

# Chinese Legislation on Supplier Review

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## 1. Introduction

A system of supplier review<sup>1</sup> refers to a system under which supplier has the right to seek review of actions or decisions of the procuring entity by resorting to the competent review bodies to obtain redress or relief, when he thinks the activities of the procuring entity are inconsistent with the relevant procurement rules.

The supplier review system can be an important and effective way to ensure compliance with the rules, as suppliers are in the best position to identify breaches and they have incentives to make a complaint for review and ask for remedies to protect their interests. The risk of being challenged by affected suppliers could provide a deterrent to breaches of the rules, and remedies for suppliers could ensure suppliers keep their confidence in participating in government procurement. Ultimately, it would be helpful for the achievement of the objectives of procurement and promote the development of government procurement. Thus, provisions on the supplier review system are an important component part of some government procurement legislation and have been included in many States' procurement laws and international instruments on government procurement, such as the Agreement on Government Procurement (GPA) of the WTO. This is also the case in China, which will be elaborated in the last part of this paper.

### 1.1 Research questions

The objective of my thesis is to provide a critical analysis of the current Chinese supplier review system, informed by an analysis of the approach of other systems to this question, and to identify and evaluate options for improvement of the Chinese system.

To examine the current supplier review system of China, it is proper to first identify different options and possibilities that are widely recognized as setting a variety of possible standards for establishing review regimes in government procurement, and then to assess the advantages and disadvantages of these various approaches. Thus, provisions on the supplier review system contained in the GPA, the APEC Non-Binding Principles, the EU Public Procurement Directives and the UNCITRAL Model Law will be studied in my thesis because of their importance and influences in the field of government procurement and/or their relevance to China. This will be briefly explained below.

The GPA of the WTO is one of the most important international instruments regarding government procurement. Since China expressed its intention to become a Party to the GPA while joining the WTO in 2001<sup>2</sup> and has announce that China will

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<sup>1</sup> It is also called as "challenge procedures" or "bid protest" procedures which is usually used in the United States.

<sup>2</sup> See paras 339 and 341 in Section VII. 4 of the Report of the Working Party on the Accession of China

launch the GPA entry negotiation submit a list on opening of the government procurement market before the end of 2007,<sup>3</sup> it is necessary to consider what the requirements on the supplier review system stipulated in the GPA to its signatories are, and how to improve the current Chinese supplier review system to harmonise it with the standards set in the GPA.

The reason to study the APEC non-binding principles is mainly due to its direct relevance to China. The APEC non-binding principles are the only international instrument currently actually applying to China. As a member of APEC, the Chinese government has undertaken to bring its public procurement regime, including its supplier review system to comply with the standards of APEC.

As to the EU public procurement regime, it is the most longstanding and most developed regime regulating procurement at international level. The EU regime, including of course its provisions on the supplier review system, has had important impact on the subsequent regimes regulating procurement, for example, on the GPA.<sup>4</sup> From studying the EU procurement directives, some experiences on the supplier review system may be learned by China.

As regarding the UNCITRAL Model Law, it is a well-drafted model, specially designed by UNCITRAL to help States to develop and reform their government procurement systems. It has been accepted widely as a global standard and has had a great influence on national public procurement law, including the *Government Procurement Law of China*.<sup>5</sup> To analyse the supplier review system suggested in the Model Law is helpful for assessing the current Chinese supplier review system. The relevant provisions of the Model Law offer many useful ideas that could be considered by China while improving its supplier review system.

## 1.2 Methodology

The method will be used to do this research is mainly doctrinal legal analysis, based on reviewing different sources of law on review and on China, the relevant international documents and literature on all of them. The present research will not undertake any empirical work based on qualitative and quantitative research methods. However, when necessary, it will use the existing empirical information related to this research, which is relatively limited.<sup>6</sup>

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(01/10/2001), WT/ACC/CHN/49. and 1.2 of Protocol on the Accession of the People's Republic of China, under which China is committed to table a GPA offer as soon as possible.

<sup>3</sup> See "China will submit a list on opening of the government procurement market before the end of 2007", available at [www.xinhuanet.com](http://www.xinhuanet.com) (May 16, 2006).

<sup>4</sup> See further Gordon, H., Rimmer, S., & Arrowsmith, S., "The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO" (1998) 21*The World Economy* pp159-187.

<sup>5</sup> More than 30 jurisdictions have established or reformed their national legislation on public procurement on the basis of the Model Law. See Report of the United Nations Commission on International Trade Law on its thirty-sixth session, 30 June-11 July 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)* Ch.X "Possible Future Work in the Area of Public Procurement", para.226, p51, available at <<http://www.uncitral.org/english/sessions/unc/unc-36/a-58-17-e.pdf>>; also see UNCITRAL "Status of Convention and Model Laws", available at <<http://www.uncitral.org/en-index.htm>>

<sup>6</sup> Qualitative academic analysts on the use and effect of supplier review that will be mainly used in this research for reference are Pachnou, D., "The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece" (PhD Thesis submitted in March 2003) and Braun, P., "Strict Compliance versus Commercial Reality: The Practical Application of EC Public Procurement Law to the UK's Private Finance Initiative" (2003) Vol. 9, No.5 December *European Law Journal* pp575-598

### **1.3 Outline of the thesis**

My thesis includes 11 chapters, which is divided into two parts. The first part includes chapters 1-6, talking about the advantages and disadvantages of a supplier review system in government procurement as a means of achieving the objectives of government procurement policy (in chapter 2), models for designing a supplier review system<sup>7</sup> (in chapter 3) and the key characteristics of national supplier review system, concerning forum, standing and procedures as well as the remedies available (in chapters 4-6).

The second part focuses on Chinese supplier review system in the field of government procurement. First, an overview on the legislative regime governing government procurement is made and a brief introduction on the existing rules regulating supplier review is given (in chapter 7). Then, the main aspects of the current Chinese supplier review system, concerning forum and avenue for review, standing and procedures and remedies available are discussed respectively (in chapters 8-10). Finally, in chapter 11, a critical analysis of the current supplier review system in China and proposals for improvement are given.

### **1.4 Structure of this paper**

This paper is based on chapter 7 of my thesis. In the next part, part 2, the development of Chinese government procurement regulations will be introduced. Then, part 3 will consider the main characteristics of Chinese government procurement legislation. Finally, part 4 will provide a general introduction to the existing rules regulating supplier review.

## **2. The development of Chinese government procurement regulations**

The development of China's government procurement regulations can be broadly divided into the following three stages<sup>8</sup>:

### **2.1 Stage I: Development of a tendering system and the enactment of the Tendering Law**

This stage started from mid-1980s and culminated in the promulgation of the *Tendering Law* in 1999.<sup>9</sup> The feature of this stage is that main efforts were made to establish a legal framework specially regulating tendering activities.

Tendering was started to be used in China, as a useful technique to pursue Chinese own policy goals,<sup>10</sup> in the early 1980 after China launched its economic reform. However, there was no national law regulating tendering activities until the

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<sup>7</sup> Models concerned in this research include the supplier review system adopted in the UNCITRAL Model Law, the GPA, the EU public procurement directives and the APEC Non-binding Principles.

