regulation

The *Tendering Regulation* contains six chapters: general provisions; solicitation of tenders; submission of tenders; opening, evaluation and comparison of tenders and awarding of contracts; legal liability; and supplementary provisions.

Article 1 of the *Tendering Regulation* provides procedural rules for tendering in government procurement of goods and services. The *Government Procurement Law* provides six categories of procurement methods: open tendering, selective tendering,² competitive negotiation, single-source procurement, requests for quotations and other methods permitted by the central government department in charge of the supervision of government procurement—the MOF.³ While procedural rules were developed for competitive negotiation and requests for quotations, the *Government Procurement Law* is practically silent on the procedures of open and selective tendering. The *Law* only requires that the time limit for submission of tenders should be no less than 20

² The literal English translation of the Chinese term should be “tender by invitation.” This term is used in all Chinese public procurement legislations. The Government Procurement Law requires that in this procedure, invitation to submit tenders should be sent to at least three suppliers randomly chosen from the pool of qualified suppliers. However, the same term is defined in the *Tendering Law* as procedures under which “specified” (more than 3, capable of performing the project and with good reputation) juristic persons or other organizations are invited to submit tenders by the procuring entity (Articles 10 and 17). Since this term used in Chinese legislation is arguably closer in meaning to “selective tendering” used in the GPA (Article VII) than the term “two-stage tendering” or “restricted tendering” used in the UNCITRAL Model Law (Article 46, 47), “selective tendering” is normally used to refer to this term in Chinese public procurement law. A definition of this term is also provided in the new *Tendering Regulation* implementing the Government Procurement Law.

³ Articles 13 and 26 of the Government Procurement Law.

days and the invitation to prequalify must be forwarded to more than three random suppliers in selective tendering. Therefore, the *Tendering Regulation* is expected to fill in the gaps in the *Government Procurement Law*.

3.2.1.1 Chapter 1: General Provisions

The scope of application of the *Tendering Regulation* is limited to “tendering activities in government procurement of goods and services.” No further clarification is provided regarding the meaning of “goods” and “services.”⁴ Since the Government Procurement Law provides that “the *Tendering Law*⁵ applies to tendering in government procurement of construction”,⁶ the scope of the *Tendering Regulation* seems to be consistent with the boundary drawn between the Government Procurement Law and the *Tendering Law* by Government Procurement Law Article 4. However, as further discussed below, in light of the new regulation implementing the *Tendering Law*, the boundary between the scope of the Government Procurement Law and the *Tendering Law* and the respective implementing regulations is still not clear.

Article 3 of the *Tendering Regulation* defines the terms “open tendering” and “selective tendering”. “Open tendering” refers to tendering procedures under which

⁴ Article 2 of the Government Procurement Law provides brief definitions for “goods”, “services” and “construction”: “‘Goods’ refers to objects of every kind or form, including raw materials, fuel, equipment and products. ‘Construction’ refers to all work associated with construction, reconstruction, extension, decoration, demolition and repair or renovation of a building or structure. ‘Services’ refers to any object of procurement other than goods or construction.”

⁵ The precise translation of the law should be “the Law of Invitation and Submission of Tender (or Bid).” But it is often quoted as the *Bidding law* or *Tendering Law*. The *Tendering Law* was enacted on August 30, 1999 and entered into force on January 1, 2000.

⁶Article 4.

“the procuring entity, through the means of a solicitation document, invites *unspecified suppliers* to submit tenders”; “selective tendering” refers to tendering procedures under which “the procuring entity, through the means of invitation document and in accordance with the law, *randomly* chooses *more than three* suppliers from the pool of qualified suppliers to submit tenders.” These definitions are not materially different from those contained in the *Tendering Law*.⁷ However, it is noteworthy that the requirement of “random” selection of qualified suppliers in the “selective tendering” procedure under the *Government Procurement Law* and the *Tendering Regulation* is not included in the *Tendering Law*.

The *Tendering Regulation* generally repeats the Government Procurement Law’s provisions on compulsory requirement of using open tendering procedure for procurement above a certain threshold;⁸ prohibition of the evasion of open tendering by breaking the contract into smaller ones;⁹ prohibition of interfering with procurement through specifying the brand of goods, the supplier of service or the procurement agency;¹⁰ conflict of interests;¹¹ and secondary policy.¹² These provisions are just as general as the ones contained in the Government Procurement Law.

It is noteworthy that the “buy national” policy contained in Article 10 of the GPL is slightly rephrased in Article 8 of the *Tendering Regulation* which provides that

⁷ Articles 10 and 17.

⁸ (Article 4 corresponding to Government Procurement Law Article 27)

⁹ (Article 5 corresponding to Government Procurement Law Article 28)

¹⁰ (Article 6 corresponding to Government Procurement Law Articles 19 and 83)

¹¹ (Article 7 corresponding to Government Procurement Law Article 12)

¹² (Article 9 corresponding to Government Procurement Law Article 9)

“[S]uppliers who participate in the tendering in government procurement of goods and services shall be *domestic suppliers* supplying *domestic goods and services* unless *foreign suppliers* are otherwise allowed to participate by laws and administrative regulations.” No further clarification was provided in the *Tendering Regulation* regarding how to differentiate domestic and foreign suppliers, goods, or services. Since the Government Procurement Law only requires that domestic goods, construction, and services shall be procured and contains no explicit restriction on the nationality of the supplier, it can be argued that the *Tendering Regulation*, as a regulation implementing the Government Procurement Law, has created a “Government Procurement Law plus” obligation regarding the “buy national” policy. The significance and legality of this and other similar provisions found in the *Tendering Regulation* will be further discussed below.¹³

3.2.1.2 Chapter 2: Solicitation of Tenders

Chapters 2 to 4 of the *Tendering Regulation* provide detailed rules on tendering proceedings which are not included in the *Government Procurement Law*. This structure of tendering proceedings is more similar to that of Chapter III of the UNCITRAL Model Law.¹⁴

¹³ See *infra* section 3.3.

¹⁴ UNCITRAL(UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW) Model Law on Procurement of Goods, Construction and Services with Guide to Enactment. Chapter III titled “Tendering Proceedings” contains three sections: solicitation of tenders and of application to prequalify; submission of tenders; and evaluation and comparison of tenders. See further Beviglia Zampetti, A.”The UNCITRAL Model Law on Procurement of Goods, Construction and Services” in Hoekman, B. M. and Mavroidis, P. C. (eds) *Law and Policy in Public Purchasing: The WTO Agreement on*

Chapter 2 on solicitation of tenders mainly provides the public notification procedures for soliciting tenders or applications to prequalify;¹⁵ contents of the notice of open tendering;¹⁶ contents of solicitation documents;¹⁷ clarifications and modifications of solicitation documents;¹⁸ and certain time limits for submission of tenders and

Government Procurement (Ann Arbor: University of Michigan Press)(1997), pp. 273-287; Hunja, “The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform”, ch.5 in Arrowsmith and Davies (eds.), Public Procurement: Global Revolution (1998).

¹⁵ (Articles 14 and 15). It is required that a procuring entity shall solicit tenders or applications to prequalify by requiring a notice of tendering (for open tendering) or a notice of prequalification (for selective tendering) to be published in media designated by financial departments. Although no further definition is provided, according to practice, such media should include both traditional (e.g. news papers) and electronic media (e.g. website).

¹⁶ (Article 17). The notice of open tendering shall contain the following main contents: (i) the name, address and contact details of the procuring entity; (ii) the name, quantity or nature of the procurement project; (iii) requirements on the qualifications of suppliers; (iv) the time, location and means of obtaining the solicitation documents and their price; (v) the deadline for the submission of tenders and the time and venue for the opening of tenders.

¹⁷ (Articles 18 and 20). According to Article 18, the solicitation documents shall include the following contents: (i) invitation to tender; (ii) instructions for preparing tenders (including requirements on sealing, signature, stamp and so on); (iii) the requirements as to documentary evidence that must be submitted by suppliers to demonstrate their qualifications and reputation; (iv) the manner in which the tender price is to be formulated and expressed, the formality of the tender document and the means to provide tender security; (v) the quantity and required technical characteristics of the procurement project, including appendix, technical drawings and so on; (vi) main terms and conditions of the procurement contract and the ways in which the procurement contract will be signed by the parties; (vii) the required time for the supply of the goods or the timetable for the provision of the services; (viii) the criteria and method to be used in determining the successful tender and circumstances under which the procuring entity reserves the right to reject all tenders; (ix) the deadline for submission of tenders and the place, date and time for the opening of tenders; (x) other information required by financial departments at or above provincial level. Article 20 allows the procuring entity to call for alternative tenders in the solicitation documents, but a description of the criteria and manner in which alternative tenders are to be evaluated and compared should also be set forth therein.

¹⁸ (Articles 25 and 27). Clarification or modification of the solicitation document has to be done by the procuring entity at least 15 days prior to the deadline for the submission of tenders through notice of amendment published in the designated media and to be communicated in writing to all receivers of the solicitation document (Article 27). The procuring entity may also organize field inspection sessions or Q&A meetings as long as they are not for the sole benefit of a single bidder (Article 25).

application to prequalify.¹⁹

These provisions are to a large extent in conformity with those contained in the UNCITRAL Model Law. However, some important elements are missing. For example, [i] contents of the notice of prequalification (for selective tendering) are not provided, in contrast with detailed requirements for the notice of open tendering in Article 17 of the Model Law²⁰; [ii] certain information, regarded as essential or minimum requirements for the content of solicitation documents in the UNCITRAL Model Law is not required by the *Tendering Regulation*, in particular, the period of time during which tenders shall be in effect and notice of the right to seek review.

Several other provisions are also noteworthy. Article 19 provides that the procuring entity may issue electronic solicitation documents through the electronic media designated by financial departments alongside with the compulsory paper ones and the paper and electronic versions shall be identical and have the same legal effect. Article 22 provides that “the procuring entity may consult experts as well as *suppliers* on the solicitation document *when necessary*.” No further clarification is provided as to the time, scope, means or procedure of such consultations. Article 21 provides that all technical standards used in the solicitation documents shall be in conformity with

¹⁹ (Articles 15, 16 and 28). It is required that the deadline for submission of tenders should be at least 20 days later than the issue date of solicitation documents. The time period for the notice of prequalification should be 7 days and application to prequalify shall be submitted by suppliers within 3 days after the expiration of that period.

²⁰ No cross reference has been set up between these two notices as done in Article 25 of the UNCITRAL Model Law. Article 15 of the *Tendering Regulation* only requires that the requirement of supplier’s qualification should be published in the notice of prequalification. However, this situation is remedied by Article 11 of the *Publicity Regulation* where the contents of the notice of prequalification are provided in detail alongside with the notice of open tendering in Article 10.

national mandatory standards.

3.2.1.3 Chapter 3: Submission of Tenders

Tenders shall be sealed and submitted at the specified location before the deadline and tenders received by the procuring entity after the deadline for the submission of tenders are invalid and shall not be accepted.²¹ The supplier, however, may modify or withdraw its tender through notice in writing to the procuring entity prior to the deadline for the submission of tenders.²²

This chapter also requires that if the bidder intends to subcontract the non-substantive or non-crucial parts to others, a statement to that effect shall be included in its tender.²³ In the case that two or more suppliers form a consortium and submit a joint tender, it is required that each participant should meet the conditions for suppliers specified in Government Procurement Law Article 22 and at least one participant should meet the special conditions specified by the procuring entity.²⁴

Detailed rules on tender security are also specified in this chapter, which arguably fills a gap left by the *Government Procurement Law* and the *Tendering Law*. Indeed, the *Government Procurement Law* has no relevant provision and Article 46 of the *Tendering Law* only requires the winning bidder to provide an earnest for performance of contract as required in the solicitation document. It is required that the amount of and the means to submit tender security shall be stated in the

²¹ (Article 31)

²² (Article 32)

²³ (Article 33)

²⁴ (Article 34)

solicitation document; the amount should not exceed one per cent of the value of the contract; the tender security may be provided in the form of “cheque, bank note, bank guarantee and other forms”; and the tender security shall be returned within 5 days after the winning tender is chosen or the entry into force of the procurement contract.²⁵ Questions remaining are [i] whether there should be a limitation on the absolute amount of the tender security in addition to the limitation on the percentage, since the requirement of tender security may be a burden when the contract value is significant; [ii] whether there is, or should be any limitation on the issuing bank, which is not clear from the language; [iii] whether tender security should also be returned when the tendering proceedings are terminated before the entry into force of a procurement contract and the tender is withdrawn prior to the deadline for the submission of tenders²⁶.

3.2.1.4 Chapter 4: Opening, Evaluation and Comparison of Tenders and Awarding of Contracts

It is required that tenders shall be opened “at the time specified in the solicitation documents as the deadline for the submission of tenders, and at the place specified in the solicitation documents” and be properly recorded.²⁷ The procuring entity, suppliers or contractors that have submitted tenders and representatives of “relevant parties” (officials from financial department or other authorities) will be present at the

²⁵ (Articles 36 and 37)

²⁶ This should presumably be the case. It should have been spelled out here as in the UNCITRAL Model Law Article 32.

²⁷ (Articles 38 and 42)

opening of tenders.²⁸ The main contents of the tenders, including name of the bidder, tender price, margin of preference, alternative tender if permitted by the solicitation document etc., have to be publicly announced during the opening or they will not be recognized in the evaluation.²⁹ Detailed provisions are also given on how to deal with minor inconsistencies of the tender document regarding different descriptions on tender price and so on.³⁰

It is also provided in this chapter that if the number of tenders, responsive tenders or qualified suppliers is less than three, the procuring entity, with the approval of competent financial departments, either [i] may use other procurement methods (competitive negotiation, request for quotation or single-source procurement) as long as rules on contents of solicitation documents, minimum requirement on the duration of or procedure of public notice were not violated; or [ii] must tender again when such violations did occur.³¹

The task of tender examination and evaluation is entrusted to a “tender evaluation committee” --a practice consistently adopted by all major Chinese legislations on public procurement since the *Tendering Law*. The committee will examine whether the tenders are in conformity with criteria set out in the solicitation documents; seek clarification or explanation from suppliers; recommend or ascertain, if so authorized,

²⁸ (Article 39)

²⁹ (Article 40)

³⁰ (Article 41)

³¹ (Article 43)

the winning tender; and report any illegal interference to the competent authorities.³²

The majority of committee members (no less than two thirds) are technical and economic experts with 8 years or more relevant experience and senior qualifications, randomly chosen from the tender evaluation expert database maintained by the competent financial departments.³³

In order to further ensure that committee members behave impartially and independently, it is also provided that the number of committee members should be “an odd number at or above five”³⁴ and each member “shall take personal responsibility over the evaluation opinion”³⁵. Although the decision making procedure (in particular the voting mechanism) of the committee is not spelled out, each committee member has the power to independently “mark” the tenders against certain benchmarks in the tender evaluation process and their marks combined will ultimately decide the winning tender through certain formula as further explained below. Furthermore, efforts are also made to avoid the conflict of interests by prohibiting staff of the procuring entity or agency becoming expert members of the committee.³⁶ Therefore, although expert members of the committee are arguably still susceptible to influence from the procuring entity that is paying them to do the job, the tender evaluation committee, as a “quasi-independent third party” handling the tender evaluation, will certainly help to achieve transparency and impartiality in government

³² (Article 44)

³³ (Articles 45-48)

³⁴ (Article 45)

³⁵ (Article 49)

³⁶ (Article 45)

procurement.

