GEORGE BROWN PRESS
JOURNALS, BOOKS & PROCEEDINGS

GBP Proceedings Series

Article

2025 2nd International Conference on the Frontiers of Social Sciences, Education, and the Development of Humanities Arts (EDHA 2025)

Double-Order Theory: A Practical Review of China's Engineering Bidding System

Yenan Li [1,*]

[1] Southeast University, Jiangsu, Nanjing, China
* Correspondence: Yenan Li, Southeast University, Jiangsu, Nanjing, China

Abstract: As a special form of competition on the basis of merit, the project bidding system is extremely important in the trend of integration of public and private law, as it combines private business and public welfare protection. It seems to be a specific system to unify "administrative agreement" and "government bidding", but the two concepts are actually different in scope, legal nature and specific construction. At this stage, China's engineering bidding system in the mechanism of operation, the nature of the positioning, remedies and other aspects of the nature of the attribute disputes, the mode of positioning is unclear, confusion in the legislation of the defects of the controversial. It is necessary to take the administrative dual-order theory in the context of public-private intersection as the research field, to distinguish between civil agreement and administrative behavior, and to divide the matter into two stages.

Keywords: bidding system; administrative agreement; two-order theory

1. Introduction

Bidding, short for bidding and tendering. Bidding is an international practice, a product of the high degree of development of the commodity economy, and an organized method of selecting the best deal using technical and economic methods and the competitive mechanism of the market economy. This way mostly occurs in the procurement of goods, works and services, the bidder through the procurement and requirements announced in advance, to attract a large number of bidders in accordance with the same conditions of equal competition, in accordance with the prescribed procedures and the organization of technical, economic and legal aspects of the comprehensive evaluation of experts, from which the project winner is selected on the basis of merit. Bidding can be broadly categorized into engineering bidding, goods bidding and service bidding; engineering bidding mainly refers to the act of construction or general contracting in respect of new construction, renovation, expansion and maintenance of projects [1].

Engineering bidding system, from the point of view of its naming mode, is presented as a specific form of bidding system in the field of engineering and special pattern, i.e., the bidding subject is a specific bidding for engineering and construction projects. Universal bidding refers to the bidder of the project, goods and services in advance public bidding documents, to attract more than one bidder to submit bids to participate in the competition, and in accordance with the provisions and requirements of the bidding to select the object of the transaction. As a concrete branch of engineering bidding and the general category of bidding are in fact not very different in terms of theoretical application and regulatory paradigm, the difference mainly lies in the refinement of the subject matter.

Received: 12 February 2025
Revised: 18 February 2025
Accepted: 06 March 2025
Published: 11 March 2025

2. Legal Attributes of the "Engineering Tender": Administrative Agreement

The lack of practice of the project bidding system reflects the incomplete consideration of the reality of the system structure, in the connotation of the extension and the essence of the theory of the premise can not be clarified, the possibility of implementation in place can not be talked about. Therefore, the legal nature of engineering bidding and the "superordinate concept" is of vital importance [2].

There is an overlap in the nature of the bidding contract and the "administrative agreement". From administrative contract, administrative contract, to administrative agreement, the concept of administrative agreement conveys a strong controversial nature of the agreement. In both common law and civil law systems, the initiator of an administrative agreement is the administrative authority, and the purpose is to maximize the public interest by adopting milder and more flexible administrative means.

The administrative agreement has the expression of the meaning of both parties, and does not contain only the unilateral will embodied in the administrative act. As a new type of administrative task fulfillment, the administrative agreement has changed the single, mandatory administrative paradigm of the past, and takes the contract reached by the two parties by mutual consent as the carrier of administrative task fulfillment, which is in line with the development trend of modern administration. Administrative relative in the administrative law of the status of the growing prosperity, not confined to the past position of the administrator, turn to the subjectivity of the participants. Zhang Jiansheng that "the administrative relative's participation in the administrative agreement, unlike it in the administrative decision in the procedural participation of both sides, without the participation of the administrative relative, the administrative agreement is impossible to set up", both sides of the subjectivity extends to the subordinate nature of the agreement, is not purely administrative or civil, but dual attributes [3].

The general view is that an administrative agreement has both an "administrative" aspect as a means of administrative management and an "agreement" aspect as a product of public-private consensus. The administrative agreement is the administrative organ, the administrative organ based on the authorization of the administrative law, with the management of public utilities "prerogative", that is, in order to protect the needs of the public interest can unilaterally exercise the right to change the right or the right to cancel, reflecting the agreement of the "administrative"; administrative agreement At the same time with the contractual nature. Relative free to decide whether to sign the agreement, the agreement between the two sides in the law within the scope of negotiation, clear rights and obligations of the two subjects. Administrative subjects in order to realize a certain administrative task, the agreement to achieve a certain individual interests of the relative, through negotiation to reach a contract, the agreement is binding on both sides, the formation of administrative law on the formation of special legal relations and effects.