<sup>8</sup> See further Wang, Ping., "The Third Phase in the Evolution of China's Public Procurement Framework: A Critical Perspective" and "China's Evolving Legal Framework on Public Procurement".

<sup>9</sup> See Wang, Ping., ., "China's Evolving Legal Framework on Public Procurement" (2004) 6 *P.P.L.R.* pp285-318 at p287

<sup>10</sup> Tendering was at that stage mainly used as a means of reform (to, for example, improved competition among state enterprises), rather than a procurement method. See further Wang, Ibid, p289; Tian, Jianbin, "Public Procurement in China: The Way Forward", (2001) 4 *P.P.L.R.* pp207-228 at p208.

late of 1990s. On August 30, 1999, the *Tendering Law* was promulgated and came into effect on January 1, 2000.<sup>11</sup> The enactment of this Law is the first milestone for the Chinese government procurement reform and legislation.<sup>12</sup>

The *Tendering Law* has 6 chapters and 68 articles. This Law uses a mixture of compulsory and voluntary approaches to define its coverage. It first states that this Law applies to all tendering activities conducted in the People's Republic of China.<sup>13</sup> Further, it is provided that construction projects involving the public interest or public security and works funded by the State or using loans from international organizations or foreign governments or when required by other law or regulations of the State Council must be procured by tendering.<sup>14</sup> These provisions mean, in the works sector, under the circumstances introduced above, the use of tendering – either open tendering or selective tendering<sup>15</sup> – is compulsory.<sup>16</sup> In other cases and in other sectors, this law would apply only when a procuring entity, no matter it is public or private, voluntarily chose to procure through tendering.

In this Law, there is only one simple Article concerning supplier review;<sup>17</sup> a formal supplier review system was not established, as will be further explained in part 4.

As denominated by its name, the *Tendering Law* is not an overall government procurement law. There are following gaps between this law and an overall government procurement law: first, it covers both public procurement and private procurement by way of tendering which is not covered in a modern government procurement regulation. Second, no other procurement methods are made available except two main procurement methods – open tendering and selective tendering. Third, provisions on tendering are mainly designed for procurement of construction works.<sup>18</sup> Fourth, there is no effective enforcement and remedies system, especially a supplier review system, in this Law.<sup>19</sup> Therefore, the enactment of the *Tendering Law* was only a “half step forward” in the evolution of Chinese government procurement regime.<sup>20</sup>

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<sup>11</sup> After entry-into-force of the *Tendering Law*, a series ministerial regulations were adopted by SDPC and other ministries to implement this Law, which includes for example *Regulation on the Scope and Threshold of Construction Projects subject to Compulsory Tendering* (Ministerial Order No.3 2000, issued by SDPC) and *Provisional Regulation on the Bid Evaluation Committee and Methods of Bid Evaluation* (Ministerial Order No.12, 2001, jointly issued by SDPC and other ministries. For other regulations see Wang, “China's Evolving...” p291 footnote 31.

<sup>12</sup> See Cao, Fuguo., *Annotation to the Chinese Government procurement Law* (in Chinese) (Beijing: Mechanical Industry Press, 2002) p1. The achievements and problems of this law were discussed there. See pp1-3. For an excellent analysis of the achievements and defects of the *Tendering Law*, see further Wang, “China's Evolving...” pp292-294.

<sup>13</sup> See Article 2 of the *Tendering Law*.

<sup>14</sup> See Article 3 of the *Tendering Law*.

<sup>15</sup> It is stated in Article 10 that tendering is divided into open tendering and restricted tendering.

<sup>16</sup> Tendering may not be required in certain circumstances such as emergency or for the consideration of national security. See Article 66 of the *Tendering Law*.

<sup>17</sup> See Article 65 of the *Tendering Law*.

<sup>18</sup> As pointed out by Ping Wang, Articles 19, 21 and 27 specially refer to procurement of construction works. See Wang, “China's Evolving...” p293.

<sup>19</sup> It should be noted that this Law provides detailed provisions on imposition administrative sanctions on individuals or units that violate the relevant rules, including procuring entities and their agents, bidders, members of the tender evaluation committee, the winning bidder and other person or units. See Chapter 5 of the *Tendering Law*.

<sup>20</sup> See Wang, “China's Evolving...” p294.

## 2.2 Stage II: Development of the government procurement system and the enactment of the Government Procurement Law

This stage occurred when the Ministry of Finance (MOF) initiated a reform of government procurement using fiscal funds in mid-1990s and culminated in the promulgation of the *Government Procurement Law* in 2002.<sup>21</sup> In this phase, great efforts were made for the establishment of an overall government procurement system and the enactment of the *Government Procurement Law*.

In the mid-1990s, a national-wide fiscal and taxation reform<sup>22</sup> was initiated by the MOF, which provided an important incentive for local governments to seek value for money by conducting government procurement and enact local rules on government procurement.<sup>23</sup> At central government level, the MOF issued a series of ministerial rules on government procurement regulations.<sup>24</sup>

On June 29, 2002, the *Government Procurement Law* was promulgated; it came into effect on January 1, 2003. It is “the first law ever enacted by the Chinese central legislature to exclusively regulate the activities of public procurement”<sup>25</sup>, which “marks another milestone for the Chinese Government Procurement Legislation.”<sup>26</sup>

The *Government Procurement Law* has nine chapters and 88 articles. This Law applies to government procurement done within the territory of the People’s Republic of China.<sup>27</sup> The term “government procurement” is defined in this Law from the following aspects: first, government procurement activities are conducted by government departments at all levels, institutions and public organizations;<sup>28</sup> second, they use fiscal funds to procure; and third, the goods, construction and services concerned have been listed in the centralized procurement catalogue compiled in accordance with law or exceed the respective prescribed procurement thresholds.<sup>29</sup>

However, because the *Tendering Law* applies to “all tendering activities”

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<sup>21</sup>Ibid, p287.

<sup>22</sup> This reform gave local governments more discretion in fiscal expenditure and tax retention. See Ibid, p295.

<sup>23</sup> For example, on October 27, 1998, the first local regulation on government procurement in the countries –the *Government Procurement Regulation of Shenzhen Special Economic Zone* - was promulgated. For further discussion on this local regulation, see See Kong, Qingjiang., “Chinese Law and Practice on Government Procurement in the context of China’s WTO Accession” (2002) 4 *P.P.L.R.* pp201-214 at p203.

<sup>24</sup> These include the *Interim Regulations on Government Procurement* (1999), the first national regulation relating to government procurement. This *Interim Regulation* was adopted on April, 17, 1999. For detailed analysis of main rules provided in this regulation, see further Tong, Xinchao., “Chinese Procurement Law: Current Legal Framework and A Transition to the World Trade Organization’s Government Procurement Agreement” (2003) 17 *Temple International and Comparative Law Journal* pp139-172 at pp143-153.

<sup>25</sup> Ibid, p140.