The *Tender Regulation* provides three alternative methods of tender evaluation:

[i] The “lowest tender price” test refers to the evaluation process where the successful tender shall be the tender satisfying all substantial requirements of the solicitation document and having the lowest tender price.³⁷ This test shall be used in procurement of standard goods and common services.

[ii] The “best combined evaluation” test refers to the evaluation process where the successful tender shall be the tender that satisfies all substantial requirements of the solicitation document and achieves top combined marks on test factors “mainly including price, technology, financial situation, reputation, experience, after-sale service and the degree of responsiveness.”³⁸ The factors that will count in the marking and their weight shall be specified in the solicitation document.³⁹ The factor of price shall be weighted from 30-60% in procurement of goods and 10-30% in procurement of services.

[iii] The “comparison of quality and price” test is arguably a variation of the “best combined evaluation” test.⁴⁰ It refers to the evaluation process where the successful tender shall be the tender that achieves the highest ratio between the mark received for non-price factors (“including technology, financial situation, reputation, experience, after-sale service, the degree of responsiveness etc.”) and the tender price.

³⁷ (Article 51)

³⁸ (Article 52)

³⁹ (Article 52)

⁴⁰ (Article 53)

The working procedure of the tender evaluation is defined as including four stages: [i] preliminary examination of qualification, tender security, the validity and integrity of the tender (e.g. seal, stamp), and the degree of responsiveness of the tender; [ii] clarification of any ambiguity or inconsistency contained in the tender documents through communication in writing without altering the substance or scope of the tender; [iii] comparison and evaluation in accordance with the methods and criteria specified in the solicitation document (this should presumably involve marking by committee members against prescribed benchmarks if the latter two evaluation methods described above are adopted); [iv] recommendation of the successful tender by providing a list of bidders sorted according to the tender price, marks or ratio achieved; [v] provision of a tender evaluation report.⁴¹ No substantial negotiations on the tender price and so on shall take place between the procuring entity and a supplier.⁴²

The successful tender shall be ascertained within five days after the receipt of the tender evaluation report in accordance with the recommendation of the report by the procuring entity or the committee if so authorized.⁴³ The result should be published through the designated media and at the same time, a legally binding notice of acceptance of tender shall be issued to the winning supplier.⁴⁴ A written contract shall be signed within 30 days after the dispatch of the notice of acceptance of tender with

⁴¹ (Article 54)

⁴² (Article 61)

⁴³ (Article 59)

⁴⁴ (Article 62)

no “substantial modification”⁴⁵ to the tender or additional “unreasonable” requirements to the supplier.⁴⁶

3.2.1.5 Chapter 5: Legal liabilities

The *Tendering Regulation* specifies in great detail the legal liabilities (including disciplinary/administrative sanctions as well as criminal punishment) associated with wrongdoings of the procuring entity, procuring agency and their staff, suppliers, members of the tender evaluation committee, state financial department and any third party interfering with the tendering process. These sanctions will be carried out by government financial departments at various levels and may be challenged through administrative review and judicial review. Comparing to the relevant provision of the Government Procurement Law (chapter 8), the *Tendering Regulation* provides more details on the following issues:

[i] The liabilities for members of the tender evaluation committee are added. These include punishment for the breach of rules on confidentiality, conflict of interest and corruption.⁴⁷ It is provided that a committee member will be warned or fined up to 1000 RMB if during the evaluation, he gets in touch privately with the supplier; abandons his post; has “obvious unreasonable or unjust” tendencies; fails to evaluate according to the criteria and methods specified in the solicitation document; or should

⁴⁵ Article 30 of the *Contract Law of People’s Republic of China*, which also applies to government procurement contracts, provides that “substantial modification” means the modification relating to the contract object, quality, quantity, price or remuneration, time or place or method of performance, liabilities for breach of contract and the settlement of disputes, etc.

⁴⁶ (Article 64)

⁴⁷ (Articles 77 and 78)

have but failed to refuse the appointment because of conflict of interests. The result of the tendering proceedings may be rendered invalid if such wrongdoings have serious impacts. More serious punishments (including loss of qualification and criminal charges) are associated with corruption or leaking information.

[ii] Compared to Article 71 of the Government Procurement Law (7 subsections), several circumstances are added in Article 68 of the *Tendering Regulation* (10 subsections) under which the procuring entity will be held responsible. These include the failure to publish contract opportunities on the designated media; failure to organize the tender evaluation committee in accordance with *the Tendering Regulation*; invading the tendering procedure by breaking up the contract or any other means; in the absence of “justifiable reasons”, refusal to ascertain the winning tender according to the order of candidates recommended by the tender evaluation committee or pick the winning tender outside of the recommended list; conclusion of a procurement contract or any additional agreement that is materially different from tender documents; failure to file relevant documentation to the government financial department.

[iii] The liabilities for the winning bidder are also added. The winning bidder may be deprived of tender security, black listed or even banned from participating in future government procurement if it refuses to sign the contract without proper reason; sells the contract to a third party or in the absence of a relevant statement in the tender documents and the consent of the procuring entity, subcontracts to others; or refuses to perform the contract.

3.2.1.6 Chapter 6: Supplementary Provisions

Chapter 6 contains certain supplementary provisions. Two interesting points in this chapter are noteworthy. Firstly, it is provided in Article 85 that “government procurement of goods and services may use *framework agreement procurement* and *fix point procurement*⁴⁸ provided that the suppliers for such arrangements are ascertained through open tendering or under special circumstances, or other means approved by financial departments at the provincial level or above.”⁴⁹ However, no detailed rules for such procurement are provided here but these will be provided in a separate regulation. The Government Procurement Law provides that government procurement may use five main procurement methods including open tendering, selective tendering, competitive negotiation, single source procurement, request for quotation, or “*any other method approved by the Ministry supervising government procurement (MOF)*.”⁵⁰ Therefore, the introduction of the framework agreement procurement in the *Tendering Regulation* may be deemed as the exercise of authority conferred by Government Procurement Law Article 26.

Secondly, it is provided that “in the tendering of imported mechanical and electrical products in government procurement of goods, the *relevant state measure* should

⁴⁸ The term “fix point procurement” is not further defined here. It presumably refers to framework agreement with a single supplier.

⁴⁹ On frameworks and their use, as well as the position under EC and GPA rules, see further Arrowsmith, “Framework Purchasing and Qualification Lists under the European Procurement Directives” (1999) 8 *Public Procurement Law Review* 115 and 168.

⁵⁰ (Article 26 of the Government Procurement Law)

apply.”⁵¹ This provision substantially altered the coverage of the Government Procurement Law. This will be further discussed below in section 3.3.

3.2.2 The Publicity Regulation

The Government Procurement Law generally requires in Article 11 that information regarding government procurements, except commercial secrets, should be made available to the public in a timely manner through the designated media.⁵² Transparency requirements also can be found in other provisions such as Articles 7, 8 and 63 of the Government Procurement Law regarding the publication of the threshold for government procurement, catalogue for centralized procurement, criteria of evaluation, and result of the procurement. On that basis, the *Publicity Regulation* further provides detailed rules on the scope of government procurement information that should be published and contents of relevant notices; the administration of the publication; the administration of designated media; and legal liabilities.

Government procurement information is defined as including laws, regulations, rules and other regulatory documents on government procurement, and data and information reflecting government procurement activities.⁵³ Government procurement information should be published through the media designated by government financial departments at or above provincial level.⁵⁴

The scope of government procurement information is specified by government

⁵¹ (Article 86)

⁵² (Government Procurement Law, Article 11)

⁵³ (Article 2)

⁵⁴ (Articles 3, 6, 7)

financial departments at or above provincial level.⁵⁵ However, it is required that certain basic information, except a national secret, supplier's commercial secret or confidential information specified by law, must be published.⁵⁶ These include [i] laws, regulations, rules and other regulatory documents regarding government procurement; [ii] the catalogue of goods and services subject to mandatory centralized procurement, threshold for government procurement and threshold for open tendering; [iii] the list of government procurement agencies; [iv] tender information, including the notice of open tendering, the notice of prequalification for selective tendering, the notice of acceptance of tender, final result and corrections; [v] the contact methods of government financial departments handling complaints and decisions regarding filed complaints; [vi] the result of assessment on centralized procurement agencies conducted by financial departments; [vii] the blacklist of agencies and suppliers with misconducts; [viii] and other government procurement information required by laws, regulations or rules. The first two categories of information are to be published by financial departments at or above provincial level.⁵⁷ Government financial departments at the same level of the procuring entity shall publish information mentioned in categories 3, 6 and 7.⁵⁸ The procuring entity or its agency has the duty to publish the tendering information contained in the fourth category.⁵⁹ The financial

⁵⁵ (Article 5)

⁵⁶ (Article 8)

⁵⁷ (Article 19)

⁵⁸ (Article 21)

⁵⁹ (Article 20)

departments may demand additional information to be published.⁶⁰

The contents of public notices in the government procurement process, namely the notice of open tendering,⁶¹ the notice of prequalification for selective tendering,⁶² the notice of acceptance of tender,⁶³ the notice of corrections, the notice of the blacklist of agencies and suppliers with misconducts and the notice of decisions of complaints are also provided in detail.⁶⁴

It is made clear that the information given in the media designated by the MOF should prevail in case of inconsistencies unless other laws or administrative regulations provide otherwise. Information provided for publication should be sent to the media via fax, email or other speedy methods.⁶⁵ The designated media is required to play the

⁶⁰ (Articles 5, 6, 9)

⁶¹ The notice of open tendering shall contain the following contents: (i) the name, address and contact details of the procuring entity and agency; (ii) the name, purpose, quantity, brief technical requirement or nature of the procurement project; (iii) requirements on the qualifications of suppliers; (iv) the time, location and means of obtaining the solicitation documents and their price; (v) the deadline for the submission of tenders and the time and venue for the opening of tenders; (vi) the name and telephone number of the person in charge of the procurement project.

⁶² The notice of prequalification for selective tendering shall contain the following contents: (i) the name, address and contact details of the procuring entity and agency; (ii) the name, purpose, quantity, brief technical requirement or nature of the procurement project; (iii) requirements on the qualifications of suppliers; (iv) the deadline for the submission of application to prequalify and supporting materials and the date for the prequalification proceedings; (v) the name and telephone number of the person in charge of the procurement project.

⁶³ The notice of acceptance of tender shall contain the following contents: (i) the name, address and contact details of the procuring entity and agency; (ii) the name, purpose, quantity, brief technical requirement or nature of the procurement project; (iii) the date the successful tender is ascertained (with serial number of the solicitation document); (iv) the date of the solicitation document; (v) the name and address of the winning supplier and the contract value; (vi) the list of names of members of the tender evaluation committee; (vii) the name and telephone number of the person in charge of the procurement project.

⁶⁴ (Articles 10-15)

⁶⁵ (Article 23)

role of the “guardian of public interest.” For example, the media should suggest the information provider to correct any information violating laws, regulations or rules and report to the financial departments when its suggestion is not followed.⁶⁶ The media also has the duty to collect statistics of government procurement information and report to financial departments on a regular basis.⁶⁷

The consequences of any misconduct by the procuring entities, procuring agencies or the designated media are also provided. It is provided that the procurement should be invalid if the tendering information contains unreasonable terms restricting or rejecting potential bidders, or the information published is untrue or contains false or defrauding contents.⁶⁸ In contrast, if the tender information is not published at all or not published in the designated media, the procurement entity will only receive a warning and be required to correct the situation.⁶⁹ It is inconceivable that the procurement will be rendered invalid only when discriminatory or false information is provided but not when no information is provided at all. There are also inconsistencies between the *Tender Regulation* and the *Publicity Regulation* in this regard which will be further discussed below.⁷⁰

3.2.3 The Review Regulation

Compared to the *Tendering Law*, the Government Procurement Law made a

⁶⁶ (Article 26)

⁶⁷ (Article 28)

⁶⁸ (Article 31)

⁶⁹ (Article 30)

⁷⁰ See discussion *infra* Section 4.3.5

breakthrough by introducing a challenge system for the aggrieved bidders. However, detailed rules for the complaint hearing such as those regarding jurisdiction and evidence are not provided in the Government Procurement Law. The *Review Regulation* fills this gap.

The *Review Regulation* applies to the complaints submitted by the suppliers to the competent financial departments. Certain preconditions are required in Article 10 for a complaint to be accepted: [i] the complainant is a supplier participating in the government procurement in question; [ii] an inquiry has been submitted to the procuring entity before the complaint is initiated; [iii] the complaint is in the right form;⁷¹ [iv] the complaint is submitted within the time limit; [v] the financial department in question has jurisdiction over the issue complained of; [v] the same complaint issue has not been dealt with by the competent financial department; and [vi] other conditions provided by the financial department of the State Council.

The starting point of the review procedure is not specified in the *Review Regulation* but Article 51 of the Government Procurement Law provides that “any supplier that believes its legitimate interests have suffered due to the procurement documents, procurement proceedings or the final results of the procurement may submit inquiry to the procuring entity in writing within 7 working days of when the supplier became or

⁷¹ It is required in Article 8 of the *Complaint Regulation* that the complaint should contain the following contents: the name, address and telephone numbers of the complainant and the respondent; the concrete issues complained of and the relevant factual grounds; the result of the inquiry to the procuring entity and relevant evidences; the date of the complaint. The complaint shall be signed by a natural person, or if it is made by a legal person, by its legal representative accompanied by the official seal.

should have become aware of the circumstances.” The supplier then may submit a complaint to the competent government financial departments within 15 working days of the expiry of the period for such inquiry (seven days according to Article 53 of the Government Procurement Law), if the procuring entity’s reply is not satisfactory or no timely reply has been made. Within five working days of receiving the complaint, the financial department should complete the preliminary examination on the admissibility and jurisdiction of the complaint.⁷² If the complaint satisfies the requirements, the date of receipt of the complaint is regarded as the date of acceptance. After the complaint is accepted, the financial department should send the copy of the complaint to the respondent (the procuring entity) and other suppliers involved in the complaint within the following three working days. The respondent and other suppliers involved have five working days to submit written correspondence and relevant supporting materials.

The detailed procedure for the financial department to handle the complaint is provided in the *Review Regulation*. The complaint will be principally dealt with through review of documents and records. But the financial departments have the discretion to initiate an investigation in order to collect evidence or to organize cross-examination of evidence by the parties when necessary.⁷³ Any party to the complaint has the duty to cooperate in such investigation and the failure to do so will result in the dismissal of complaint (in the case of the complainant) or “giving up the right to

⁷² (Article 11)

⁷³ (Article 14)

explain *as well as admitting the accusation*” (in the case of the respondent).⁷⁴ The financial department has 30 working days to make a decision as required by Article 56 of the Government Procurement Law.⁷⁵ Regarding the interim measures, the financial department may suspend the procurement proceedings for up to 30 days “according to the circumstances.”⁷⁶

Unless the complaint is withdrawn or dismissed for lack of factual grounds, the financial department may grant the different remedies according to the nature of the misconducts if the complaint ought to be upheld.⁷⁷ There are two scenarios:

Firstly, if procurement documents have been found to contain terms of obvious tendency or discrimination which have or might have prejudiced the legitimate interests of the complainant and other suppliers, the financial department may [i] when the procurement proceedings are not completed, order the correction of such documents and resume the procurement according to new documents; [ii] when the procurement proceedings have been completed but the contract has not been signed, declare the whole procurement unlawful and order the procurement to be conducted again; [iii] when the procurement proceedings have been completed and the contract has been signed, declare the whole procurement unlawful and order the respondent to pay compensation according to “*relevant regulations*.”