However, the integration of the dual attributes of the agreement remains controversial, and the principle of administration by law, which is used to control the exercise of public power, and the concept of contractual "freedom of contract" are difficult to coexist and are not easily reconcilable in nature [4].

3. Two-Order Theory

The dual-order theory originated in Germany and was proposed by the German scholar Hans-Peter Epperson. The "dual-order theory" refers to the vertical dismantling of a social relationship into different stages, to which legal norms of a different nature apply. Taking loan guarantees as an example, the act of the government deciding whether or not to provide a guarantee and the act of how to fulfill the guarantee are two distinct phases, and the government's decision whether or not to provide a guarantee belongs to the operation of public power. The core of the theory lies in the division of the acquisition of subsidies into two stages: the stage of governmental decision, which is of a public law

nature and is subject to public law; and the stage of performance of the loan after the guarantee, which is of a private law nature and is subject to private law [5].

The "two-order theory" essentially provides a way of thinking about legal issues, i.e., it affirms that an administrative agreement is not a single, but rather a composite legal relationship. The "two-order theory" is a theory that classifies the nature of a complex legal relationship on the basis of the objective facts of the relationship, and it is flexible. The combination of public law and private adjustment is not static, for example, in the German "principle of distinction between civil legal acts" theory system, the right to claim and administrative registration and publicity are regarded as two civil legal acts: one is a civil contractual legal relationship, and the other is a legal relationship of administrative publicity.

Dual-order theory will be complete factual behavior as a split, in practice will inevitably appear before and after the two phases of the articulation difficulties and other issues [6]. Dual-order theory will be a unified life relationship into two different legal relations, before and after the two stages of the relationship between what is related to the evaluation of the effectiveness of the latter stage of the behavior of the impact of many issues in the academic community has not reached a consensus.

According to one view, the administrative disposition in the first stage is "terminated" by the conclusion of the contract in the second stage. In this view, if the conclusion of the subsequent contract extinguishes the effect of the previous administrative act, can a third party claim avoidance action?

According to another view, the administrative act of the previous stage continues to be in force and continues to affect the subsequent act. On the basis of this view, it is possible to distinguish the relationship between the former administrative act and the latter agreement as follows: first, the former administrative act is the effective element of the latter agreement. The disadvantage of this view is that if the administrative act of the former stage is revoked because of its invalidity, the contract of the latter stage is necessarily invalid, so is it appropriate that the consequences of the violation of the law by the administrative organ should be borne by the other party to the contract? Secondly, the former stage of the administrative act is the later stage of the agreement "transaction basis". When the basis of the transaction is lost, can the unfavorable party request the adjustment or termination of the contract? Thirdly, the administrative act in the first stage is the legal cause of the agreement in the second stage. Can the other party to the contract assert a claim for the return of unjust enrichment when the legal cause for the formation of the contract is lost?

The original purpose of the two-stage theory was to distinguish between public and private legal relationships, but in the course of its development it has gradually evolved into a criterion for distinguishing between the two stages of "decision" and "performance". Without first judging the two stages, the subsequent public-private legal relationship cannot be demarcated, and the complete legal relationship in a contract is therefore in constant dispute.

4. Dilemma Analysis and Rule of Law Paths in the Perspective of Two-Order Theory

4.1. Dilemma Analysis

4.1.1. Difficulties in Realizing Judicial Remedies

The debate on the legal nature of the bidding system is not merely a theoretical disagreement, but also a question of practical interests, i.e., the choice of legal remedies. In other words, the definition of the legal nature will affect the choice of dispute resolution, which in turn will affect the protection and realization of the rights and interests of the parties.

Civil contract, administrative contract or mixed contract of the nature of the definition of the applicable civil litigation procedures, administrative litigation procedures or choose to apply; the current theory of the legal nature of the bidding contract of the lack

of clarification resulting in the parties to the dispute settlement path of choice, the realization of judicial remedies difficult.

Theoretical disputes on the legal nature of the bidding contract, in addition to the choice of the relative path of relief, also oriented to the selection of the type of litigation of the judiciary, the courts at all levels for the dispute in the end to take the civil litigation or administrative litigation wavering, the judicial practice of the confusion [7].