<sup>26</sup> See Cao, Fuguo & Wang, Ping., “The New Chinese Government Procurement Law” (2002) 6 *P.P.L.R.* ppNA133-139 at p133.

<sup>27</sup> See Article of the *Government Procurement Law*. However, the emergency procurements for serious natural disasters and other force majeure incidents and procurement in relation to national security and State secrets are exempted from the application of the *Government Procurement Law*. Also, defence procurement is not subject to this Law. See Articles 85 and 86 of the *Government Procurement Law*. In addition, government procurement using loans from international organizations or foreign governments may follow provisions contained in the loan agreement, provided that national and public interests will not be damaged. See Article 84 of the *Government Procurement Law*.

<sup>28</sup> This means that procurement undertaken by state enterprises is excluded from the coverage of this Law.

<sup>29</sup> The centralized procurement catalogue and the threshold for government procurement items that come under the central budget are determined and published by the State Council; The centralized procurement catalogue and the threshold for government procurement items that come under the local budget are determined and published by the people’s governments of provinces, regions or municipalities directly under the Central Government or the departments authorized by them. See Articles 7 and 8 of the *Government Procurement Law*.

conducted in China, in order to avoid the conflict in coverage between the two national laws, it is stated in Article 4 that government procurement of works through tendering procedures should be covered by the *Tendering Law*. This arguably means that the procurement of construction conducted with fiscal funds by government departments, institutions or public organisations would be regulated by the *Tendering Law*, if it were conducted through open or selective tendering procedures.<sup>30</sup> However, this simple provision does not completely solve the clash of the two national laws in coverage,<sup>31</sup> as will be further discussed later.

One achievement of the *Government Procurement Law* is that it establishes a new challenge system,<sup>32</sup> which is similar to review system contained in many procurement systems and recommended in the Model Law.<sup>33</sup> This will be further considered in part 4.

The enactment of the *Government Procurement Law* makes significant progress in the area of rule of law in government procurement.<sup>34</sup> However, it is far from completed because of the existence of the following problems:

First, the *Government Procurement Law* fails to incorporate the existing rules on tendering into this Law. Thus, in the area of government procurement, a dual law system of government procurement – the cross application of the *Tendering Law* and the *Government Procurement Law* –, rather than a uniform Chinese government procurement legal framework, is established.

Second, there is no a clear demarcation line between the *Tendering Law* and the *Government Procurement Law*. As already noted, the *Government Procurement Law* simply provides that the *Tendering Law* applies to government procurement of construction through tendering. It is not made clear that only government procurement of construction through open and selective tendering are regulated by the *Tendering Law*; any other government procurement activities, such as government procurement of goods through tendering, should be governed by the *Government Procurement Law*. Thus, uncertainty is caused when some types of government procurement is concerned, for example when government procurement of goods and services for a construction project is concerned.<sup>35</sup>

In addition, some provisions contained in the *Government Procurement Law* are

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<sup>30</sup> In other words, this means procurement of construction conducted by other subject that is not regulated by the Government Procurement Law, such as state enterprises, will not be governed by the Government Procurement Law, although the latter may be regulated by the Tendering Law where it concerns public security or public interests or it is wholly or partly funded by the investment of State-owned funds or financed by the State. See further Cao, *Annotation to the Chinese Government Procurement Law*, note 1 above, pp45-47.

<sup>31</sup> See Wang, “China’s Evolving...” p306; Cao, “China’s Government Procurement Reform:...” pp74-75.

<sup>32</sup> See chapter 6 of the *Government Procurement Law*.

<sup>33</sup> See Cao and Wang, pNA137.

<sup>34</sup> See Tong, “Chinese Procurement Law: ...” p164.

<sup>35</sup> For government procurement of goods and services for a construction project, it may be argued that they should be governed by the *Tendering Law*. This is because Article 3 of the *Tendering Law* provides that construction projects subject to compulsory tendering include not only construction itself but also the procurement of important equipment or materials for the construction and related services such as design. However, according to the explanation on the term “construction” provided in Article 2 of the *Government Procurement Law*, “construction” does not concern any equipment or materials and any services. It is clarified that “goods” refers to objects of every kind and form, including but not limited to *raw materials, fuel, equipment and products*. Thus, it may be argued that government procurement of goods and services for a construction project through tendering should be regulated by the *Government Procurement Law*.

not detailed and clear enough and require further elaboration and clarification.<sup>36</sup>

Therefore, as argued by Ping Wang, the enactment of the *Government Procurement Law* is only an episode but not the final curtain of the evolution of China's government procurement regime.<sup>37</sup>

### **2.3 Stage III: Enactment of implementing regulations after the entry-into-force of the Government Procurement Law**

After the entry-into-force of the *Government Procurement Law* in January 2003, the third phase of the development of the government procurement regime started. The main feature of this stage is that many ministerial regulations, based on the *Tendering Law* or the *Government Procurement Law* respectively, were adopted to implement the above two national laws regulating government procurement.

The *Government Procurement Law* gives the task of the enactment of implementing measures to the State Council.<sup>38</sup> However, it is the MOF that has enacted extensive implementing rules to implement the *Government Procurement Law*.<sup>39</sup> Meanwhile, parallel to the *Government Procurement Law*, the *Tendering Law* is still used to regulate tendering activities especially in the area of government procurement of works. To implement the *Tendering Law*, a series of ministerial rules were adopted by the State Development and Reform Committee (SDRC) and other central government departments.<sup>40</sup>

It is worth noting that different government departments, mainly the MOF and the SDRC, based on the *Government Procurement Law* and the *Tendering Law* respectively, sometimes competitively adopted rules for regulating certain aspects of government procurement. A typical example concerns government procurement of goods through tendering, which will be explained below.

As far as government procurement of goods through tendering is concerned, on 11 August 2004, the MOF issued the *Measures on the Administration of Tendering in Government procurement of Goods and Services* (hereafter the “*MOF Tendering Measures*”). It offers detailed procedural rules for tendering in government procurement of *goods and services*<sup>41</sup>, since there are very few procedural rules on tendering in the text of the *Government Procurement Law*, although it offers more detailed procedural rules for other procurement methods. Five months later, for

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<sup>36</sup> For example, as will be further discussed in part 4, the *Government Procurement Law* provides merely basic rules on supplier review.

<sup>37</sup> See further Wang, “China's Evolving...” p300.

<sup>38</sup> See Article 87 of the *Government Procurement Law*, which provides that detailed procedures and measures for the implementation of the Law should be promulgated by the State Council.

<sup>39</sup> For example, on August 11, 2004, the MOF issues three set of implementing regulations – the *Measures on the Administration of Tendering in Government procurement of Goods and Services*, the *Measures on the Administration of the Publication of Government Procurement Information* and the *Measures on the Handling of Complaints of the Government Procurement Suppliers* (hereafter the “*MOF Review Measures*”), they came into effect on September 11, 2004. For further discussion on these three ministerial regulations, see Wang, “The Third Phase...”

<sup>40</sup> For example, the SDRC, together with other six departments, issued the *Measures on Tendering in Procurement of Goods in Construction Projects* and the SDRC adopted *Measures on the Handling of Complaints on Tendering Proceedings in Construction Projects* (hereafter the “*SDRC Review Measures*”), which will be further discussed later.