Secondly, if it is found that procurement documents or the process of the procurement

⁷⁴ (Articles 15-16)

⁷⁵ (Article 20)

⁷⁶ (Article 22)

⁷⁷ (Articles 18 and 19)

have or might have affected the outcome, or illegal conducts have been found in the process of selecting the successful tender, the financial department may [i] when the contract is not signed, declare that the whole or certain part of the procurement is unlawful and should be conducted again; [ii] when the contract has been signed but not yet performed, annul the contract and order the procurement to be conducted again; [iii] when the contract has been performed, declare that the procurement is unlawful and order the liable party to pay compensation to the *procuring entity* and complainant for any loss incurred.

These differences between the remedies available under different circumstances are noteworthy. If the demarcation line between the two scenarios mentioned above is not at all clear, which is arguably the case, inconsistencies will arise. This will be further discussed below.⁷⁸

The decision of the financial department should be in writing, reasoned, adhere to certain formalities, and published in the designated media.⁷⁹ Article 58 of the Government Procurement Law is reiterated in Article 24 of the *Review Regulation*, which provides that “If *the complainant* disagrees with the decision made by the financial department or no decision has been made within the time limit, it has the right to apply for administrative review of the decision [by financial departments at higher level] or initiate an administrative action [judicial review] in the people’s court.”

This provision gives the odd impression that only the complainant but not the

⁷⁸ See discussion *infra* Section 4.3.5

⁷⁹ (Article 21)

respondent has the right to appeal, which should not be case.

It is also provided that the complaint proceedings should be free for both the complainant and the respondent and it is the liable party or parties that should cover the examination fee if incurred.⁸⁰

3.3 Critical Assessment of the Regulations Implementing the Government Procurement Law

3.3.1 A New Episode in the “Coverage Saga”

In order to ascertain the real impact of these new regulations implementing the Government Procurement Law, regard shall be had, first of all, on the scope of application of these regulations.

3.3.1.1 The Overlap between the Coverage of the Tendering Law and the Government Procurement Law

As pointed out already in chapters 1 and 2, there is a tension between two primary Chinese public procurement legislations—the *Tendering Law* and the Government Procurement Law.⁸¹ This tension is manifested, in particular, on the issue of coverage. The *Tendering Law* in principle applies to “all tendering proceedings [open and selective tendering] within the territory of the People’s Republic of China”, be it

⁸⁰ (Article 29)

⁸¹ See Cao, Fuguo, “From Tendering law to the Public Procurement Law” in Arrowsmith, S. and Trybus, M. (eds.), *Public Procurement: The Continuing Revolution* (London: Kluwer Law International)(2003); Wang, P. “China’s Evolving Legal Framework on Public Procurement” (2004) 13 *Public Procurement Law Review* 285-318.

public procurement or private procurement.⁸² The *Tendering Law* also requires that procurement of certain construction projects and procurement of services (such as ground exploration, design and monitoring) and goods (important materials and equipments) incidental to such construction projects must be conducted through tendering proceedings.⁸³ These construction projects include [i] projects that concern public interests or security, such as large infrastructure, public utility etc.; [ii] projects funded wholly or partly by state-owned or state-borrowed capital; [iii] projects funded by loans or aids from international organizations or foreign governments. Procurement of these construction projects and that of associated services and goods may be regarded as the mandatory scope of application of the *Tendering Law* although other procurements where tendering proceedings are conducted may also apply the *Tendering Law* on a voluntary basis. This mandatory scope is further defined by a ministerial regulation approved by the State Council.⁸⁴

⁸² Article 2 of the *Tendering Law*.

⁸³ Article 3 of the *Tendering Law*.

⁸⁴ *Regulation on the Scope and Threshold of Construction Projects Subject to Tendering*, State Development and Planning Commission with the approval of the State Council, 1 May 2000. It provides that [i] infrastructure projects that concern public interests or security include projects concerning energy, transportation, post, telecommunication, water (dams, flood control facilities), refuse, road and bridges, parking, environmental protection and so on; [ii] public utility projects that concern public interests or security include projects concerning supply of water, electricity, gas and heat to the public, technology, education, culture, sport, tourism, hygiene, social welfare, housing etc.; [iii] projects funded by state-owned capital include projects funded by state budget of various level, specialized governmental construction funds run by financial departments, or fund of state-owned enterprises and institutions provided that the investor has *de facto* control of the project; [iv] projects funded by state-borrowed capital include projects funded by national bond, loans borrowed or guaranteed by the state, loans of policy from the state, loans borrowed by the investor but authorized by the state. On threshold, it provides that the mandatory tendering requirement shall apply to any construction contract the estimated value of which is above 2 million RMB; any goods (materials and

The Government Procurement Law defines government procurement as “all purchasing activities conducted using fiscal funds by state organs at all levels, institutions and social organizations when the goods, construction and services concerned are listed in the Centralized Procurement Catalogue or the value of which exceeds the respective Prescribed Procurement Thresholds for goods, construction or services as applicable.” Key factors of this definition are the nature of the procuring entity (government departments, institutions and social organizations under budget control such as public hospitals, state schools and universities, cultural organizations, state-owned news agencies, sports organizations and scientific research institutes excluding state enterprises) and the source of the fund.

The *Tendering Law* covering all tendering proceedings and the Government Procurement Law covering government procurement overlap when government procurement of construction works, goods, and services is conducted through tendering proceedings. The Government Procurement Law has tried to resolve this clash by one simple sentence in Article 4 that limits the application of the *Tendering Law* vis-à-vis government procurement to tendering proceedings in government procurement of construction works.⁸⁵ In other words, the intention of Article 4 of the Government Procurement Law is arguably that: [i] the *Tendering Law* does not apply to tendering proceedings in government procurement of goods and services; [ii] the

equipments) or contracts the estimated value of which is above 1 million RMB; any relevant services contract the estimated value of which is above half of a million RMB; or any contracts in a project worth more than 30 million RMB.

⁸⁵ Article 4 of the Government Procurement Law provides that the “*Tendering Law* shall apply to tendering proceedings in government procurement of construction.”

Tendering Law does not even apply to government procurement of works in which procurement methods other than open and selective tendering are used. This provision of the Government Procurement Law has substantially altered the scope of application of the *Tendering Law*.⁸⁶

However, there are still certain ambiguities regarding the demarcation line between these two laws. First of all, it is not entirely clear whether government procurement of goods (materials and equipments) and services closely related to a construction project should be covered by the Tendering Law or the Government Procurement Law, although the definition of goods and construction provided in the Government Procurement Law suggests that the Government Procurement Law should apply.⁸⁷ Secondly, it is not clear whether government procurement of construction through tendering proceedings is completely outside of the realm of the Government Procurement Law or the Government Procurement Law still applies to such procurement with respect to issues other than tendering procedure such as “buy national” policy, secondary policy, rules on publicity, challenge and review

⁸⁶ It is argued by this author that although the doctrine of *lex posterior derogat priori* has been established in legal interpretation by the *Legislation Law* effective on 1 July 2000 (Article 83), it remains hard to reconcile the limitation conferred by the Government Procurement Law with the directly conflicting provision of the *Tendering Law* (namely that the *Tendering Law* is applicable to “all tendering activities within the territory of People’s Republic of China”). An amendment of the *Tendering Law* itself might be necessary.

⁸⁷ It is defined in Article 2 of the Government Procurement Law that “Goods refers to all forms and kinds of objects, including *materials*, fuel, *equipments*, products etc. [...] Construction refers to all work associated with construction, reconstruction, extension, decoration, demolition and repair or renovation of a building or structure.”

mechanism.⁸⁸ Thirdly, the Government Procurement Law contains no detailed rules on tendering proceedings even in government procurement of goods and services. This gives the impression that the *Tendering Law* might be of some significance after all in government procurement of goods and services. However, as explained in the following section, the analysis of regulations implementing the Government Procurement Law and those implementing the *Tendering Law* suggests the “fight for administrative territory under the name of the law” as noted in chapters 1 and 2 is still ongoing.

3.3.1.2 The Conflict of Coverage between Implementing Regulations of the Government Procurement Law, that of the Tendering Law and the MOC Tendering Regulation on M&E Products

Since the second half of 2004, there have been three sets of public procurement regulations adopted by various ministries. These are all “ministerial regulations” according to the categorization set out in the *Chinese Law of Legislation* and have the same level of legal authority as explained in chapter 1.

The first category includes three regulations implementing the Government Procurement Law discussed above in 3.2. They were enacted by the MOF. Their legal base is the Government Procurement Law. Among them, only the *Tendering Regulation* contains provisions on the scope of application. The *Tendering Regulation* applies to “tendering proceedings in government procurement of goods or services”;

⁸⁸ This question is particularly acute since the Tendering Law has not provided any challenge mechanism.

but “tendering proceedings in government procurement of mechanical and electronic products from abroad shall be conducted in accordance with *relevant national measures*.”⁸⁹ Goods and services are not defined in the *Tendering Regulation* so the definitions contained in the Government Procurement Law Article 2 should apply. In the absence of any limitation on scope of application, the *Publicity Regulation* and the *Review Regulation* should in principle apply to all government procurement arguably including government procurement of construction and government procurement of mechanical and electronic products from abroad.

The second category includes two regulations jointly adopted by the NDRC, Ministry of Construction, Ministry of Railway, Ministry of Transportation, Ministry of Information Industry, Ministry of Water Resources and General Administration of Civil Aviation: the *Measure on Tendering in Procurement of Goods in Construction Projects* (“*Tendering Regulation on construction-related goods*”)⁹⁰ and the *Measure on the Handling of Complaints on Tendering Proceedings in Construction Projects* (“*Review Regulation on construction tendering*”)⁹¹. The legal base of these two regulations is the *Tendering Law*. Articles 2 and 61 of the “*Tendering Regulation on construction-related goods*” provide that the regulation applies to “tendering proceedings in procurement of goods related to construction projects subject to mandatory tendering requirements” and “tendering proceedings in procurement of goods classified as fixed assets investment” with “goods” referring to “important

⁸⁹ (Article 2 and 86)

⁹⁰ Enacted on 18 January 2005 and entered into force on 1 March 2005.

⁹¹ Enacted on 21 June 2004 and entered into force on 1 August 2004.

equipments, materials etc. related to the construction project.”

The third category refers to the *Implementing Measure on International Tendering in Procurement of Mechanical and Electronic Products* (“*Tendering Regulation on M&E products*”).⁹² This regulation was enacted by the Ministry of Commerce (MOC) on November 1, 2004 and entered into force on December 1, 2004. Its legal base is also the *Tendering Law*. It provides in Article 2 that “the regulation applies to all international tendering proceedings in procurement of mechanical and electronic products conducted in the territory of China.” Article 8 further provides the scope of mechanical and electronic products procurement subject to mandatory international tendering requirements which includes procurement of mechanical and electronic products from abroad in: [i] projects that concern public interests or security, such as large infrastructure, public utility etc.; [ii] projects invested wholly or partly by state-owned or state-borrowed capital; [iii] projects funded by loans or aids from international organizations or foreign governments; and [iv] *government procurement*.⁹³ The “*Tendering Regulation on M&E products*” also contains a chapter on publication and challenge.

The clashes among these three categories of regulations, especially regarding

⁹² The term “international tendering” is not defined further anywhere. It presumably means competitive tendering proceedings inviting mainly foreign suppliers to submit tenders.

⁹³ It is noteworthy that the term “government procurement” is used here in parallel with other “public” projects. Even though the definition of “government procurement” provided in the Government Procurement Law is a narrow one, there is an undoubted overlap between government procurement and other three “public” procurement projects listed above. It is suggested that this approach reflects the general misunderstanding about government procurement among Chinese bureaucrats, namely the term “government procurement” only means procurement under the administrative authority of the MOF and its local offices, which at present mainly includes purchase of office equipment and vehicles.

coverage, are obvious and astonishing.

First of all, according to their scope explained above, both the *Tendering Regulation* implementing the Government Procurement Law and the “*Tendering Regulation on construction-related goods*” implementing the *Tendering Law* applies to tendering proceedings in procurement of goods closely related to construction projects, notably procurement of materials and equipments. For example, if a local government wants to procure the key equipment for its refuse recycling plant being built through competitive tendering, the procuring officer will find it very hard, if at all possible, to decide which tendering regulation should be followed. The “*Tendering Regulation on construction-related goods*” clearly steps out of the boundary set up by Article 4 of the Government Procurement Law within which the reach of the *Tendering Law* vis-à-vis government procurement should remain in procurement of construction. In the UNCITRAL Model law, the term “construction” includes “services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself.”⁹⁴ However, the definition of “construction” in the Government Procurement Law does not seem to have any intention to include goods or services. It can be argued that the “uneasy peace” between the Government Procurement Law and the *Tendering Law* achieved by Article 4 of the Government Procurement Law has been broken by the enactment of the “*Tendering Regulation on construction-related*

⁹⁴ Article 2(d) of the UNCITRAL Model Law.

goods.”

Secondly, while the *Tendering Regulation* adopted by the MOF provides that “in the tendering of imported mechanical and electrical products in government procurement of goods, the *relevant state measure* should apply,”⁹⁵ no statement to that effect can be found in the “*Tendering Regulation on construction-related goods.*” Therefore, there is a potential clash between the “*Tendering Regulation on construction-related goods*” adopted by the NDRC et.al. and the “*Tendering Regulation on M&E products*” adopted by the MOC although both state that the *Tendering Law* is the legal base.

Thirdly, duplicated rules on transparency requirements and review procedure can be found in the *Publicity Regulation* and *Review Regulation* implementing the Government Procurement Law, the “*Review Regulation on construction tendering*” implementing the *Tendering Law*, and the “*Tendering Regulation on M&E products*” adopted the MOC. And no provisions coordinating the scope of application of different rules such as Government Procurement Law Article 4 or Article 86 of the *Tendering Regulation* can be found in any of these documents. Therefore, it will be hard for a complainant to decide which set of rules to follow if the procurement in question is, for example, procurement of key equipments for a local government’s refuse recycling plant being built through international competitive tendering because such equipment is not available in domestic market. The issues regarding forum for supplier review will be further analyzed in chapter 4.

⁹⁵ (Article 86)

It is noteworthy that none of the above-identified clashes has actually been addressed in the *Interim Measure on Coordination Mechanism*, an initiative adopted by the State Council to streamline the institutional framework for procurement regulation as noted in chapter 1. Tendering proceedings in government procurement of goods and services, the area where conflicts between regulations may arise as explained above, is actually excluded from the coverage of the *Interim Measure on Coordination Mechanism*!⁹⁶

3.3.2 “Government Procurement Law Plus” Obligations found in the Secondary Regulations

3.3.2.1 A Note of Terminology

The term “Government Procurement Law plus obligation” refers to the obligation created by certain provisions in three regulations implementing the Government Procurement Law that is beyond the authority conferred by the Government Procurement Law.