4.1.2. Confusing System of Legislative Norms

Prior to the amendment of the Administrative Procedure Law in 2014, the departmental regulations of the former Ministry of Construction and the normative documents issued by the Ministry of Finance and the National Development and Reform Commission (NDRC) basically supported the use of arbitration or civil litigation to resolve disputes over the bidding system. The Law on Administrative Litigation, amended in 2014, added to the scope of cases "if it is believed that the administrative organ does not perform in accordance with the law, fails to perform in accordance with the agreement, or unlawfully alters or terminates the government franchise agreement, the agreement on compensation for the expropriation of land and housing, etc.", which enlarged the scope of acts for which administrative litigation can be initiated, completely breaking the tradition of resolving disputes over bidding and tendering contracts by means of arbitration or civil litigation.

The current legislation has a positive attitude towards "the legal remedies for disputes over bidding contracts are administrative reconsideration and administrative litigation", but Article 49 of the "Law on Cooperation between the Government and Social Capital (Draft for Public Consultation)", which is open for public consultation in 2016, stipulates that "in the event of a dispute between the government and the social capital, the social capital and the implementing unit over the cooperation agreement and it is difficult to reach agreement through negotiation". Implementing units on the cooperation agreement disputes and difficult to reach agreement through negotiation, you can file a civil lawsuit or arbitration according to law", on the dispute should be applied to civil litigation or arbitration of the different provisions of the legislative system on the legal remedies for bidding contract disputes there are still contradictory provisions of the conflict.

4.2. Rule of Law Pathway

Since the "two-stage theory" has made it clear that the signing of the tender contract is the node, and the legal nature is divided into two stages, the choice of legal remedies should also be discussed in stages.

The first stage belongs to the public sector to choose the process of private partners, is essentially the public sector administrative processing behavior, the disputes arising from the administrative remedies should be applied, you can apply for administrative reconsideration or administrative litigation.

In the second stage, if the dispute occurs in the process of contract fulfillment, civil remedies should be applied, and the parties can engage in mediation, arbitration or civil litigation; if there are obvious situations in the public sector in which the public sector applies its administrative power to change or cancel the contract, or uses its administrative power to affect the performance of the contract, it should be regarded as an administrative contract, and the private sector can file an administrative reconsideration or administrative litigation, and use the rules of public law to protect their own legal rights and interests. (c) Legal rights and interests.

Before the contract is signed, the public sector is in the process of selecting a private partner, which is characterized by a strong public interest purpose and the exercise of public power; according to the Administrative Licensing Law and other provisions, the public sector must make decisions in accordance with the legal procedures, through bidding and other means that provide for fair competition. The disputes that arise are against

the administrative authorities' administrative decisions, and should be purely administrative disputes for which administrative remedies, including administrative reconsideration, administrative litigation and State compensation, are applicable.

Bidding contracts are, in principle, civil contracts, and when a private party defaults on a contract (e.g., fails to carry out construction work in accordance with the agreed time, quality, etc.), the public sector may bring a breach of contract claim against the private sector, and the lawsuit at that time shall be a civil action. The plaintiff is the public sector as a legal entity, and the defendant is a private entity, and the court may, based on the plaintiff's claim, decide that the defendant bears the responsibility of continuing to perform, compensating for the loss, and other breach of contract liabilities.

However, as the public sector enjoys administrative power, when there is a breach of contract by the private sector, the public sector in practice will often habitually use its administrative power to take administrative penalties, administrative coercion and other means against the private sector in order to efficiently realize the protection of the public interest. At this point, when the exercise of administrative power is extremely obvious, the private sector may initiate administrative reconsideration or administrative litigation if it believes that the administrative action violates its legitimate rights and interests.

It should be noted in particular that, if the breach of contract of the private subject does not obviously jeopardize the public interest, the public sector should first apply civil remedies, such as civil breach of contract; at the same time, the legislation should encourage the public sector to use civil remedies to safeguard the public interest, and shall not arbitrarily use the administrative power to interfere with the performance of the contract.

5. Conclusion

To a certain extent, the project bidding system is a combination of public and private interests, and there is an overlap in the conceptual connotation and nature of the "administrative agreement". Disputes over the nature of the attributes, unclear mode of positioning, and confusing legislation, the current practice of engineering bidding in the system design and specific practice are flawed, resulting in difficulties in the choice of dispute resolution. From the perspective of dual-order theory, the stages of bidding behavior are scientifically rationalized, the legal nature of attribution is restated, and the judicial relief path is reconstructed, so as to realize the harmony and unity of public and private law and the smooth and effective operation of the system.

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