<sup>41</sup> The *MOF Tendering Measures* has 6 chapters 90 Articles. For a detailed introduction to provisions contained in this *Tendering Measure* and further analysis of these provisions, see Wang, “The Third Phase...” p6-14.

regulating tendering activities in procuring goods related to construction projects subject to mandatory tendering requirements,<sup>42</sup> the SDRC together with other six government departments enacted the *Measures on Tendering in Procurement of Goods in Construction Projects*<sup>43</sup> (hereafter the “*SDRC Tendering Measure on Construction-related Goods*”). Also, the Ministry of Commerce (MOC) adopted the *Implementing Measures on International Tendering in Procurement of Mechanical and Electronic Products*<sup>44</sup> (hereafter the “*MOC Measures on Tendering*”), which is designed to specially regulate international tendering activities in procuring machinery and electrical products in China.<sup>45</sup>

According to Article 82 of the *Litigation Law*<sup>46</sup>, these ministerial rules have the same legal effect. As a result, more confusion rather than clarity have been caused in practice. As revealed above, there are obvious overlaps in coverage among the MOF and SDRC regulations when government procurement of construction related goods through tendering is concerned. It is still not clear which rules should be followed while procuring construction related goods through tendering. Further, the adoption of the *MOC Measures on Tendering* has caused confusion on which rules – the relevant provisions of the *Government Procurement Law*<sup>47</sup> or the *MOC Measures on Tendering* – applies to government procurement of mechanical and electrical products through international tendering.

In relation to supplier review system, there are also different ministerial regulations<sup>48</sup> and also it causes the same problem - it is not clear which rules should apply while handling complaints concerning certain kinds of government procurement competition. This will be considered in detail in part 4.

### **3 Main characteristics of China’s legal framework on government procurement**

Main characteristics of China’s legal framework on government procurement can be summarised as the following five points:

#### **3.1 A dual system of government procurement law**

From the above introduction to the development of Chinese government procurement legislation, we can see clearly that China’s government procurement legislation

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<sup>42</sup> See Article 2 of the *Tendering Measure on Construction-related Goods*.

<sup>43</sup> It was issued by SDPC, 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 on January 18, 2005, effective on March 1, 2005. It mainly provides detailed rules on the procurement of goods related to construction projects through open and selective tendering and basic rules on two-stage tendering.

<sup>44</sup> See MOC Order No.13. It was issued on November 1, 2004 and came into force on December 1, 2004. It provides detailed rules for procuring machinery and electrical equipment through tendering, concerning the scope of tendering, evaluation experts, solicitation documents, solicitation of tenders and submission of tenders, evaluation of tenders, publication and challenge, awarding of contracts and legal liabilities.

<sup>45</sup> See Article 2 of the *MOC Measure on Tendering*.

<sup>46</sup> *Litigation Law of the People’s Republic of China*. This Law was adopted at the 3<sup>rd</sup> meeting of the Ninth National People’s Congress of the People’s Republic of China on March 15, 2000 and came into effect on July 1, 2000. Under Article 86 of *Legislation Law*, where there is inconsistency between the provisions in the rules of different departments, the State Council will make a ruling on it.

<sup>47</sup> There is no any special provision on mechanical and electrical products in the *Government Procurement Law*.

<sup>48</sup>For example, the SDRC and the MOF respectively adopted their own *Review Measures*. These will be discussed in detail in part 4.



feature two distinct strands of development – the *Government Procurement Law* and the *Tendering Law* have developed independently and have their own unique characters, which does not harmonize each other since they have been driven by different government departments and by different philosophies and policies.<sup>49</sup> As a result, a dual law system of government procurement law – the coexistence of two primary laws regulating government procurement and cross application of them in practice - has been established in China.

### **3.2 The existence of numerous supplementary regulations**

Because there is no clear demarcation line between the above two national laws and some provisions are not concrete and clear enough, numerous supplementary regulations have been enacted vertically and horizontally to clarify and concretize basic rules contained in the above two primary laws.

Vertically, a series of supplementary ministerial rules were enacted by the MOF, SDRC, MOC and other central government departments to respectively implement the two national laws, as already introduced in 2.3 above. Horizontally, almost all local governments have established local regulations or rules<sup>50</sup> to implement the two primary laws. For example, to implement the *Tendering Law*, Beijing<sup>51</sup> promulgated the implementing regulations. Similarly, to implement the *Government Procurement Law*, many local rules were enacted.<sup>52</sup>

The existence of these implementing regulations makes rules on government procurement more fragmented and more complicated. Because of overlaps and conflicts existed among these implementing regulations, these implementing regulations have caused more confusion in the application of the relevant rules in certain cases, for example, when procuring construction related goods through tendering, as analysed in 2.3 above.

### **3.3 The enforcement of rules heavily relies on administrative measures**

The two primary laws governing government procurement<sup>53</sup> and their implementing regulations mentioned above<sup>54</sup> all have detailed provisions on legal liabilities. They use either one chapter or at least several articles to provide in detail what kinds of legal liabilities, mainly disciplinary and administrative sanction, should be imposed on the wrongdoer.<sup>55</sup> Correspondingly, a private enforcement mechanism – a supplier

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<sup>49</sup> See Cao, “China’s Government Procurement Reform:...” p61.

<sup>50</sup> This local rules, according to Article 82 of the *Legislation Law*, have the same level of legal authority as those ministerial rules mentioned above. In the case that there is a conflict between a local regulation and a ministerial rule, the problem of which rules should be followed will be arisen.

<sup>51</sup> See *Regulations on Tendering of Beijing Municipality* which was promulgated on September 6, 2006 and came into force on November 1, 2002.

<sup>52</sup> Examples are the *Measures on Implementing the Government Procurement Law of Qinghai Province*, the *Provisions on Government procurement Methods and Procedures of Guangdong Province* and the *Interim Measures on Administration of Files related to the Government Procurement Projects of Beijing Municipality*.

<sup>53</sup> See chapter 5 of the *Tendering Law* and chapters 7 and 8 of the *Government Procurement Law*.

<sup>54</sup> See chapter 5 of the *MOF Tendering Measures*, chapter 5 of the *Publicity Measures*, chapter 4 of the *MOF Review Measures*, chapter 9 of the *MOC Measures on Tendering*, chapter 5 of the *Tendering Measures on Construction-related Goods* and Articles 26 and 27 of the *SDRC Review Measures for Construction Projects*.

<sup>55</sup> This include not only the procuring entity and suppliers but also others involved in government procurement of goods, construction or services such as government procurement/tendering agencies, tendering evaluation experts and supervisory authorities.

review system – is not given enough attention, especially in the first stage mentioned earlier in 2.1 above. This will be further explained in part 4.

### 3.4 Lack of a unified supervisory body

There is no a unified supervisory body in China’s legal framework on government procurement; supervision responsibility is entrusted to different departments and local authorities in line with the structure of the administrative system<sup>56</sup>, as further revealed below.