As noted above in chapter 1, the Chinese *Legislation Law* (2000) has established in Chapter 5 a strict hierarchy for different kinds of legal instruments with national law adopted by the National People’s Congress at the top followed by regulations adopted by the State Council, local regulations and ministerial regulations. The ministerial regulation is strictly forbidden from stepping out of authority or being inconsistent

⁹⁶ (Article 4)

with the national law.⁹⁷ Therefore, the legality of these “Government Procurement Law plus” provisions listed below is therefore questionable since no proper legislative authority from the Government Procurement Law can be established.

It is also noteworthy that Article 87 of the Government Procurement Law requires that “detailed procedures and measures for the implementation of this law shall be promulgated by the State Council”, in other words, the implementing regulation should consist of State Council regulations. In fact, all three regulations implementing the Government Procurement Law are only ministerial regulations adopted by the MOF. Therefore, it can be argued that even disregarding the provisions of these regulations, they are still in breach of the *Legislation Law* because of their ministerial regulation status.

3.3.2.2 “Buy National” Policy

Article 10 of the Government Procurement Law only requires that “domestic goods, construction and services shall be procured for government procurement” with certain exceptions.⁹⁸ Article 8 of the *Tendering Regulation* further requires that “suppliers participating in the tendering proceedings in government procurement of goods and services (hereinafter ‘bidder’) should be *domestic suppliers* providing domestic goods and services, except if otherwise provided by law and administrative regulations”.

⁹⁷ (Article 87)

⁹⁸ The exceptions include (i) when goods, construction or services needed are not available within the territory of People's Republic of China or though available, cannot be acquired on reasonable commercial terms and conditions; (ii) when the items to be procured are for use abroad; or (iii) in other (unspecified) circumstances provided for by laws and administrative regulations.

The term “domestic supplier” is not defined further. It is not clear whether a juridical person registered under Chinese law but wholly owned by foreign investors (a so called “foreign-invested enterprise”) will be classified as a domestic supplier. In any case, it is safe to argue that the *Tendering Regulation* effectively introduced a “buy from national” policy in addition to the “buy national” policy of the Government Procurement Law.

This “Government Procurement Law plus” obligation is potentially problematic since in recent years, a lot of Chinese private companies have been deliberately transferred into foreign-invested enterprises through offshore financial centers in order to enjoy tax exemptions or benefits aiming at encouraging foreign direct investment (FDI). It will be interesting if these companies are banned from participating in government procurement of goods and services.

3.3.2.3 Precondition for the procuring entity to conduct procurement by itself

The Government Procurement Law requires that government procurement of goods, services and works listed in Centralized Procurement Catalogue *must* be entrusted to Centralized Procurement Institutions that are procurement intermediaries with status of a not-for-profit institutional legal entity independent from the supervisory authority of government procurement --the finance department-- and could be established by local governments higher or at the levels of autonomous prefectures or prefectures with districts, based on their own necessity.⁹⁹ The Government Procurement Law also

⁹⁹ (Articles 16, 18 and 60)

provides that procuring entities *may* entrust procurement agencies approved by relevant organs of the State Council or provincial governments to conduct government procurements that are presumably outside the Centralized Procurement Catalogue.¹⁰⁰

The *Tendering Regulation* sets out three preconditions only, after the satisfaction of which a procuring entity may conduct the tendering by itself: [i] the entity must be capable of undertaking civil liabilities independently; [ii] the entity is capable of producing solicitation documents and organizing the tendering procedure and has specialized procurement officers appropriate to cope with the size and level of complication of the procurement project; [iii] such procurement officers should have finished the training course on government procurement organized by the financial departments at or above provincial level.¹⁰¹ If any of these conditions are not met, a procurement agency *must* be employed to conduct the tendering even if the procurement involved is not within the scope of Centralized Procurement Catalogue. This is another example of “Government Procurement Law plus” obligation since such conditions are not required under the Government Procurement Law.

3.3.2.4 *False or Malicious complaint*

The Government Procurement Law established the right of the supplier to submit complaints to the procuring entity and to seek administrative review.¹⁰² The

¹⁰⁰ (Article 19)

¹⁰¹ (Articles 11 and 12)

¹⁰² (Articles 51-58)

Government Procurement Law contains no limitation on how many times a supplier may submit complaints in any given period of time.

However, the *Review Regulation* provides, de facto, such a limitation. Article 26 of the *Review Regulation* provides that any “false or malicious complaint” should be dismissed and the complaint involved should be blacklisted and punished according to the law.¹⁰³ Further, a “false or malicious complaint” may be assumed when [i] *the complainant has made complaints three times within 12 months and after the review proceedings, no material evidence has been found in each occasion*; [ii] the complainant fabricates the facts or provides false information or materials.

This provision is in fact a restriction on how many times a supplier can or affords to submit complaints. It can be argued that this restriction is rather arbitrary. This is because, first of all, no restriction of this kind can be found in international public procurement instruments. Secondly, it is already hard enough for a supplier to make a complaint in consideration of not “biting the hands that feed,” this provision makes it even harder with the threat of blacklisting and sanctions. This will in turn hinder the effectiveness of supervision through suppliers which is an important instrument to ensure transparency and fairness in government procurement. Thirdly, Article 26 of the *Review Regulation* has not specified whether the quota of three times per year is meant to be within the jurisdiction of one local financial department or nationwide. In practice, it will be inconceivable for a large national company to be allowed only three “unsuccessful encounters” with the financial departments. Fourthly, the term

¹⁰³ (Article 26)

“false or vicious complaint” implies that wrongful intent of the complainant should be established. Under any theory of criminology, it is questionable that three unsuccessful complaints per year will be sufficient to demonstrate such intent. At last, but not least, as the complainant has been granted by the Government Procurement Law the right to question the process of the procurement and to submit complaints, if no adequate factual grounds are found later, the complainant should bear the consequences of the failure. There is no legal base in the Government Procurement Law authorizing this “Government Procurement Law plus” restriction regarding the times of challenges.

Another example of the “Government Procurement Law plus” provision contained in these new regulations is the amendment of the Government Procurement Law’s scope of application. As mentioned above, the *Tendering Regulation* excludes “the tendering of imported mechanical and electrical products in government procurement of goods” from its coverage, and the *relevant state measure* should apply.¹⁰⁴ However, nothing in the Government Procurement Law may authorize such exclusion. The only provision of the Government Procurement Law concerning the coordination of different public procurement regulations is Article 4 defining the coverage of the *Tendering Law* vis-à-vis government procurement.

3.3.3 Inconsistencies and loopholes

Furthermore, a number of inconsistencies and loopholes in provisions of the

¹⁰⁴ (Article 86)

secondary regulations implementing the Government Procurement Law exist. Some examples are listed below.

3.3.3.1 The contents of the notice of open tendering

The content of the notice of open tendering (the equivalent to invitation to tender) is not only provided in Article 10 of the *Publicity Regulation* but also provided in Article 17 of the *Tendering Regulation*. The former requires more information to be included in the notice than the latter, namely “the purpose and brief technical requirement of the procurement project” and “the name and telephone number of the person in charge of the procurement project.”

3.3.3.2 The definition of “bidder”

The *Tendering Regulation* provides a definition of “bidder”--“juridical person, other organization or natural person that respond to solicitation of tender, *satisfy the qualification criteria specified in the solicitation document*, and participate in the tendering competition.”¹⁰⁵ It is interesting to note that a “bidder” has to be a supplier that satisfies qualification criteria. This means that the scope of the term “bidder” should have been much narrower than the term “supplier.”

However, it is impossible to decide whether a supplier is qualified or not before the qualification process. In fact, it is evident that throughout the *Tendering Regulation*, the term “bidder” has been used interchangeably with the term “supplier.” For example, Article 8 provides that “suppliers participating in tendering proceedings in

¹⁰⁵ (Article 29, emphasis added)

government procurement of goods and services (*hereinafter* ‘bidder’) should be domestic suppliers supplying domestic goods and services...”

3.3.3.3 *Procuring entity’s right to extend the deadline for submission of tender*

Article 28 of the *Tendering Regulation* provides that “the procuring entity may, taking into consideration the circumstances, extend the deadline for the submission of tenders as long as all receivers of the solicitation document are notified in writing of the change and a notice of amendment to that effect is published in the designated media at least 3 days prior to the deadline.”¹⁰⁶ It is not clear what kind of “*circumstances*” may be taken into consideration and may justify the extension; how many times or for how long the deadline may be extended.

In contrast, Article 30 of the UNCITRAL Model Law clearly specifies two grounds under which such extension may take place: [i] when it is necessary to afford suppliers or contractors reasonable time to take the clarification or modification made by the procuring entity, or the minutes of the meeting of suppliers or contractors, into account in their tenders; or [ii] if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.¹⁰⁷

It can be argued that this provision is a potential loophole since too much discretion has been given to the procuring entity on this matter.

¹⁰⁶ (Article 28)

¹⁰⁷ (Article 30 of the UNCITRAL Model Law)

3.3.3.4 Consulting suppliers on the solicitation documents

Article 22 of the *Tendering Regulation* provides that “the procuring entity may, if necessary, consult *experts* or *suppliers* on the solicitation documents.”¹⁰⁸ Article 45 further requires that those experts who have been consulted on solicitation documents shall not participate in the tender evaluation any more.¹⁰⁹ However, there is no similar “conflict of interest” provision for the suppliers consulted.

A number of provisions in public procurement regulations including the Tendering Regulation have been specially designed to ensure a level playing field for all suppliers participating in the tendering proceedings. For example, the Government Procurement Law Article 77 states that the supplier is forbidden from negotiating with the procuring entity in tendering proceedings and such negotiation, if occurred, would invalidate the procurement;¹¹⁰ Article 25 of the *Tendering Regulation* provides that any survey of the grounds or Q&A conference should not be reserved for certain suppliers.¹¹¹

It can be argued that Article 22 of the *Tendering Regulation* clearly breaks the level playing field without providing a respective remedy. This is because: [i] it is impossible to consult all potential bidders before issuing the solicitation documents, therefore the consultation can only be within a small, closed circle; [ii] there is no transparency requirement regarding such consultation process, those consulted

¹⁰⁸ (Article 22)

¹⁰⁹ (Article 45)

¹¹⁰ (Government Procurement Law Article 77)

¹¹¹ (Article 25 of the *Tendering Regulation*)

suppliers and the procuring entity may take this opportunity to undertake substantial negotiations; [iii] consulted suppliers are likely to gain a more advantageous position compared to other suppliers, but there is no remedy available to “neutralize” this unjustified advantage.

As further explained in the following section, any tendency or discrimination of the solicitation document has serious consequences. It is certainly not right to ban discrimination on the one hand, but provide the perfect opportunity for discrimination to occur (with a close-door, limited consultation process) on the other.

3.3.3.5 Remedy regarding discriminatory solicitation documents

The Government Procurement Law and its new implementing regulations all contain provisions on the consequence and remedy in case of irregularity in the solicitation documents, especially terms of obvious tendency and discrimination. However, these provisions are found to be inconsistent with each other.

The Government Procurement Law provides that if the procuring entity, *inter alia*, discriminates against suppliers on unreasonable terms and such discrimination has or might have influenced the outcome, the financial department shall terminate the procurement when the winning supplier has not been ascertained; or annul the contract and select a new successful supplier from qualified candidates if the procurement contract has been signed but not yet performed; or order damages to be paid when the contract has been performed.¹¹²

¹¹² (Government Procurement Law (Articles 71(4) and 73))

The *Tendering Regulation* provides in Article 68(4) and 71 that if the procuring entity, *inter alia*, excludes potential bidders with unreasonable restrictions, discriminates against suppliers, or the solicitation documents contain terms of obvious tendency or excluding potential bidders and such behaviour has or might have influenced the outcome, the financial department shall terminate the procurement *and order it to be conducted again* when a winning supplier has not been ascertained; or annul the contract and select a new successful supplier from qualified candidates *according to the recommended order* if the procurement contract has been signed but not yet performed; or order damages to be paid when the contract has been performed.¹¹³

The approach of the *Publicity Regulation* and *Review Regulation* dealing with the same issue is quite different. Article 31 of the *Publicity Regulation* simply provides that if, *inter alia*, “the tendering information [including solicitation document] contains terms rejecting a potential bidder with unreasonable requirements”, “the procurement should be deemed invalid” without differentiating remedies according to the conclusion and performance of the procurement contract.¹¹⁴ The approach of the *Review Regulation* is even more sophisticated than that of the Government Procurement Law and the *Tendering Regulation* as explained above in section 3.2.3.

In the case that solicitation documents contain terms of obvious tendency or discrimination that have or might have influenced the outcome:

[i]When the tendering proceedings are not completed, the Government Procurement

¹¹³ (*Tendering Regulation* Article 68(4) and 71)

¹¹⁴ (Article 31 of the *Publicity Regulation*)

Law requires the procurement to be terminated; the *Tendering Regulation* requires the procurement to be terminated and conducted again; the *Publicity Regulation* requires the procurement to be deemed invalid; Article 18 of the *Review Regulation* requires the document to be corrected and the procurement to be resumed according to new documents; Article 19 of *Review Regulation* requires that the whole or certain part of the procurement is declared unlawful and conducted again.

[ii] When the tendering proceedings have been completed but the contract has not been signed, the Government Procurement Law and the *Tendering Regulation* provides no remedy for this scenario; the *Publicity Regulation* would again require the procurement to be deemed invalid; Article 18 of the *Review Regulation* requires the whole procurement to be declared unlawful and conducted again; Article 19 of the *Review Regulation* requires that the whole or certain part of the procurement is declared unlawful and is conducted again.

[iii] When the contract has been signed but not yet performed, the Government Procurement Law requires the contract to be annulled and a new successful supplier to be selected from qualified candidates; the *Tendering Regulation* requires the contract to be annulled and a new successful supplier to be selected from the list of qualified candidates *according to the recommended order*; the *Publicity Regulation* would again require the procurement to be deemed invalid; Article 18 of the *Review Regulation* requires the procurement to be declared unlawful and the respondent to pay damages; Article 19 of the *Review Regulation* requires the contract to be annulled and the procurement to be conducted again.

[iv] When the contract has been performed, the Government Procurement Law and the *Tendering Regulation* require damages to be paid by the guilty party; the *Publicity Regulation* would, as always, require the procurement to be deemed invalid; Article 18 of the *Review Regulation* requires the procurement to be declared unlawful and the respondent to pay damages; Article 19 of *Review Regulation* requires the procurement to be declared unlawful and the liable party to pay compensation to the *procuring entity* and complainant for any loss incurred (although the liable party is very likely to be the procuring entity).

The inconsistencies demonstrated above may arguably have serious negative impacts on achieving the goal of fair, transparent and efficient procurement. It would be extremely hard, if possible at all, for the authority to decide which rule to follow under a given circumstance. It is suggested that the cause of these inconsistencies is the vague language used to define the situation in which a certain type of remedy applies. For example, Article 18 of the *Review Regulation* concerns cases where *procurement documents* have been found to contain terms of obvious tendency or discrimination which have or might have prejudiced the legitimate interests of the complainant and other suppliers;¹¹⁵ Article 19 concerns cases where *procurement documents* or the process of the procurement have been found to have or might have affected the outcome, or illegal conducts have been found in the process of selecting the successful tender.¹¹⁶ There is clear overlap between the coverage of these two

¹¹⁵ (Article 18 of the *Review Regulation*)

¹¹⁶ (Article 19 of the *Review Regulation*)

articles. The fact that the inconsistencies identified above appear in regulations drafted by the same Ministry and enacted at the same time or even in the same document makes the situation even more unacceptable.