In the *Tendering Law*, it did not make it clear which department is responsible for supervision over tendering activities but left it to be decided by the State Council.<sup>57</sup> According to the State Council’s opinions issued in 2000,<sup>58</sup> administrative supervisory duties regarding tendering activities are allocated to the relevant departments in charge of administration in line with the structure of the administrative system<sup>59</sup>. Such decentralized supervisory system in the area of the *Tendering Law* remains after the promulgation of the *Government Procurement Law*.<sup>60</sup>

In the *Government Procurement Law* and its implementing regulations<sup>61</sup>, it is made clear that the financial departments of the governments at all levels are departments for supervision over government procurement, performing the duty of supervision over government procurement activities in accordance with law.<sup>62</sup> Also, they are empowered to deal with suppliers’ complaints.<sup>63</sup> This, to certain extent and for certain government procurement activities, unifies the supervisory body. However, a coherent institutional framework for supervising government procurement activities as a whole (including tendering activities) was not established until now, as a decentralized supervision system is still in use when tendering activities are concerned. This is believed to be one cause of poor tendering practice.<sup>64</sup>

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<sup>56</sup> See further Cao, “China’s Government Procurement Reform:...” p80.

<sup>57</sup> According to Article 7 of the *Tendering Law*, the *relevant* administrative departments should supervise tendering activities and investigate and handle illegal acts committed in tendering activities. The administrative supervision of tendering activities and the specific division of functions and powers among the relevant departments should be formulated by the State Council.

<sup>58</sup> See General Office of the State Council, *Notice on Promulgation of the “Opinions on the Division of Duties and Obligations among Relevant Organs of the State Council in Conducting Administrative Supervision upon Tendering Activities”*, No. 34, May 3, 2000. In this document, the SDPC was entrusted to guide and coordinate matters related to tendering nationwide. For a more detailed discussion on this *Notice*, see Wang, “China’s Evolving...” pp293-294.

<sup>59</sup> Under this rules, Ministry of Water Resource, Ministry of Communication, Ministry of Railways, Administration of Civil Aviation and Ministry of Information Industry are responsible for supervising tendering activities conducted in the sector they are in charge and dealing with complaints occurred in each sector; tendering activities in house-building and related projects should be overseen by the Ministry of Construction; the MOC is the supervisory body responsible for tendering in government procurement of imported mechanical and electrical equipments. In addition, SDRC (former SDPC) is empowered to supervise tendering activities in major national construction projects.

<sup>60</sup> For example, it is provided in the *Tendering Measures on Construction-related Goods* (Article 6) that departments of development and reform, construction, railways, communications, information industry, water resources, civil aviation, etc. at all levels are respectively responsible for supervising tendering activities in procuring construction-related goods under their authority, and investigating illegal conducts committed. A similar provision is found in the *SDRC Review Measures for Construction Projects* introduced in part 4 later.

<sup>61</sup> See Article 13 of the *Government Procurement Law*; Article 10 of the *MOF Tendering Measures* and Article 3 of the *MOF Review Measures*.

<sup>62</sup> See Article 13 of the *Government Procurement Law*.

<sup>63</sup> See Article 55 of the *Government Procurement Law*.

<sup>64</sup> See Wang, “China’s Evolving...” p313.

### **3.5 The existence of many overlaps, ambiguities and clashes**

Since there is a dual law system in the area of government procurement, many overlaps, ambiguities and serious clashes have been caused among legislation on government procurement. A typical example that can be used to illustrate this point concerns coverage, which has been analyzed in 2.3 above.<sup>65</sup>

Because of overlaps and ambiguities existed in the two national laws and their respective implementing regulations, until now, it is still not clear: which law and implementing regulation should apply while procuring goods and services related to a construction project through tendering; and whether all provisions contained in the *Tendering Law* apply to government procurement of works through tendering.<sup>66</sup>

## **4. Existing rules regulating supplier review**

As explained above in 2.2 and 2.3, there is no clear demarcation line between the scope of the two national laws generally regulating government procurement and their implementing regulations. This ambiguity and inconsistency in the whole Chinese government procurement regime identified above in 3.5 have undermined the effectiveness and certainty of the supplier review mechanism as well.

Although not regarded as a priority in the process of drafting the *Tendering Law*, now rules on supplier review can be found in two national laws<sup>67</sup> and various ministerial and local regulations.<sup>68</sup> However, it is worth noting at the outset that these provisions are not coordinated components of a carefully designed supplier review system; overlap and inconsistencies regarding their scope of application exist; and the application of these inconsistent and ambiguous provisions in practice is arguably even more problematic due to the tension between different government departments.

In this section, the existing Chinese legal rules regulating supplier review is elucidated by examining separately the following categories, namely i) complaints regarding government procurement of works; and ii) complaints regarding government procurement of goods and services. This second category will be further sub-divided to consider separately: a) general goods and services, b) construction related goods and services and c) mechanical and electrical products, since some special rules may apply to the last two types of procurement. Due to conflicting provisions contained in different ministerial regulations as further analysed below, the current situation is very complex, as shown in the diagram 1 (see the last page).

### **4.1 Rules on handling complaints arising from government procurement of**

<sup>65</sup> For a detailed discussion on problems related to coverage, see Wang, “The Third Phase...” pp18-24.

<sup>66</sup> In other words, whether the relevant rules of the *Government Procurement Law*, such as provisions on publicity and challenge system, should apply to government procurement works through tendering. See further Wang, *ibid*, p20.

<sup>67</sup> See Art.65 of the *Tendering Law* and Articles 51-58 of the *Government Procurement Law*, which will be discussed in detail later.

<sup>68</sup> Main ministerial regulations dealing with supplier review are the *MOF Review Measures*, the *SDRC Review Measures for Construction Projects* and Articles 45-51 of the *MOC Measures on Tendering*, which will be further discussed later. As to local regulations on supplier review, such as the *Implementing Measures on Handling Complaints Submitted by Suppliers Participating in Government Procurement of Hebei Province* and *Measures on Handling Complaints Submitted by Suppliers Participating in Government Procurement of Anhui Province*, they will not be considered in detail in this research.

## works

As already introduced in 2.2 above, Article 4 of the *Government Procurement Law* provides that in the case of government procurement of works through tendering, the *Tendering Law* should apply. The implications of this brief provision on the division of scope between the *Government Procurement Law* and the *Tendering Law*, as already explained, are not clear. So far as concerns the jurisdiction over supplier complaints regarding government procurement of works through tendering, it is not clear whether the *Tendering Law* or *Government Procurement Law* should apply.

One view is that Article 4 of the *Government Procurement Law* only allows the *Tendering Law* to regulate tendering procedures in government procurement of works and thus other rules on other matters that are contained in the *Government Procurement Law*, including the rules on supplier review, should apply to government procurement of works through tendering. The grounds for such a view include the following two points:

First, there is only one article concerning supplier review in the *Tendering Law*. It is simply stated in Article 65 that bidders and other interested parties have the right to lodge an objection with the procuring entity or complain to the *relevant* administrative supervision department if they believe that tendering activities are not in conformity with the relevant provisions of the *Tendering Law*. Without further provision on detailed rules needed for a formal supplier review system, such as detailed specifications on forum for review, procedural arrangements and remedies available, it is impossible for bidders to make complaints under Article 65 of the *Tendering Law*, if they believe that the procuring entity violates rules in procuring works through tendering.