3.4 GPA-Consistency of the New Government Procurement Regulations

With a view that Chinese public procurement law would sooner or later be brought into conformity with the GPA rules, it is worthwhile to assess the GPA-consistency of these new public procurement regulations implementing the Government Procurement Law. Since, as explained above, the coverage of these new regulations is limited,¹¹⁷ only a brief technical assessment will be conducted with special regards to GPA rules on non-discrimination, tendering procedure, publicity requirements and challenge.

3.4.1 GPA Rules of Non-Discrimination

GPA Article III contains both a national treatment and a MFN obligation with regard to covered procurement. Products, services and suppliers of other Parties offering products or services of the Parties shall be treated no less favourably than those that are either domestic or of any other Party.¹¹⁸ It further provides that a locally established supplier should not be discriminated against because of its foreign ownership or affiliation.¹¹⁹

¹¹⁷ See *supra* section 3.3.1.

¹¹⁸ [GPA Article III]

¹¹⁹ [GPA Article III]

Obviously, both the “buy national” policy contained in Government Procurement Law Article 10¹²⁰ and the “buy national from national” policy in Article 8 of the *Tendering Regulation*¹²¹ are inconsistent with GPA Article III.

A more difficult question is to assess the extent to which secondary policies advocated by the *Government Procurement Law* and the *Tendering Regulation* may be tolerated under the GPA’s rule of non-discrimination. Article 9 of the Government Procurement Law provides that “[G]overnment procurements shall facilitate achieving objectives of national economic and social development policy, including environmental protection, assistance to underdeveloped or ethnic minority regions, promotion of small and medium-sized enterprises etc.”¹²² Article 9 of the *Tendering Regulation* merely repeated the Government Procurement Law Article 9 without providing any concrete implementing measures such as price preference, set aside or special requirements on qualification or contract terms.¹²³

It can be argued under certain circumstances that such secondary policy may be consistent with the non-discrimination rule of the GPA: [i] if secondary policies are defined in terms accepted in the supplier’s own state, or limited to domestic suppliers; [ii] if a special derogation is undertaken in the note to China’s Annexes¹²⁴; [iii] if the

¹²⁰ (Government Procurement Law Article 10)

¹²¹ (Article 8 of the *Tendering Regulation*)

¹²² (Article 9 of the Government Procurement Law)

¹²³ (Article 9 of the *Tendering Regulation*)

¹²⁴ Korea’s notes to Annex 1 of the GPA provides that “[T]his Agreement does not apply to the single tendering procurement including set-asides for *small- and medium-sized businesses...*” WT/Let/401, 14 September 2001.

use of secondary policy can be classified as “offsets”¹²⁵ and China, as a developing country, is permitted under GPA Article XVI to use this.¹²⁶

3.4.2 Tendering and Award Procedure

Three tendering procedures are provided in the GPA, namely open tendering, selective tendering and limited tendering. The definition of open tendering and selective tendering contained in the GPA is not materially different from that contained in the *Tendering Regulation*.

The GPA prohibits the procuring entity from providing “to any supplier, information with regard to a specific procurement in a manner which would have the effect of precluding competition.” The consultation clause of the *Tendering Regulation* criticized above in 3.3.3.4 may be inconsistent with the GPA’s requirement.

The GPA also sets out detailed rules on qualification of suppliers and technical specification.¹²⁷ But the *Tendering Regulation* does not contain any equivalent provisions.

The GPA provides essential information that should be contained in the “notice of proposed procurement”. Compared to the contents of notice of open tendering and selective tendering provided in the *Tendering Regulation* and the *Publicity Regulation*, the GPA “notice of proposed procurement” requires a little bit more information such

¹²⁵ “Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.” Article XVI of the GPA footnote 7.

¹²⁶ (GPA Article XVI)

¹²⁷ (GPA Article VI and VIII)

as any date for starting delivery or completion of delivery of goods or services and whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.¹²⁸

Regarding the time limit, the GPA requires that in open tendering procedure, the period between the publication and the deadline for submission of tender shall be no less than 40 days.¹²⁹ But the Government Procurement Law and the *Tendering Regulation* requires 20 days.¹³⁰

On the contents of the tender documentation (solicitation documents), there is no material difference between GPA Article XII and the *Tendering Regulation*. Only the GPA requires that the “length of time during which any tender should be open for acceptance” is to be included,¹³¹ which should have been but is not included in the *Tendering Regulation*.

On the submission, receipt, and opening of tender, the provision of the GPA is general and flexible enough to accommodate the *Tendering Regulation*. But no right for the procuring entity to extend the deadline for submission is established in the GPA.

For the award of contracts, provided that all essential requirements set out in the solicitation document are met, the successful tender should either be the lowest price tender or the most advantageous tender.¹³² As explained above, the second and third

¹²⁸ Compare (Article IX of the GPA) with (*Tendering Regulation* Article 17) (*Publicity Regulation* Article 10-12)

¹²⁹ (GPA Article XI)

¹³⁰ (*Government Procurement Law* Article 35); (*Tendering Regulation* Article 16)

¹³¹ (GPA Article XII)

¹³² (GPA Article XIII)

evaluation methods provided in the Tendering Regulation may arguably be simply regarded as identifying the most advantageous tender albeit through complicated formula¹³³.

3.4.3 Publicity Requirement

The publicity requirements of the GPA mainly consist of requirements to publicize contract opportunities;¹³⁴ award procedures – for example, obligations to publish general procurement rules;¹³⁵ and to notify the qualification and award criteria for each contract.¹³⁶

The *Publicity Regulation* is largely in conformity with these requirements. The only obstacle for the Chinese government when adapting to the rules in this area would be to designate a single media as the official publication for the GPA.

3.4.4 Challenge System

The GPA provides that the supplier has the right to request explanation from the procuring entity regarding reasons for its decisions (e.g. rejection and acceptance of tender).¹³⁷ This is provided in the Government Procurement Law¹³⁸ but not in the *Tendering Regulation* or the *Review Regulation*.

Before initiating a challenge procedure, the supplier is encouraged by the GPA to seek

¹³³ See above section 3.2.1.

¹³⁴ GPA Article IX.

¹³⁵ GPA Article XIX.1.

¹³⁶ GPA Articles XII.2 and XIII.4.

¹³⁷ GPA Article XVIII.2.

¹³⁸ (Article 51)

resolution of its complaint in consultation with the procuring entity.¹³⁹ But the *Review Regulation* makes such consultation a precondition for a complaint to be admissible for administrative review.¹⁴⁰ This is arguably inconsistent with the GPA since the direct access of the supplier to administrative review should not be impeded.

Another potential inconsistency lies in the fact that the impartiality and independence of the review body and even the court, which is required by the GPA Article XX.6,¹⁴¹ is questionable in China. The GPA requires that the review body should have “no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment.”¹⁴² According to the Government Procurement Law and new regulations, the MOF and its local branches are currently the review bodies but they are also the “cashier” who will ultimately pay the bill of the procurement. Even the appointment of judges in China will have to be approved by the local Communist Party committee, let alone the appointment of officials in charge of administrative review.

GPA Article XX.6 also requires that in the administrative review procedure, participants can be heard, represented, have access to all proceedings and can present witnesses.¹⁴³ But the *Review Regulation* provides that the complaint will be principally dealt with through review of documents and records and the investigation or hearing

¹³⁹ (GPA Article XX)

¹⁴⁰ (*Review Regulation* Article 7)

¹⁴¹ (GPA Article XX.6)

¹⁴² (GPA XX:6)

¹⁴³ (GPA Article XX.6)

will only be organized if the financial department deems necessary.¹⁴⁴

In general, it can be argued that GPA rules, especially technical rules such as the formality of public notice and tender document and time-limit, are general and flexible enough to accommodate domestic public procurement regulations. However, regarding Chinese new regulations implementing the Government Procurement Law, there are still a number of inconsistencies that need to be addressed in the future, the most significant of which is the “buy national” policy.

3.5 Conclusion

After two phases of evolution in China’s public procurement framework marked respectively by the enactment of the *Tendering Law* (2000) and the *Government Procurement Law* (2003), the current phase of Chinese public procurement law development is symbolized by the adoption of various secondary ministerial regulations implementing the primary laws, with the new State Council implementing regulations horizontally.

These regulations have been expected to address the deficiencies left by the first two phases and to prepare China for the “big challenge” ahead—joining the GPA.

It is noted, first of all, that more detailed technical rules have been provided in these regulations such as time limits, formalities of important documents, a tender evaluation procedure and a review handling procedure. These will to a certain extent help the implementation of the *Government Procurement Law*.

¹⁴⁴ (*Review Regulation Article 14*)

However, in general, it is argued that secondary regulations developed in the current phase have failed to improve the effectiveness and integrity of China's public procurement legal framework.

This is because first of all, secondary ministerial regulations under the *Government Procurement Law* and those under the *Tendering Law* have reopened the "Pandora's box"—the coverage conflicts between the two pieces of primary legislation. The inter-ministerial coordination mechanism warranted by the State Council to improve the institutional cooperation can hardly be an effective remedy for such an overt conflict of rules. The fundamental problem of the Chinese public procurement regime, namely the fragmentation of rules and institutional tension as the result of the co-existence of two primary public procurement legislations, remains.

Secondly, it can be argued that these secondary regulations contain provisions that are outside of their authority conferred by the legal base—the *Government Procurement Law* and therefore in breach of the Chinese *Legislation Law*. While these regulations confer obligations without proper legal base, they have failed to answer some key questions left open by the *Government Procurement Law* and supposed to be resolved by the implementing regulations. These include, for example, how to define domestic products and services; how to implement secondary policy; how to calculate the value of a contract in order to deter any evasion of rules through division of contracts; what is the procedure to handle complaints submitted by parties other than the participating supplier.

Thirdly, a number of serious inconsistencies and loopholes as the result of bad

drafting technique can be identified. These inconsistencies will bring more confusion rather than guidance in practice. The fact that provisions in one document or in documents adopted by the same ministry at the same time are inconsistent with each other brings serious doubt on the Chinese government's ability to adapt to GPA rules in the future.

Chapter 4 Supplier Review in Chinese Public Procurement Law

4.1 Overview

As mentioned above in chapters 1, 2 and 3, in China, two primary laws regulating government procurement – the TL and the GPL – coexist. Rules on supplier review can be found in both laws and their respective implementing regulations. Unfortunately, these two sets of rules are not in harmony with each other as further illustrated in the following sections. This may be regarded as the single biggest problem of the Chinese procurement remedy system.

To ensure the enforcement of the TL, the TL relies heavily on administrative measures, rather than a supplier review system (also called “domestic review” or “bid challenge” system) which can be an effective mechanism for securing compliance with government procurement rules, due to its deterrent and corrective effects.¹ This is because that the TL provides in detail that different legal liabilities, mainly disciplinary and administrative sanctions, shall be imposed on those who have infringed procurement rules, such as the procuring entity and suppliers,² but uses merely one Article to deal with supplier review. The TL Article 65 simply states that

¹ See Zhang, X., “Supplier Review as a Mechanism for Securing Compliance with Government Procurement Rules: a Critical Perspective”, (2007) 16 *P.P.L.R.* p325.

² See the TL, Arts. 49-64.

bidders and other parties with interests who consider that the tendering activities are not in conformity with the relevant TL provision shall have the right to lodge an objection with the contracting party or to complain to the relevant administrative supervision department. It did not even indicate the administrative body responsible for dealing with supplier review. Clearly, the TL itself does not set up a formal review system.

The GPL, in contrast, in addition to relying on administrative measures for enforcement of government procurement rules,³ by providing basic rules on review in Articles 51-58, establishes a formal supplier review system which is similar to the review system recommended in the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. In Articles 51-58, the GPL briefly provides for rules on forum for review, standing and procedures as well as remedies available to aggrieved suppliers.

However, because it is not clear from the GPL and the TL whether the GPL's rules on supplier review apply to complaints arising from government procurement of works regulated by the TL, as explained further at 3.3.1 above, the NDRC and other central government departments,⁴ based on the TL Article 65, issued the Measures on the Handling of Complaints on Tendering Proceedings in *Construction Projects*

³ The GPL provides more detailed rules on administrative supervision and legal liabilities than the TL in chapters 7 and 8.

⁴ They are Ministry of Construction, Ministry of Railways, Ministry of Communications, Ministry of Information Industry, Ministry of Water Resources and General Administration of Civil Aviation of China.

(hereafter the “*NDRC Review Measures*”) on 21 June 2004.⁵ This ministerial regulation contains 31 articles, mainly involving general principles of handling complaints, forum for review, procedural rules on filing of complaints and handling of complaints, decision-making and legal liabilities that shall be imposed on the personnel of the procuring entity, the complaining bidder and the personnel of the administrative review body when they act unlawfully.

One month later, the MOF, based on the GPL, adopted the Measures on the Handling of Complaints of the Government Procurement Suppliers (hereafter the “*MOF Review Measures*”) on 11 August 2004.⁶ It has 32 Articles divided into five chapters, concerning general provisions, filing complaints and acceptance, handling of complaints and making decisions, legal liabilities and supplementary provisions.

Recently, based on the TL and the GPL respectively, the draft *Implementing Regulation on the TL* and the draft *Implementing Regulation on the GPL* at the State Council level mentioned above were published respectively in September 2009 and January 2010. These two draft Implementing Regulations both have detailed rules on supplier review.⁷ (However, provisions on supplier review will not be discussed in detail in this chapter, since they are draft and uncertain whether and when they will become effective.)

From the above introduction, we can see that two sets of rules on supplier review

⁵ It was effective on 1 August 2004.

⁶ It came into effect on 11 September 2004.

⁷ See the draft Implementing Regulation to the TL, Arts. 57-61; the draft Implementing Regulation to the GPL, Arts. 64-83.

– *the GPL / the MOF Review Measures* and *the TL / NDRC Review Measures* - have been set up in practice under the two laws and their respective implementing regulations.

The applicable scope of the aforesaid two sets rules is unclear, especially when complaints concern government procurement of works-related goods and services, because of the co-existence of the GPL and the TL and the lack of a clear demarcation between them in coverage. It can be argued that the review rules in the GPL and its implementing regulations shall apply to all complaints arising from government procurement of goods, services and works (including works-related goods and services) through tendering or any other procurement methods because of the following reasons. Firstly, the GPL Article 2 states that it applies to “all government procurement done within China”. Secondly, the GPL and its implementing regulations provide necessary rules on supplier review, whereas the TL does not provide a formal supplier review mechanism. Thirdly, the GPA Article 4 allowing that government procurement of works through tendering is regulated by the TL means only that the TL procedural rules on tendering shall be followed in the above case; it does not mean that complaints arising from government procurement of works through tendering shall be handled under the TL rules on review. Finally, the GPL does not exclude government procurement of works-related goods and services through tendering from its coverage, thus complaints arising from the aforesaid procurement must be handled in accordance with the review rules in the GPL and its implementing regulations.

Another view, however, is that complaints arising from government procurement

of works through tendering, and possibly government procurement of works-related goods and services through tendering, shall be handled under the review rules in the TL and its implementing regulations, rather than the review rules in the GPL and its implementing regulations. This is because, first, government procurement of works through tendering, *as a whole*, has been excluded from the scope of the GPL by virtue of GPL Article 4. Next, although there are no detailed rules on review in the TL itself, necessary rules on review have been supplemented in the implementing regulations. Finally, according to the TL Article 3, not only construction itself but also works-related goods and services are subject to compulsory tendering; thus, as with government procurement of works through tendering, government procurement of works-related goods and services through tendering must be regulated by the TL and accordingly complaints arising from government procurement of works-related goods and services through tendering shall be dealt with under the review rules in the TL and its implementing regulations.

Thus, we can see, the review rules in the GPL and its implementing regulations shall definitely apply when complaints arising from i) government procurement of general goods and services through any procurement method,⁸ ii) government procurement of works *not* through tendering and iii) government procurement of works-related goods and services *not* through tendering. The review rules in the TL

⁸ However, complaints arising from government procurement of mechanical and electrical goods *through international tendering* may be dealt with according to the provisions on challenge contained in the Implementing Measures on International Tendering in Procurement of Mechanical and Electronic Products issued by the Ministry of Commerce on 1 November 2004.

and its implementing regulations usually apply to complaints regarding government procurement of works through tendering. As far as complaints arising from government procurement of works-related goods and services through tendering are concerned, it is unclear whether the GPL and its implementing regulations or the TL and its implementing regulations shall apply.

4.2 Forum for review

It is necessary to point out first that there is no explicit provision in the TL and the GPL and their respective implementing regulations stating that suppliers have the right to initiate a civil litigation directly against the procuring entity. Because of this, in practice, courts often refuse to accept such a case on the ground that the dispute over government procurement activities between the procuring entity and the supplier concerned should be treated as an administrative case and accordingly should be first handled by the competent administrative review body and then be adjudicated by the administrative division of the court under the Administrative Litigation Law (ALL). Therefore, this section will focus on discussing the main channel of review – a tiered review system including procuring entity review (-complaining to the procuring entity itself or its agency), administrative review (-complaining to the competent administrative review body introduced below), administrative reconsideration (-applying to a higher administrative body or other organs empowered by law to reconsider the administrative review body's decision), and/or administrative litigation (-bringing the case before the administrative division of the court for judicial review).

As explained further below, both sets of rules on review establish a tiered review system, involving the aforesaid review stages. As revealed later, the two sets of rules are different sometimes. For example, as explained below, under the review rules in the GPL and the MOF Review Measures, entity review is compulsory; whereas it is optional under the review rules in the TL and the NDRC Review Measures. Also, different government departments are entrusted with administrative review tasks under the GPL and the MOF Review Measures and the TL and the NDRC Review Measures respectively.

4.2.1 Procuring Entity Review

The GPL provides in Articles 52 and 54 that an aggrieved supplier *may* submit a written challenge to the procuring entity or its procuring agency within the time limit. Furthermore, Article 55 states, “[W]here the supplier that has made a challenge is not satisfied with the procuring entity or its agent’s reply, or the latter fails to make a reply within the specified time limit,” the supplier may lodge a complaint with the competent financial department. This arguably means that the person who has the right to seek an administrative review is only *the supplier who has submitted a challenge to the procuring entity*, and procuring entity review is a compulsory stage before administrative review. A *compulsory* procuring entity review was further made clear in the *MOF Review Measures* implementing the GPL, in which Article 7 clearly states that an aggrieved supplier “*shall*” “*first*” submit a challenge to the procuring entity or its agent. If it is unsatisfied with the response of the procuring entity or of the

agency or no response is given within the prescribed time limit, the supplier may file a complaint with the financial department at the same level - the administrative review body discussed further below.

As noted earlier, the TL Article 65 states that a bidder or other interested party has the right to lodge an objection with the procuring entity *or* to complain to the relevant administrative supervision department. This arguably means that the supplier concerned can choose to complain to *either* the procuring entity itself *or* the competent administrative review body directly. Further, in the *NDRC Review Measures* mentioned earlier, submitting a complaint to the procuring entity is not even mentioned. Therefore, procuring entity review is not a compulsory prerequisite, but optional, for the supplier to seek an administrative review under the TL / the *NDRC Review Measures*.

4.2.2 Administrative Review

In accordance with the GPL Article 55 cited above, suppliers who are unsatisfied with the reply of the procuring entity or its agent or receive no reply within the prescribed time limit may seek further administrative review from the administrative department supervising government procurement. Furthermore, the GPL explicitly designates the financial departments at all levels as the competent authority for supervising government procurement and handling procurement complaints in Article 13. This indicates that the financial departments are empowered to handle procurement related complaints. Further division of responsibilities between central and local financial

departments is provided in the MOF Review Measures Article 3. According to Article 3, the MOF is responsible for handling suppliers' complaints in government procurement activities under the central budget projects; and the financial departments of the local governments above the county level are responsible for dealing with suppliers' complaints in government procurement activities under the budget projects at the same level.

However, different government departments are entrusted with the task of administrative review under the TL and its implementing regulations. As introduced earlier, the TL Article 65 states that any bidder and other interested person may complain to "*the relevant administrative supervision department*". This clearly indicates that suppliers are given the right to seek administrative review; however, it was not made clear in this Article which administrative supervision department is responsible for administrative review. This issue was clarified in the "Opinions on the Division of Duties and Obligations among Relevant Organs of the State Council in Conducting Administrative Supervision upon Tendering Activities" issued by the State Council on 3 May 2000. The "Opinions", based on the structure of the administrative system, authorise various government departments to supervise tendering activities and handle complaints associated with procurement by entities under their control respectively. Based on the structure of the administrative system, the duty of administrative supervision over tendering activities is allocated to different departments, including Ministry of Water Resource, Ministry of Communication, Ministry of Railways, Administration of Civil Aviation and Ministry of Information

Industry. They are empowered to supervise tendering activities conducted in their respective administrative territory and handle complaints occurred in the sector they are in charge of. According to the above division of supervisory duties, the Ministry of Railways, for example, should be responsible for dealing with complaints about tendering activities conducted in construction of railways. In addition, the *Opinions* provide that complaints about tendering activities, in house construction and auxiliary installation projects should be handled by the Ministry of Construction, and that the Ministry of Commerce (MOC) is the supervisory body responsible for dealing with complaints about tendering activities in government procurement of imported mechanical and electrical equipments. The NDRC is entrusted to supervise tendering activities in major national construction projects. Such a decentralised system for review is maintained in the NDRC Review Measures Article 4.

4.2.3 Administrative Reconsideration

According to the GPL Article 58 and the MOF Review Measures Article 24, if the complaining supplier disagrees with the competent financial department's decision or the latter failed to make a decision in due time, it may further apply for administrative reconsideration or bring an administrative litigation before the court. The possibility of applying for administrative reconsideration or initiating administrative litigation was not mentioned in the TL itself; however, it was clarified in Article 25 of the NDRC Review Measures implementing the TL that parties concerned may apply for administrative reconsideration or bring an administrative lawsuit if they are unhappy

with the relevant administrative review body's decision handling its complaint or receive no decision in due time. Thus, under both sets of rules, the complainant unsatisfied with the decision of the administrative review body concerned can apply for further administrative reconsideration.

Administrative reconsideration is a system of administrative remedies, which is undertaken by a higher administrative body or other organs empowered by law in China, at the request of the person who believes that his lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ, in order to reconsider under legal procedures whether the specific administrative act is legal and appropriate and make a decision.⁹ Its main purpose is to protect the lawful rights and interests of the aggrieved parties by reviewing whether administrative organs usually at lower level exercise their functions and powers in accordance with law. Under the Administrative Reconsideration Law (ARL) Article 10, in the administrative reconsideration stage the respondent of the application should be the administrative body that undertook the specific administrative act, i.e. the administrative review body handling government procurement complaints, rather than the procuring entity. This means that parties to the administrative reconsideration procedure are no longer the supplier and the procuring entity but the supplier and the administrative review body handling the complaint. Thus, the administrative reconsideration organ mainly deals with the supplier's complaint against the

⁹ See further Ying, S., (ed.) *Administrative Law and Administrative Litigation Law*, (Beijing: Law Press, 2005), p416.

administrative review body's decision on the dispute between the supplier and the procuring entity, rather than the original dispute itself.

4.2.4 Administrative Litigation

Administrative litigation may be raised by the complaining supplier after receiving the administrative review body's decision or in the case of no decision, as an alternative to applying for administrative reconsideration, according to the GPL Article 58 and Article 25 of the NDRC Review Measures implementing the TL, as introduced above. Alternatively, it may be initiated after the administrative reconsideration body makes its decision if the complaining supplier is unsatisfied with the administrative reconsideration decision, according to the ARL Article 5. In China, an administrative lawsuit is handled by administrative division of the court, according to Article 3 of the *Administrative Litigation Law* (ALL).

However, it should be noted that administrative litigation is “a kind of judicial control over the exercise of administrative power by the executive branch of the government.”¹⁰ Thus, in the above administrative litigation instituted by the complaining supplier, the defendant is the administrative organ that undertook the specific administrative act – the financial department concerned or other administrative bodies handling complaints about tendering activities – or the administrative reconsideration organ,¹¹ rather than the procuring entity. Accordingly,

¹⁰ See Lin, F., “Administrative Law” in Wang, C. & Zhang, X., (eds.) *Introduction to Chinese Law* (Hong Kong: Sweet & Maxwell Asia, 1997), p87.

¹¹ See the Administrative Litigation Law Article 25.

in administrative litigation, the competent court examines only whether the administrative review body properly handles the supplier's complaint against the procuring entity or whether the administrative reconsideration organ properly deals with the supplier's complaint against the administrative review body's decision; it has no power to deal with the original dispute between the supplier and the procuring entity.¹²

It is worth noting that, according to the ALL Article 58, the supplier refused to accept the judgement of first instance has the right to file an appeal with the court at the next higher level for the final judgment.

4.2.5 Summary and Comments

As shown above, a tiered review system was established in both sets of rules on review. However, it should be noted that under the GPL and the MOF Review Measures, procuring entity review is a compulsory stage prior to administrative review; whereas under the TL and the NDRC Review Measures, currently, such a review stage is optional, which makes it possible for the aggrieved suppliers to seek administrative review directly.

Administrative review is an important review stage in China; however, as revealed earlier, there is no unified administrative review body handling all complaints related to government procurement activities. Rather, the financial departments and many other relevant administrative departments are involved in

¹² See Cheung, A.K.C., "China's Administrative Litigation Law" (2005) *AUT P.L.* p549.

handling complaints. Further, the division of duty of dispute resolution among the financial departments and other relevant administrative departments is unclear because the applicable scope of the two sets of rules on review is not clear enough. Because of this, confusion on which administrative body should be responsible for handling the case when a specific complaint is filed has been easily caused in practice.¹³ This has happened in the leading Chinese case on government procurement - the two *Modern Wo'er* cases.¹⁴ Furthermore, the independence of the administrative review body cannot be guaranteed, since the administrative review body, especially those government departments entrusted with administrative review tasks in the implementing regulation implementing the TL, may have close relationship with the procuring entity or its agency.

The review process in China can be very lengthy because i) a sequential tiered review system introduced above is adopted and ii) the court and the administrative reconsideration organ have no power to handle the complaint on procurement process between the supplier and the procuring entity but merely examine whether the

¹³ To avoid conflict in jurisdiction between MOF and the other government departments responsible for handling procurement complaints, Article 72 of the draft Implementing Regulation on the GPL provides that the financial department concerned may terminate the review process if the complaint has been accepted by any other administrative department for review. Also, to avoid conflict in jurisdiction among other government departments except MOF, Article 61 of the draft Implementing Regulation on the GPL stipulates that the administrative supervisory department receiving the complaint first is responsible for handling the complaint in the case that the complaint is brought before two or more administrative supervisory departments.

¹⁴ *Beijing Modern Wo'er Trading Co.Ltd. v. Ministry of Finance of the People's Republic of China*, No.1 Intermediate People's Court of Beijing Municipality, First Level Administration Division Decisions No. 432 and 433 (2005). See further Mitterhoff, D., "Beijing Court Orders Ministry of Finance to Rule on Supplier's Complaints, But Skirts Broader Issues of Schism in China's Procurement Supervision" (2006) December, Vol.3 No.12 *International Government Contractor* p98.

administrative review body or administrative reconsideration organ properly handles the supplier's complaint, as noted above.

4.3 Standing

The issue of who has the right to review will be considered by discussing who can raise a complaint to the administrative review body – the financial department or other relevant administrative bodies – as complaining to the administrative review body is the precondition to seek further administrative reconsideration or judicial review under both sets of rules on review, as noted above. As revealed below, actual suppliers are given the right to review under the both sets of rules on review; however, whether potential suppliers, subcontractors and others (such as the general public) have the right to review depends on which set of rules on review will apply, as provisions on this issue are different in the two sets of rules.

4.3.1 Provision on standing in the GPL / the MOF Review Measures

As explained below, under the GPL and the MOF Review Measures, it seems that only actual suppliers have the right to review. The GPL Article 55 and the *MOF Review Measures* Article 7 give standing merely to “suppliers” to challenge against the procuring entity. This clearly excludes subcontractors and others such as the general public from the ambit of complaints, simply because they are not “suppliers”. According to the GPL Article 21, “suppliers” refer to the legal persons, other organisations or natural persons that provide goods, works or services to the procuring

entity.” It is unclear from this definition whether suppliers referred to in the GPL include potential suppliers and subcontractors. However, the *MOF Review Measures* Article 10 explicitly requires that an eligible complaining supplier must, first of all, be a supplier who *has participated* in the government procurement activity in question. Further, the MOF reinforced this point in the guideline issued to its subordinates,¹⁵ requiring that the complaint made by a complainant that did not participate in the disputed government procurement activities shall be deemed invalid and dismissed. This arguably means that, under the GPL and the MOF Review Measures, only actual suppliers have the standing to seek review from the financial department; potential suppliers have no right to make a complaint.

4.3.2 Provision on standing in the TL / the NDRC Review Measures

In contrast, the TL and the NDRC Review Measures give the right to review to not only actual suppliers but also potential suppliers, and possibly subcontractors and others, as analysed below. As noted earlier, the TL Article 65 provides that “bidders and other parties with interests” shall have the right to complain to the relevant administrative supervision department if they believe that tendering activities are not in conformity with the law. As analysed below, this implies that not only actual suppliers but also potential suppliers and subcontractors and even others have the right to review, since the TL also gives “other parties with interests” right to review. The *NDRC Review Measures* Article 3 further explains that “other parties with

¹⁵ See *Notice of the MOF on Strengthening the Examination of Acceptance of Suppliers' Complaints*, Treasury Department of the MOF [2007] No.1.

interests” refer to legal persons, other organisations and individuals, except the bidders, who have a direct or indirect interest in the project conducted through tendering or in the tendering activities. This definition of “other parties with interests” is a broad one since both “direct” and “indirect” interest can be taken into account. Therefore, arguably, potential suppliers can be regarded as “other parties with interests” with the standing to seek review, since they have a direct interest in the tendering activities which might have been harmed by the procuring entity’s unlawful acts such as discriminatory specifications.¹⁶ In addition, arguably, by way of contracting with the main supplier, subcontractors have an “indirect interest” in the process of government procurement of works through tendering; thus, they shall have the right to complain to the competent administrative supervision body against the procuring entity. Similarly, it may be argued that others such as members of the public can have the right to review, as the public interest would be harmed if tendering activities in the disputed project were irregular and thus they had an indirect interest in the project.