However, if the new challenge system established in the *Government Procurement Law* applies to government procurement of works through tendering, bidders concerned would be able to make complaints, as the *Government Procurement Law* provides basic rules on supplier review. In the *Government Procurement Law*, a special chapter, including 8 articles (Articles 51-58), is used to provide basic rules on supplier review. These rules concern suppliers' rights to make queries and complaints regarding government procurement activities,<sup>69</sup> forum and avenue for review,<sup>70</sup> time limits for various stage of review<sup>71</sup> and the possibility of suspension of procurement process.<sup>72</sup> According to these rules, the supplier concerned can bring his complaint to the relevant review body – the competent financial department - to seek review, when his complaint concerns government procurement of goods or services or government procurement of works through other procurement methods other than tendering which is regulated by the *Government Procurement Law*. If complaints regarding government procurement of works through tendering can be handled in line with the above rules on supplier review, as well as complaints regarding goods and services and regarding works procured other than through tendering, this will avoid the following problematical situation: while the

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<sup>69</sup> See Articles 51 and 52 of the *Government Procurement Law*.

<sup>70</sup> See Articles 52, 55 and 58 of the *Government Procurement Law*.

<sup>71</sup> See Articles 52, 53, 55 and 56 of the *Government Procurement Law*.

<sup>72</sup> See Article 56 of the *Government Procurement Law*.

procuring entity breaches the procurement rules, if it occurs in procuring goods or services, or works through other procurement methods other than tendering, the suppliers are able to make complaints; whereas if it occurs in procuring construction through tendering, the suppliers are unable to do so.

Second, in the challenge system of the *Government Procurement Law*, “the suppliers” are given the right to make complaints.<sup>73</sup> As to the term “suppliers”, they are defined in Article 21 as the legal persons, other organizations or nature persons that provide goods, *construction* (emphasis added) or services to the procuring entity. It can be argued that this implies that the legislative intention of the *Government Procurement Law* is to apply rules on challenge to handling supplier’s complaints about *all* government procurement activities, including government procurement of construction through tendering which are regulated by the *Tendering Law*.

Another view, however, is that government procurement of works through tendering, as a whole, has been excluded from the scope of the *Government Procurement Law* and thus the rules on supplier review contained in the *Government Procurement Law* should not be used while dealing with complaints about government procurement of works through tendering. This is mainly because, after the entry-into-force of the *Government Procurement Law*, the SDRC still adopted its *Review Measures*, which will be considered in detail below.

Based on Article 65 of the *Tendering Law*, the SDRC issued its *Review Measures* on July 6, 2004. This ministerial regulation contains 31 articles, mainly involving general principles of handling complaints,<sup>74</sup> forum for review,<sup>75</sup> procedural rules on filing of complaints and handling of complaints,<sup>76</sup> decision-making<sup>77</sup> as well as legal liabilities that should be imposed on the personnel of the procuring entity, the complaining bidder and the personnel of the administrative review body when they act unlawfully,<sup>78</sup> etc..<sup>79</sup>

In Article 2 of the *SDRC Review Measures*, its applicable scope is made clear. It explicitly states that the current Measures apply to dealing with complaints about “tendering activities of construction projects”<sup>80</sup>. This means that, according to these *SDRC Measures* themselves, the SDRC measures should be used while handling complaints regarding tendering activities in government procurement of works, including tendering activities in major national construction projects.<sup>81</sup>

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<sup>73</sup> See Articles 52 and 55 of the *Government Procurement Law*.

<sup>74</sup> For example, Article 5 of the *Measures* provides that administrative supervisory bodies should adhere to the principles of fairness, impartiality and high efficiency while handling complaints so as to safeguard the national and public interests as well as the legal interest of parties involved in tendering activities.

<sup>75</sup> See Articles 4 and 25.

<sup>76</sup> For example, Article 7 of the *Measures* make clear the main contents of the statement of complaint. In Articles 14, 15 and 18, provisions on investigation and evidence collection are specified. Time limits on the acceptance of a complaint and decision making are found respectively in Article 11 and Article 21 of the *Measures*.

<sup>77</sup> See Articles 20 and 2.

<sup>78</sup> See Articles 24, 26 and 27 of the *SDRC Review Measures*. For example, Article 26 stipulates that, if a complaint fabricates stories or forges evidence, his complaint should be treated as a false or malicious complaint and should be dismissed by the administrative review body. The complaint should be warned. If the circumstances are serious, he should be fined up to 10,000 RMB at the same time.

<sup>79</sup> For example, Article 23 requires that administrative supervision bodies should set up a file for the complaint handled and keep and manage it well and accept supervision from the relevant departments.

<sup>80</sup> Article 2 of the *SDRC Review Measure* states that “the present Measures applies to complaints about tendering activities of construction projects and handling of complaints.”

<sup>81</sup> Major national construction projects refer to construction projects which are funded or financed by the State and

## **4.2 Rules on handling complaints arising from government procurement of goods and services**

### **4.2.1 Introduction**

According to relevant provisions of the *Government Procurement Law*, which will be explained below in 4.2.2, handling of supplier complaints regarding government procurement of goods and services should, in general, be handled in accordance with the *Government Procurement Law* and the *MOF Review Measures* introduced below. However, as will be analysed in 4.2.3 and 4.2.4 below, provisions contained in ministerial regulations adopted by the SDRC and MOC suggest that complaints regarding government procurement of construction related goods and services<sup>82</sup>, and government procurement of mechanical and electrical products<sup>83</sup> might be dealt with by SDRC and MOC respectively in accordance with their own ministerial regulations. Therefore, the situation for government procurement of general goods and services,<sup>84</sup> that of construction related goods and services and that of mechanical and electrical products will be discussed separately.

### **4.2.2 The rules on handling complaints arising from government procurement of general goods and services**

As already noted in 2.2 above, the *Government Procurement Law* merely excludes government procurement through tendering from its coverage. Further, definitions on “goods”, “services” and “construction” contained in Article 2 of the *Government Procurement Law* make it clear that *all* goods and services<sup>85</sup>, no matter whether they are related to construction projects or not, should be regulated by the *Government Procurement Law*. Thus, according to the *Government Procurement Law*, rules on supplier review provided in the *Government Procurement Law* are generally applied while suppliers make complaints regarding government procurement goods and services, including government procurement of construction related goods and services through tendering.