4.3.3 Summary and Comments

It was seen from the above that the scope of complainants in the TL and NDRC Review Measures is broader than that of the GPL and MOF Review Measures. The former clearly gives not only actual suppliers but also potential suppliers standing to make a complaint, and it can be argued that the former extends the right to review to

¹⁶ See discussion on the issue of “other parties with interests”, available at www.machineinfo.com.cn/e_magzine; Cao, fn.5 above, p273.

subcontractors and possibly others. However, the latter seems to give the right to review merely to actual suppliers. Such different provisions in the two sets of rules may cause conflicts in practice and result in unequal protection to potential suppliers and subcontractors.

4.4 Time limits for initiating and completing the review process

There are detailed time limits for almost every review stage in China; however, certain time limits in the two sets of rules on review are different, as explained below.

4.4.1 Time limits for procuring entity review

As procuring entity review is compulsory under the GPL, as introduced earlier, the GPL further provides time limits for it. The GPL Articles 52 and 54 state that a supplier may, within 7 working days, make a challenge in writing to the procuring entity or its agent. Further, Article 53 provides that the procuring entity or its agent shall, within 7 days from the date of receipt, make a reply and notify the supplier in writing.

Since procuring entity review is not a compulsory step for review under the TL Article 65, the TL provides no time limits for procuring entity review.

4.4.2 Time limits for administrative review

Under the GPL Article 55 and the *MOF Review Measures* Article 7, the supplier unhappy with the procuring entity's reply or receiving no reply may complain further to the competent financial department within *15 working days* following the

expiration of the time limit for responding. Further, the *MOF Review Measures* Article 11 requires the financial department to examine whether the complaint has satisfied conditions for initiating complaints¹⁷ within 5 *working days* after receiving it. As to the time limit for completing the administrative review process, the GPL Article 56 and the *MOF Review Measures* Article 20 require the financial departments to make a decision within 30 *working days* after receiving the complaint. There is no provision on the extension of this time limit, which means complaints regarding government procurement of general goods and services must be handled within the above time limit.

The time limits for administrative review is not mentioned in the TL itself but is clarified in the *NDRC Review Measures* implementing the TL. According to the *NDRC Review Measures* Article 7, the complainant shall raise a written complaint within 10 *days* after it knows or should have known that its rights and interests are harmed. This is shorter than the time limit for filing complaints provided by the GPL. In addition, the time limit for examining complaints specified in the *NDRC Review Measures* Article 11 is shorter, according to which the administrative review body shall check up the complaint within 5 *days* after receiving it, to decide whether or not to accept the complaint. Regarding the time limit for completing the administrative review process, the *NDRC Review Measures* Article 21 provides that the administrative review body shall make a decision within 30 *days* starting from the day when it receives the complaint; if the review body is unable to make a decision within

¹⁷ See Article 10.

the above time limit because circumstances are complex, the aforesaid time limit may be extended after approval by the head of the administrative review body. This indicates that the time limit for completing administrative review specified in the *NDRC Review Measures* is shorter than that of the GPL if the case is not complex and is longer than that of the GPL if the case is complicated.

4.4.3 Time limits for administrative reconsideration

As noted above at 4.2.3, under both sets of rules on review, the supplier unsatisfied with the administrative review body's decision or receiving no reply may apply for administrative reconsideration. The time limits for making an application for administrative reconsideration and for completing this process are provided in the ARL.

According to the ARL Article 9, the supplier unsatisfied with the decision of the administrative review body may apply for an administrative reconsideration within 60 days after receiving the decision. The ARL Article 17 further requires the administrative reconsideration organ to examine the application within 5 working days after receiving it, to decide whether or not to accept it.

The ARL Article 31 stipulates that administrative reconsideration organs shall make an administrative reconsideration decision within 60 days from the day of acceptance of the application, unless otherwise provided. If circumstances are complex and the administrative reconsideration organ is unable to make a decision within the aforesaid time limit, the responsible person of the administrative reconsideration organ may

approve to give extra 30 days at the most to make a decision. This implies that the administrative reconsideration organ may spend 90 days maximum to make its decision.

4.4.4 Time limit for administrative litigation

As introduced earlier in section 4.2.4, administrative litigation may be invoked when the supplier who is unhappy with the administrative review body's decision or is receiving no reply chooses to initiate an administrative litigation, instead of applying for an administrative reconsideration; or when the supplier refuses to accept the administrative reconsideration decision and decides to seek further judicial review.

In the former case, according to the ALL Article 39, the supplier shall initiate administrative proceedings within 3 months from the day it receives the administrative review body's decision. This time limit is much longer than the time limit for applying for administrative reconsideration. This makes it possible for the supplier who failed to apply for an administrative reconsideration within 60 days to bring an administrative lawsuit against the administrative review body's decision. In the latter case where the supplier has applied for an administrative reconsideration first but refuses to accept the administrative reconsideration decision, according to the ALL Article 38, it may initiate administrative proceedings within 15 days from the day of the receipt of the decision, or within 15 days after the expiry of the time limit for making a reconsideration decision in the case that the administrative reconsideration organ fails to make a decision within the specified period. The court,

under Article 42 must decide whether to accept or reject the case within 7 days after receiving the statement of complaint.

As to the time limit for completing administrative litigation process, the ALL Article 57 stipulates that the court shall make a judgment of first instance within 3 months from the day of docketing the case. After approved by the higher court, this time limit may be extended in special circumstances. Since the first instance court's judgment may be appealed to the court at the next higher level, Article 58 further provides for detailed time limits for appellant procedures; under which, if a party, the supplier or the administrative review body or the administrative reconsideration organ refuses to accept the first instance court's judgment, it has the right to file an appeal within 15 days of the serving of the written judgment.¹⁸ Article 60 requires the appellant court to make the final judgment within 2 months from the day of receiving the appeal, unless it is approved that the time limit can be extended in special circumstances. This provision is ambiguous, since it does not further explain what cases are complicated and how long the time limit can be extended.

4.4.5 Summary and comments

As shown above, unlike the GPL and the MOF Review Measures providing detailed time limits for procuring entity review, the TL and the NDRC Review Measures offer no time limits for such a review stage. As far as administrative review is concerned, the two sets of rules on review provide different time limits for bringing a complaint

¹⁸ Under this Article, the time limit for appealing against the first instance court's ruling rejecting to accept the supplier's complaint is 10 days.

and for completing the administrative review process. Such differences may cause confusion to the supplier concerned, since it may be unclear which law and implementing regulation should apply to its particular case. In addition, different administrative review bodies – the financial departments and other government departments concerned – are given different time limits to handle different procurement complaints. Furthermore, it should be noted that in certain review stages, such as administrative reconsideration and administrative litigation, time limits for completing the review process can be extended in special circumstances; however, it is not made clear in the law what constitutes “special circumstances” and how long the extension can be. The consequence is that in certain cases (for example, in the *Modern Wo’er* cases), the supplier may have to wait for an extremely long time for the judgment.

4.5 Available Remedies

Suspension, setting aside and damages are the main remedies available to the aggrieved supplier in dealing with procurement complaints. Whether such remedies are available to the aggrieved supplier in both sets of rules on review is discussed below. As shown above, both sets of rules establish a tiered review system, including procuring entity review, administrative review, administrative reconsideration and judicial review. However, as will be revealed, these three remedies are not available in every review stage, but mainly available in the stage of administrative review. This is because, neither the TL nor the GPL and their implementing regulations make clear

what kinds of remedies should be available to aggrieved suppliers in procuring entity review. Also, as introduced in section 4.2.3 and 4.2.4, in stages of administrative reconsideration and administrative litigation, the administrative reconsideration organ and the court are responsible for handling the supplier's complaint against the decision of the administrative review body or of the administrative reconsideration organ, rather than the dispute between the procuring entity and the supplier. Thus, they generally have no power to suspend the procurement process, setting aside the procuring entity's unlawful decisions or order the procuring entity to pay compensation to the aggrieved supplier.¹⁹

4.5.1 Suspension

As analysed below, currently in the administrative review stage, the remedy of suspension is made available to the aggrieved supplier under the GPL and the MOF Review Measures, however, such a remedy is not available under the TL and the NDRC Review Measures.

The GPL Article 57 clearly states that “[u]nder specific circumstances, the department in charge of supervision over government procurement may, during the period in which it is dealing with the complaint, require in writing the procuring entity to suspend its procurement activities, provided that the period of suspension does not

¹⁹ However, as the administrative reconsideration organ is empowered to alter the administrative review body's specific administrative act in the ARL Article 28(3), it may be argued that the administrative reconsideration organ can make a new decision on the supplier's complaint to substitute the administrative review body's decision, under the law and regulation applying to the complaint. For example, it might set aside the procuring entity's illegal decision under the MOF Review Measures Arts 18 and 19.

exceed a maximum of 30 days.” The MOF Review Measures Article 22 further requires that the procuring entity shall immediately suspend its purchase upon receiving the suspension notice and shall refrain from resuming procuring activities prior to the expiry or cancellation of the notice. These provisions clearly show that the financial departments in charge of handling procurement disputes are empowered to suspend the award process in certain circumstances, and the remedy of suspension is not automatic but is decided by the financial department. Unfortunately, the GPL and the MOF Review Measures failed to indicate detailed factors that should be considered in deciding whether to order a suspension. Thus whether to suspend the procurement process at the stage of administrative review is at the discretion of the financial department concerned.

In contrast, the TL and the NDRC Review Measures offer no provision on suspension. Consequently, it is impossible for the aggrieved supplier to ask the administrative review body concerned to order a suspension when its complaint concerns government procurement activities possibly covered by the TL, for example, complaints arising from government procurement of works through tendering.

4.5.2 Setting aside

As analysed below, under both sets of rules, the administrative review body can set aside the procuring entity’s illegal decisions, however, particular attention should be paid to concluded contracts, since there are different rules for them in the two sets of rules. Such contracts can be annulled under the GPL and the MOF Review Measures;

while under the TL and the NDRC Review Measure, they cannot be set aside.

The GPL Article 73(2) clearly provides that concluded contracts can be annulled provided they have not been performed. The *MOF Review Measures* provides more detailed provisions on the remedy of setting aside. Article 18 (2) and (3) state that in the case that the procurement documents show obvious preference or discrimination and have resulted in or are likely to cause damage to lawful rights and interests of the complainant or other suppliers, if the procurement activity has already been completed but the contract has not been concluded, the financial department shall declare the procurement activities illegal and order the procuring entity to recommence procurement. If the procurement activity has already been completed and the contract has been concluded, the financial department shall declare the procurement activity illegal and order the procuring entity to bear the corresponding compensation liability according to the relevant law. Further, Article 19(1) and (2) provide that if the financial department, after examination, finds that the procurement documents or process has affected or may affect the award decision, or there is any illegal act in the process of bid award or transaction, in the case that the procurement contract has not been concluded, the financial department shall declare the whole or part of procurement illegal under different circumstances and order the procuring entity to carry out a new procurement activity. If the contract has been signed but has not been performed yet, the financial department shall order the annulment of the contract and order the procuring entity to carry out a new procurement activity.

Article 18 and Article 19 are not clear enough and they are overlapping so far as

defective procurement documents are concerned. These provisions seem to mean that setting aside the procuring entity's unlawful decision shall be granted in the following two cases, if the contract has not been signed: first, when the procurement documents are defective, which has caused or may cause loss to the complaining supplier; second, when the defective procurement documents or irregular procurement process has affected or may affect the award of the contract, or there is an illegal act in the process of tendering or transaction. As to concluded contracts, under Article 18(3) and Article 19(2) of the *MOF Review Measures*, the financial department can annul them, provided they have not been performed. However, it is unclear when a contract will be deemed as performed.

In contrast, concluded contracts arguably cannot be annulled under the TL, as explained below. The NDRC Review Measures do not directly provide what kinds of remedies are available to the aggrieved supplier once illegal activity is found in tendering activities, but merely state that the administrative review department shall make a decision under the relevant TL provisions. According to the relevant provisions of the TL (Articles 52, 55 and 57), the procuring entity's award decision shall be *ineffective* when the determination of the winning bid is affected by certain breaches (for example, the procuring entity discloses the reserve price to some bidders or negotiates with bidders on substantive matters such as the tendering price and tendering plan). This means that the procuring entity's unlawful award decision can be set aside. However, as shown above, the relevant TL provisions merely state that the award decision shall be *ineffective*; the TL does not clearly provide that concluded

contracts can be *annulled* by the administrative review body, if illegal activity is found in the process of tendering.²⁰ Thus, arguably, annulment of concluded contracts is not allowed under the TL.

4.5.3 Damages

As revealed below, there are provisions on damages in the GPL and the MOF Review Measures, although they are quite simple and vague, providing no clear rules on detailed conditions for damages and the extent of compensation. There is no provision in the TL requiring *the procuring entity* to bear compensation liability, and it does not mention further rules on conditions for damages and the extent of compensation.

First, both the GPL and the *MOF Review Measures* clearly provide for the damages remedy. The GPL Article 73(3) states if the procuring entity or its agency's illegal behavior (such as negotiating with certain bidders in the procurement process, treating suppliers differentially and colluding with certain suppliers) have affected or may affect the results of selecting the winning supplier, in the case that the contract has been performed and has caused loss to the supplier, the procuring entity or its agency shall bear the responsibility to pay compensation. Similarly, the *MOF Review Measures* Article 18(3) provides if the procurement documents show obvious preference or discrimination and have caused or may cause loss to the complainant, in the case that the contract has been concluded, the financial department shall determine

²⁰ Cao, F., Colling, J. and Trepte, P., "China's Accession to the Government Procurement Agreement and Opportunities for Domestic Reform: A Study in the light of EU Experience", available at www.euchinawto.org, p93. [visited on 20 May 2010].

the procurement activity illegal and order the procuring entity to bear compensation liability. Further, Article 19(3) states that if the financial department determines that the result of selecting the winning supplier has been affected by defective procurement documents or irregular procurement proceedings and the government procurement contract has already been performed, the financial department shall declare the procurement activity illegal; and if loss has been caused to the complainant, the procuring entity or its agency shall be ordered to bear the compensation liability. These provisions indicate that the administrative review body should award damages to the aggrieved supplier if an unlawful procurement contract has been signed or performed.

Although not expressly stated, certain conditions can be seen from the above provisions for awarding compensation, including that i) the procuring entity has committed violations; ii) the complaining supplier has suffered or may suffer losses; and iii) the supplier's loss is caused by the procuring entity's violation. However, it is unclear from the above provisions, for the awarding of damages, whether the supplier must prove its chance to win the contract and whether the violation made by the procuring entity or its agency must be serious. In addition, it is unclear from these provisions whether compensation is limited to tender or protest only or include lost profits.

Second, there is no provision in the TL and the NDRC Review Measures requiring *the procuring entity* to bear compensation liability. The TL Article 50 mentions the damages remedy, which states that *the procuring agency* shall be liable to pay

compensation if it discloses details or materials which related to tendering and are subject to a confidentiality requirement or it colludes with the procuring entity or a bidder, and has caused losses to others. As it is not made clear in the TL and the NDRC Review Measures that the procuring entity must pay compensation to the aggrieved supplier, it may be impossible for the supplier to claim compensation from the procuring entity.

4.5.4 Summary and Comments

As was seen from the above, remedies available in China are not effective enough. Firstly, as far as the remedy of suspension is concerned, this remedy is currently only available in the administrative review stage when the financial departments handle complaints regulated by the GPL and the MOF Review Measures; it is not available in procuring entity review, the administrative review stage when the TL and the *NDRC Review Measures* apply to complaints, administrative reconsideration and administrative litigation. Since the review process can be quite lengthy in China, as noted earlier, it is common in practice that the disputed contract has been signed or even performed after the final review decision is made; consequently, the aggrieved supplier cannot receive effective remedies.

Secondly, as to the remedy of setting aside, under the GPL and the MOF Review Measures, it can be used to annul a concluded contract provided they are not performed; while under the TL, annulment of concluded contracts may be not allowed. This inconsistency can result in the following situation: if the supplier's complaint

concerns government procurement of general goods and services definitely regulated by the GPL and the MOF Review Measures, the competent financial department can annul a concluded contract which has not been performed; and thus the supplier can obtain an opportunity to compete for the disputed contract. Nevertheless, if the complaint concerns government procurement of works through tendering possibly covered by the TL, once the contract has been signed, even if it has not been performed, it cannot be annulled; and thus it is impossible for the supplier to have an opportunity to participate in the competition.

Finally, the damages remedy is actually only available to certain suppliers. As discussed above, according to the GPL and the MOF Review Measures, the aggrieved can claim for damages from the procuring entity if the irregular procurement contract has been performed and has caused losses to it. However, there is no provision in the TL and the NDRC Review Measures requiring that *the procuring entity* bears compensation liability in the case that it violates procurement rules and has caused losses to the supplier. This can result in inconsistency in practice. That is to say, it is impossible for the complaining supplier to apply for the damages remedy if its complaint concerns tendering activities in procuring works possibly regulated by the TL. However, if its complaint concerns government procurement of general goods and services definitely governed by the GPL, it would be able to apply for this remedy. In addition, as the provisions on damages are not detailed and clear enough in the GPL and the MOF Review Measures, it is difficult for the supplier to predict whether it is hard to claim damages and how much compensation they are likely to be granted.

4.6 Conclusions

From the above discussion, we can see that China has established its domestic review system and has provided for basic rules on supplier review. However, it is hard to say that the current Chinese supplier review system is well-designed and effective because of the following problems that exist in the current system. First, there is no unified supplier review system applying to all complaints concerning government procurement process, and the existence of the two sets of rules on review, whose applicable scope is uncertain, has caused many confusions and resulted in inconsistency in practice. Next, many government departments are involved in handling procurement complaints and there is no clear demarcation line in their jurisdictions over the procurement complaints and the independence of the review bodies are not guaranteed sometimes. This makes it difficult for the aggrieved supplier to ascertain to which administrative department it should file its complaint especially when its complaint concerns government procurement of works-related goods and services through tendering, since several government departments may all have jurisdiction. In addition, government departments concerned may evade their responsibility of handling suppliers' complaints by arguing that the other government department has a duty to deal with the complaint.²¹ Then, because a sequential tiered review system is used in the GPL and the MOF Review Measures and the court and the administrative reconsideration organ cannot deal with the supplier's complaint

²¹ This has happened in the *Modern Wo'er* cases, see fn. 14 above.

against the procuring entity or its agency and thus have no power to order effective remedies to the supplier in stages of administrative reconsideration and administrative litigation, the current review system is quite rigid, time-consuming and ineffective. Fourth, under the GPL and the MOF Review Measures, unlike actual suppliers, potential suppliers and subcontractors may have no right to review and consequently receive no effective protection. Fifth, the time limits for bringing and completing the administrative review process are different in the two sets of rules, which may confuse the complaining supplier. Finally, under the current supplier review system, the review process can be very lengthy; however, suspension of the award process is merely available in the administrative review stage when the GPL and the MOF Review Measures apply, this may result in the situation that the contract has been performed before the complaint is handled. In addition, provisions on available remedies such as damages are unclear and incomplete, which makes it difficult for suppliers to obtain sufficient remedies. Therefore, to make the Chinese supplier review system more effective, certain reforms are needed.

Chapter 5 Conclusion

Public procurement has developed in China in the wave of economic reform towards market economy during the last fifteen years and made significant progress in the context of legal framework in the past few years. The modern concept of public procurement has been primarily accepted and new objectives such as efficiency, value for money gained more and more momentum than old consideration of administrative convenience. Most, if not all, aspects of public procurement have been covered by two national laws on bidding activities and government procurement, numerous ministerial and local legislation. A legal framework on public procurement is clearly emerging.

However, the development of public procurement regime has been driven mainly by administrative organs in a piecemeal manner. The fundamental problem of Chinese public procurement regime is arguably the fragmentation of rules and institutional tension as the result of the co-existence of two pieces of primary public procurement legislation. It could be argued that the imminent task is to seek the harmonisation of existing overlapped legal rules and their relevant institutional framework.

Based on the above analysis, the following distinctive features of the development of China's public procurement regime can be concluded:

5.1 Distinctive Starting Points

As revealed above, the initiation of tendering system and relevant regulation was closely associated with the “ideological liberalization of competition” and the reform

of government administration regarding economic activities. It could be argued that applying tendering to construction projects of state enterprises served dual objectives to deter bureaucratic interference and managerial abuse although only the latter has been suggested by commentators.¹ At the same time, it was rightly pointed out that tendering in the import of machinery and electrical equipments served primarily as a “trade barrier” since domestic tendering in search for qualified domestic substitution was required to be conducted first.² Fighting corruption became the major driving force in late 1990s after several serious construction accidents although without carefully designed and coherent rules, qualified and up-right civil servants, effective challenge, supervision and enforcement system, simply relying on the form or “flag” of tendering or public procurement to fight against corruption is just a big illusion.

Even the new wave of government procurement regulations initiated by MOF and finance departments in regional level since mid-1990s has been confined to be part of government budgetary reform and *Budget Law* was used as the legal base of MOF Provisional Measures.³ Nonetheless, with public procurement having not been mentioned in any tendering regulations, if development of tendering regulations agreed to be the first step of China’s public procurement, it could be argued that the starting point and driving force thereof is quite different from that of western countries. The main feature of China’s economic reform- gradualism and trial without

¹ Tian, Jingbin, ‘Public Procurement in China: The Way Forward’(2001)10 *Public Procurement Law Review* 207, at 208.

² *Ibid.*

³ Article 1 of MOF *Provisional Measures on the Administration of Government Procurement*

destination- also manifested in the development of public procurement regime especially in the initial stage.

5.2 Bureaucrats-led Legislative Process Featured with “fight under the name of the law” and “deliberate ambiguity”

Since the initiation of tendering system in mid-1980s, hundreds of regulatory documents including two national laws, numerous ministerial regulations and provincial or sub-provincial legislations have been promulgated. Competition, consolidation and coordination can all be identified in this dramatic process. Although their provisions vary hugely, these regulations do have one thing in common: government administrative organs, instead of national or regional legislature, have been the decisive driving force behind the move throughout the process of initiation, draft, discussion, promulgation and implementation.⁴As evident from above analysis, operating under no proper check and balance from democratic institutional framework and limited pressure on accountability from public and media, these government administrative organs have naturally put consideration of administrative convenience, protection of sector or regional interests and affirmation or expansion of their own “administrative territory” above basic requirement of probity, certainty and coherence of legal rules in regulating public procurement as well as other legislative processes. This unique feature of China’s bureaucrats-led legislative process has been lively

⁴ Some may argue that GPL is a exception since the draft group of GPL was led by Financial and Economic Committee of NPC instead of government ministries. However, it should be pointed out that leading members of that committee are retired former Ministers from MOF and SDPC.

summarized as “battle of regulation” and “fight under the name of the law”, which was identified as the main target of *Legislation Law* enacted 15 March 2000 and entered into force 1 July 2000.⁵ However, it could be argued that without democratic elected and public accountable legislatures, by only laying down the hierarchy and formation of legislations, the “battle of regulation” could not be eliminated completely. The saga between *Tendering Law* and GPL mostly occurred post- *Legislation Law* and the continuous battle on laying down qualification of procuring agencies and designation of media for publication has manifested its insufficiency.

Ambiguity of provisions is another striking common feature of regulations manufactured in the bureaucrats-led legislative process, which is due more to intentional manipulation than poor drafting techniques. Public procurement rules have provided some classic examples. Article 66 of *Tendering Law* provides that in some *special circumstances*, procuring entity can be exempted from compulsory tendering according to *relevant national regulations*, but the exhaustive list of these *special circumstances* and *relevant national regulations* haven’t been provided therein. Regarding qualifications of suppliers, GPL provides “*other conditions specified by*

⁵ State Council, *Notice on the Implementation of Legislative Law*, No. 11, 8 June 2000, in Chinese, at para. 2, 5. One important contribution *legislation Law* has made is the provision of the hierarchy of regulatory documents in Chinese legal system with the Constitution at the top and national laws enacted by the NPC and its Standing Committee, Implementing Ordinances and Administrative Regulations enacted by the State Council, Ministerial Orders and Local Legislation following. Significant legislative power has been granted to regional People’s Congress. Article 82 provides that the Local Legislation enacted by regional People’s Congress has the same legal force as the Ministerial Order. Furthermore, Article 86 provides when a Local Legislation is in conflict with a Ministerial Order, the State Council can uphold the Local Legislation in question within its own discretion but can only uphold the Ministerial Order after a ruling sort from the Standing Committee of the NPC.

law and administrative regulation”; regarding procuring methods, GPL provides “*other* procuring methods confirmed by the administrative organ of public procurement in the State Council”.⁶ Though flexibility is also import to legislations with evolutionary nature, it could be argued that such extensive use of “other” without further specification has certainly destroyed the balance between legal certainty and flexibility. Since the ambiguous provisions left unexplained in the law are most likely to be substantial ones with great practical significance and some have been clarified only by subsequent implementing rules adopted by relevant administrative organs, it could be argued that the technique embraced by bureaucrats leading the legislative process is “deliberate ambiguity” with a aim to retain as much discretion on the hand of administrative organs as possible.

5.3 Influence of International Institutions

It was noted that the development China’s public procurement regime emerged when public procurement gained more and more attention from international trade, financial and legal institutions such as GATT, World Bank, Asia Development Bank and the United Nations Commission on International Trade Law (UNCITRAL).⁷ Since the initiation of the economic reform, many China’s infrastructure projects have been financed by loans from international financial institutions and foreign governments such as the World Bank and Asian Development Bank (ADB), the

⁶ Article 22 and 26. emphasis added.

⁷ Dodds, Jr. R.F. “Offsets in Chinese Government Procurement: The Partially Open Door”(1995)26 *Law and Policy in International Business* 1119-1143, at 1119.

procurement of which was normally undertaken through certain competitive tendering procedure as required.⁸ The techniques and experiences, if not the ideology and philosophy, gained through these projects have certainly helped the initiation of tendering system in China as illustrated in the tendering rules developed in this context.⁹

As mentioned above, experts from international institutions such as World Bank, ADB, UNCITRAL, EC and some western countries have also involved in the legislation process of *Tendering Law* and *GPL* during which international workshops were viewed by Chinese scholar to be “the most important means of discussion and consultation”.¹⁰ Financial supports were also provided by international institutions.¹¹ Impacts of the UNCITRAL *Model Law on Procurement of Goods, Construction and Services* could easily be found in Chinese public procurement

⁸The International Bank for Reconstruction and Development, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS, first publication in 1985 and revised thereafter.

⁹ Shanghai was identified as the first to adopt the World Bank Procurement Guidelines in purchasing equipment with special budgetary funds in 1995. See Kong, Qingjiang, “Chinese Law and Practice on Government Procurement in the Context of China’s WTO Accession”(2002)11 *Public Procurement Law Review* 201-214, at 203. Other rules following this trend include MOF, *Measures on Inspection of Procurement through Tendering in the Projects Financed by World Bank Loans*, 1991; MOF, *Notice on Use of Standard Documents in Procurement through Tendering in the Projects Financed by World Bank Loans*, 1991; State Planning Commission, MOF and People’s Bank of China, *Notice on Publication of Guidance on Entrusting International Procuring Agency for Projects Financed by World Bank and ADB Loans*, 1994.

¹⁰ Cao, Fuguo, “From Tendering law to the Public Procurement Law” in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International)

¹¹ From 1998 to 2002, 6 projects of consultation and technical assistance for government procurement legislation were sponsored by ADB which involved 3 million US dollars. See Rothery, R., procurement expert of Asian Development Bank (ADB), “Legal Framework of China’s Public Procurement”, footnote 2, in Chinese, available at www.Chinatendering.com.

legislations especially the GPL.¹² It was suggested that China's participation in the APEC has provided the incentive for government organs to lead the legislative action of government procurement law.¹³ Though direct confirmation could not be sort, it is safe to argue that the promulgation of GPL has certain interaction with China's accession to WTO since government procurement was a main concern of China's trade partners.

More research is needed to systematically analyze the impact of China's GPA accession on both domestic regulation of government procurement. It can be argued that the challenges posed by GPA membership are not much different from those for the establishment of a mature public procurement legal framework. The successful conduct of the GPA negotiation and the subsequent implementation of GPA obligations also require a coherent legislative framework, a unified supporting institutional framework and an independent and impartial review procedure led by experienced judicial bodies. The current fragmentation in national procurement legislation and the lack of corporation among key policy makers will inevitably further increase the cost for undertaking GPA accession negotiation which is already

¹²Article 8 of the Model Law requires international competitive tendering is the norm, and governments must justify the use of other procuring methods. This has been followed by GPL which provides in Article 26 that open tendering should be the main procurement method and provides justification for use of other procuring methods in Article 29 to 31.

¹³Government procurement is one of the important areas of cooperation in achieving APEC trade and investment liberalization and facilitation. For instance, the 1995 *Osaka Action Agenda* explicitly provides that APEC should increase its understanding on government procurement policies and systems of member economies, push for further opening of the government procurement markets in the Asia-Pacific region and cooperate with member economies on system-building. See Long Yongtu, Vice Minister of MOFTEC, *Speech at the opening of APEC Workshop on Government Procurement Practices*, July 14, 1999 Kunming, available at www.apec.org.

very high due to the inherent deficiencies of GPA negotiation process.

On the other hand, it is important to note the positive impacts of China's GPA accession from domestic perspective. GPA membership will arguably bring significant benefits for China: [i] GPA membership will provide Chinese exporters the access to GPA Parties' government procurement market, notably that of the US which is normally closed to foreign suppliers; [ii] lifting the ban on the participation of foreign bidder will, while opening up domestic procurement market, also give the government access to international market place and the chance to make budgetary savings by obtaining better value for money; [iii] greater competition from foreign bidders is arguably an opportunity for the reform and restructuring of Chinese state enterprises to move forward; [iv] mandatory obligations of the GPA will help government to set up an efficient and independent domestic procurement regime which is immune from internal political pressure or personal influence with benefit of helping to combat corruption and regionalism¹⁴; [iv] most importantly, the GPA accession negotiation and the subsequent implementation process is likely to produce a driving force for deepening the domestic reform of public procurement regime and a solution to the "dead lock" created by institutional tensions.

¹⁴ Linarelli, J, 'China and the WTO Agreement on Government Procurement' (1996) 5 P.P.L.R. CS54, at 57.