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examined and approved by the SDRC or the State Council after being checked by the SDRC. To mention major national construction projects here is because the SDRC, based on the State Council’s *Opinions* introduced in 3.4 above, issued *Temporary Measures for Supervision of Tender and Bidding on Major National Projects* on January 10, 2002, in which one provision of this regulation concerns supplier review. Article 7 of the above regulation provides that, for illegal activities occurring in the tendering process of major national construction projects, any units and individuals have the right to complain or report to the SDRC. Obviously, this provision concerns forum for review and standing. Because this regulation and the *SDRC Review Measures* were both adopted by the same government department, in line with Article 83 of the *Litigation Law*, the *SDRC Review Measures*, as the regulation specially dealing with supplier review and adopted later, should apply, as far as complaints regarding government procurement of major national construction projects are concerned.

<sup>82</sup> This merely refers to government procurement of construction related goods and services *through tendering*, as procurement through other methods other than tendering is clearly regulated by the *Government Procurement Law*.

<sup>83</sup> This merely refers to government procurement of mechanical and electrical products *through international tendering*.

<sup>84</sup> The term “general goods and services” used here refer to goods and services which are not related to construction projects and goods which are not mechanical and electrical products purchased through international tendering.

<sup>85</sup> This refers to those goods and services that are required to be acquired through government procurement under the *Government Procurement Law*. For example, they should be listed in the centralized procurement catalogue or the value of the goods or services exceeds the prescribed thresholds.

As the *Government Procurement Law* contains only basic rules on supplier review, the MOF issued its *Review Measures*<sup>86</sup>, providing further detailed rules on administrative review, one month after the adoption of the *SDRC Review Measures*. It has 32 Articles which are divided into five chapters, concerning general provisions (Articles 1-6),<sup>87</sup> filing complaints and acceptance (Articles 7-13)<sup>88</sup>, handling of complaints and making decisions (Articles 14-24)<sup>89</sup>, legal liabilities (Articles 25-28)<sup>90</sup> and supplementary provisions (Articles 29-32)<sup>91</sup>.

As to the applicable scope of this implementing regulation, it provides in Article 2 that these *Measures* should be used when suppliers complain to the financial departments and the latter accepts the case and makes decisions. We can see that the *MOF Review Measures* does not limit its scope of application. Since the financial departments are designated in Article 13 of the *Government Procurement Law* as departments for supervision over government procurement and thus are responsible for dealing with complaints regarding government procurement activities, this means that the *MOF Review Measures* should be applied while complaints concern government procurement of general goods and services which are clearly covered by the *Government Procurement Law*.

#### ***4.2.3 Rules on handling complaints arising from government procurement of construction-related goods and services***

As to complaints regarding government procurement of construction related goods and services, one view is that, since they relate to a type of goods and services, such complaints should also be handled in accordance with the *Government Procurement Law* and the *MOF Review Measures*, whether the procurement of such goods or

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<sup>86</sup> For a detailed analysis of the *MOF Review Measures*, see Wang, “The Third Phase...” pp16-18; Cao, “Developments in China...” pNA212.

<sup>87</sup> For example, it is stipulated in Article 5 that the financial departments, while handling complaints, should adhere to the principles of fairness, impartiality, convenience and high efficiency so as to safeguard the national and public interests. Article 4 requires that the financial departments at all level should publicize their respective telephone number, fax and other matters that may facilitate the suppliers’ filing the complaints through media designated by the financial department above the provincial level. Article 6 requires that a supplier should make a complaint in its real name and he should provide specific matters to complain about and factual basis in his complaint. No one may file any false or malicious complaint. Article 3 concerns division among the financial departments in charge of dealing with suppliers’ complaints.

<sup>88</sup> For example, it is made clear in Article 10 which conditions should be satisfied when a supplier initiates a complaint. In Article 8, it is required that the complaining supplier should submit a statement of complaint while initiating a complaint and made clear the main contents of such a statement. Articles 11 and 12 concern how the financial departments should handle a complaint after receiving it.

<sup>89</sup> How the financial departments conduct review and make an investigation is made clear in Article 14 and the time limit for making the decision is stipulated in Article 20. Articles 17-19 provide rules on how the financial departments make a handling decision in different circumstances. As to main contents of the handling decision, it is clarified in Article 20. Article 23 requires that the financial department should release the handling result through the designated media.

<sup>90</sup> Articles 25-27 empower the financial departments to impose sanctions on the procuring entity and its personnel, members of the bid evaluation committee and suppliers where their unlawful acts are found. For example, it provides for stringent sanctions on the complaining supplier in Article 26, under which a supplier will be blacklisted and fined, in addition to dismissing his complaint, if he has filed three or more complaints but investigation reveals no evidence or fabricated or presented false complaint materials, which is regarded as a false or malicious complaint. Article 28 concerns imposing administrative sanction on the personnel of the financial department who abuses his official capacity, etc..

<sup>91</sup> According to Article 29, the financial departments are not permitted to collect fees from parties to the dispute. As to the authentication expense in connection with the process of handling a complaint, it is required to be borne by the party in the wrong. Articles 30 and 31 concern the file management system and requirements on the maintenance of business secrets and personal privacy.

services is conducted by using tendering procedures or whether by other procurement methods. This is because neither the *Government Procurement Law* nor the *MOF Review Measures* explicitly exclude complaints regarding government procurement of construction-related goods and services, as analyzed in 4.2.2 above.

However, for complaints concerning government procurement of construction related goods and services, because of the provision on the scope of construction projects of the *Tendering Law* which will be discussed below, another view is that the *SDRC Review Measures* should apply.

As already noted in 2.2 above, it is made clear in Article 3 of the *Tendering Law* that not only the construction itself but also construction-related goods and services, such as important equipment used for a construct project, should be purchased through open or selective tendering. Since complaints regarding government procurement of works through tendering can be arguably handled under the *Tendering Law* and the *SDRC Review Measures*, as discussed in 4.1 above, it may be argued that complaints regarding tendering activities in procuring construction related goods and services should be dealt with under the *Tendering Law* and the *SDRC Review Measures* as well.

In the *Modern Wo'er* cases<sup>92</sup>, for example, the MOF, although it is expressly empowered to supervise all government procurement activities and deal with complaints,<sup>93</sup> asserted that the complaint concerning tendering activities in procuring goods related to major national construction projects should be handled by the SDRC which is entrusted with the task of dealing with complaints about tendering activities in major national construction projects.<sup>94</sup> In these two cases, the MOF argued that the complaints about tendering activities in procuring blood testing equipment, which was a part of a major national construction project -government procurement of a medical rescue and treatment system - managed by the SDRC and the Ministry of Health, should be handled by the SDRC, even if blood testing equipment is a kind of goods. However, the first instance court has ruled that the above goods in disputing are within the scope of goods defined in Article 2 of the *Government Procurement Law* introduced earlier,<sup>95</sup> and thus the complaint about tendering activities in procuring the aforesaid goods should be handled by the MOF under the *Government Procurement Law*.<sup>96</sup>

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<sup>92</sup> *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 Administrative Division Decision No.432 (2005) and No. 433. These are the first case concerning government procurement after the entry-into-force of the *Government Procurement Law*. For further introduction and analysis of these two cases, see Mitterhoff, D.J., "Beijing Court Orders Ministry Of Finance To Rule On Supplier's Complaints, But Skirts Broader Issue of Schism in China's Procurement Supervision" (2006) Vol.3, No.12 *International Government Contractor*, pp98-108; Gu, Liaohai, "Why the first government Procurement case has not been handled for so long time?" (In Chinese) (Shouli Zhengfucraigou Anli Weihe Bei Pan "Wuqituxing" ?), available at <http://www.chinabidding.com/dbjh/Detail.do?ServiceName=GLSZL&dodic=1308776>.

<sup>93</sup> See Articles 13 and 55 of the *Government Procurement Law*, which will be analyzed in detail in chapter 8.

<sup>94</sup> As already introduced in 3.4 above, the SDRC was empowered to supervise tendering activities in major national construction projects in the State Council's *Opinions* and accordingly it is responsible for dealing with complaints concerning tendering activities in that sector.

<sup>95</sup> See 2.2 above.

<sup>96</sup> The MOF has appealed to the second instance court and insisted its arguments introduced above and stressed that the judgment of the first instance court overruled the mode of management under which every year billions funds are separately managed by different departments. See *Jinghua News* (Jinghua Shibao) January 7, 2007.



It should be pointed out that the court made its rulings in the above cases by simply characterizing the goods in dispute as a kind of goods defined in Article 2 of the *Government Procurement Law*; it did not directly address the issue of whether complaints regarding tendering activities in procuring goods or services for a major national construction project should be regulated by the *Government Procurement Law* and the *MOF Review Measures* or the *Tendering Law* and *SDRC Review Measures*. It is still not clear from the above rulings which implementing regulation -the *SDRC Review Measures* or the *MOF Review Measures* -should be used while handling suppliers' complaints regarding government procurement of construction-related goods and services, as the court avoided addressing tensions between the *Tendering Law* and the *Government Procurement Law*.<sup>97</sup>

#### **4.2.4 Rules on handling complaints arising from government procurement of mechanical and electrical goods**

With regards to complaints regarding government procurement of mechanical and electrical products, because there is no any special provision on such products in the *Government Procurement Law* and the *MOF Review Measures*, thus, one view is that the *Government Procurement Law* and the *MOF Review Measures* should apply for all of these procurement products.

However, because of the following two reasons, it may be argued that complaints regarding government procurement of mechanical and electrical goods should be handled under the *MOC Measures on Tendering* mentioned in 2.3 above, in the case in which these types of goods are procured through international tendering.

First, according to the State Council's *Opinions* on the division of administrative supervision duties over tendering activities mentioned in 3.4 above, the MOC was entrusted with the supervisory duty over tendering activities in government procurement of imported machinery and electrical equipment. Then, the MOC issued its own *Measures on Tendering*, which applies to international tendering activities of mechanical and electrical products conducted within the territory of China.<sup>98</sup> In the above regulation, there are 7 articles (Articles 45-51) concerning bidders' challenge. These articles offer rules on how the bidders make complaints about international tendering activities in procuring machinery and electrical products<sup>99</sup> and how the competent administrative authority deals with complaints.<sup>100</sup>

Next, Article 86 of the *MOF Tendering Measures* for goods and services mentioned in 2.3 above allows that government procurement of imported machinery and electrical products through tendering can be conducted under other relevant measures of the State. This might imply that complaints regarding government procurement of machinery and electrical goods are handled under the ministerial regulation specially dealing with international tendering activities of machinery and electrical products – rules on supplier review contained in the *MOC Measures on Tendering*.

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<sup>97</sup> See further Mitterhoff, "Beijing Court Orders..."

<sup>98</sup> See Article 2 of the *MOC Measures on Tendering*.

<sup>99</sup> See Articles 45-47 and Article 51 of the *MOC Measures on Tendering*.

<sup>100</sup> See Articles 48-50 of the *MOC Measures on Tendering*.

It should be noted, since it is made clear in Article 2 of the *MOC Measures on Tendering* that the applicable scope of these *Measures* is limited to “international tendering activities of machinery and electrical products”, government procurement of machinery and electrical products through domestic tendering or other procurement methods should not be regulated by the *MOC Measures on Tendering*. This means that complaints regarding government procurement of machinery and electrical products through domestic tendering or other procurement methods are handled under the rules on supplier review of the *Government Procurement Law* and the *MOF Review Measures*.

### 4.3 Summary

From the above discussion, we can see what is clear is that complaints regarding government procurement of general goods and services and complaints regarding government procurement of works through other methods other than tendering should be handled under the *Government Procurement Law* and the *MOF Review Measures*.

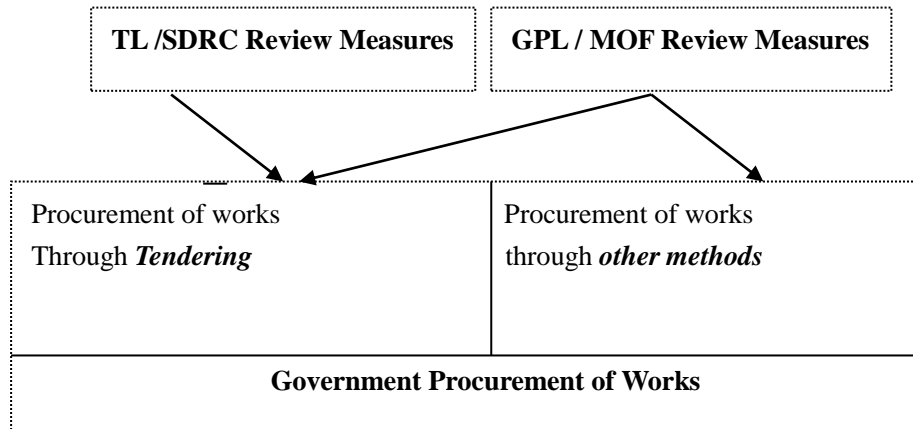
However, the coverage of three types of procurement, namely, government procurement of works, government procurement of construction-related goods and services through tendering and government procurement of mechanical and electrical products, is not clear. To sum up:

- i) The position for works is:
  - For complaints regarding government procurement of works through other procurement methods other than tendering, it is clear that the *Government Procurement Law* and the *MOF Review Measures* apply.
  - For complaints regarding government procurement of works through tendering, it is not clear whether the *Government Procurement Law* and the *MOF Review Measures* or the *Tendering Law* and the *SDRC Review Measures* apply.
- ii) The position for goods and services is:
  - For complaints regarding government procurement of general goods and services, government procurement of construction-related goods and services not through tendering and government procurement of mechanical and electrical products not through international tendering, it is clear that the *Government Procurement Law* and the *MOF Review Measures* apply.
  - For complaints regarding government procurement of construction-related goods and services through tendering, it is not clear whether complaints should be handled under the *Government Procurement Law* and the *MOF Review Measures* or the *Tendering Law* and the *SDRC Review Measures*.
  - For complaints regarding government procurement of mechanical and electrical products through international tendering, it is not clear whether the *MOF Review Measures* or the *MOC Measures on Tendering* apply.

**Diagram 1.**

**The current situation of application of rules on supplier review**

**i) For complaints regarding government procurement of works**



**ii) For complaints regarding government procurement of goods & services**

