

The administrative law's thinking about Chinese government service outsourcing contract

Chunlei Yang^a, Feixiang Duan

School of Law, Yangtze University, Jingzhou 434023, China

^aycl114@sina.com

Abstract

Government service outsourcing as a more democratic, moderate, and flexible administrative contract management means, can effectively reduce administrative costs, reduce government spending, improve administrative efficiency, curb the excessive expansion of government agencies and personnel, change the traditional ideas, establish service administrative ideas, and improve the quality of government services. But the problems about administrative subject's ultra vires outsourcing, abuse of prior powers, and lack of responsibility constraint and ambiguity of relief methods exist in the actual operation. The above phenomena need to be regulated and perfected according to the concept of the priority of administrative remedy, the finality of judicial remedy and the administrative supervision throughout to guarantee that the government services outsourcing operates orderly and healthily, to better response to public demands about diversification of public service, to improve governance exactly and realize the administrative targets effectively.

Keywords

government service outsourcing, government service outsourcing contract, administrative system reform, legal regulation, legal relief.

1. Introduction

Since 1970s, western developed countries have set off a wave of government reforms and introduced market mechanisms into the field of government service supply. The marketization and socialization of the government service has gradually become the international trend of the contemporary administrative reform. Among them, the government service outsourcing has become an important reform mechanism adopted by various countries. By several decades of practice, the development of the government service outsourcing in the developed countries and regions has been relatively mature. In recent years, some local governments in China have begun to rely more on enterprises and private organizations to complete some government service work. Service outsourcing has gradually become the mainstream of public service performance. In September 23, 2009, the Ministry of Finance and other nine ministries jointly issued the guidance on encouraging the government and enterprises to let contract to promote the development of China's service outsourcing industry. It marks that the government service outsourcing begins to develop towards systematization and large-scale. That promoting the transformation of government services and improving the government's administrative efficiency by purchasing outsourcing services becomes an important direction of government decision-making.

2. Theoretical overview of government service outsourcing

Government service outsourcing virtually refers to a new public service supply mode that the government raises resources, makes decisions, determines the service standards by administrative means, and then takes the market mechanism as a lever, attracts market players and non profit organizations to participate through bidding, contract and other ways, completes production in the competition. It forms the pattern of common participation of different subjects with taking government as leadership.

2.1 The theoretical basis of government service outsourcing

The marketization reform of government service is based on two theories: public choice theory and new public management theory. Public choice theory considers that public services can be provided by the government or by the society. The boundaries between public and private and the government monopoly should be broken. The competition between government and society and the competition between public and private should be formed. Public should be given opportunities to choose the public service, that is, the opportunity to vote with their feet. The new public management theory advocates that the private sector's management concept and management methods should be introduced into the government management to establish an enterprise-oriented government. In dealing with the relationship between government and market, enterprise or society, new public management theory provides a set of new ideas different from traditional administration that in the provision of public goods and public services, except the bureaucracy, other organizations can have all these functions. Choosing which means depends on which way can realize the public demands for public goods in the most economical way.

2.2 Types and characteristics of government service outsourcing

The outsourcing of government services mainly includes three aspects: the first is the government sectors' internal transactional service outsourcing, such as the maintenance of government internal office information system, logistics business and conferences affairs, human resource management outsourcing. This kind of service is mainly a service requirement coming from government departments' objective to ensure its effective operation, with the characteristics of internal and transactional. Outsourcing is to reduce costs, improve efficiency and centralize government attention to core business. The second is technical service outsourcing in government management and service, such as planning, information statistics, expert consultation, research. This kind of service is mainly a service requirement coming from public sectors' objective to better fulfill their own public management and service responsibilities, with the characteristics of indirect and professional. The motivation of outsourcing are not only saving costs, but also breaking through the restriction from the bottleneck of government departments' ability and improving the level of specialization, etc. The third is public service outsourcing that should be provided by the government, such as street cleaning, community pension, public utilities, education services, public transport, medical care, social services, industrial services, etc. This kind of service is directly related to a limited range of the public vital interests, with the characteristics of direct, core and influence. The purpose of outsourcing is to ease the pressure of the shortage of government productive resources, improve government service performance, and enhance public satisfaction.

2.3 The social value of government service outsourcing

Firstly, the government buying public services from non-governmental organizations can improve the government efficiency and the quality and productivity of public services. At the same time, it is an inevitable result of the integration of two reform directions about service-oriented government and small government. Government service outsourcing is that the government promotes marketization of the public service's productive process based on the undertaking of the basic responsibility. The government reduces costs and improves efficiency and quality through the competition among multiple producers. It reduces government spending, and promotes the government from operation to management by using management efficiency of enterprises and civil organizations. Through the service outsourcing, government can concentrate on doing "government" and the "business" is outsourced to the market, so that the right people can do the right thing.

Secondly, due to a large extent into the composition of the market, the government service outsourcing as a more democratic, moderate, and flexible management means expand the degree of social subject's participation in administrative affairs and reflect the spirit of democracy and the rule of law in modern administrative management. It is conducive to further establishing the government's image of "people first" and "for the people", closing political and civil relations, and promoting social harmony and prosperity.

Finally, the government service outsourcing is conducive to breaking the monopoly and sealed conditions, accelerating the development of modern service industry, promoting the transformation of economic development, expanding domestic demand, improving people's livelihood, and expanding the space of entrepreneurship and employment. Through the government service outsourcing, breaking the government monopoly and introducing market competition mechanism can not only use the power of competition to impose market pressure to the inefficient producers, but also overcome some lack of expertise of government services, and give full play to the professional advantages of contractors; Simultaneously, it can provide a fair development platform, policy environment and system environment for all kinds of investment to set up service industry, which is in favor of the development of the service industry of service consumption and the high-ranking service industry of knowledge and professional technology, so as to promote consumption upgrading, to enhance the power of consumption to fuel economic growth, and more to solve the problem of absorption and placement of the labor.

3. The nature and the real dilemma of government service outsourcing contract

3.1 The nature of government service outsourcing contract

From the current operating mechanism of government service outsourcing, the nature of government service outsourcing contract should be the administrative contract, which is a kind of external administrative contracts. Because, the administrative contract is a settlement which is based on agreement between administrative subject and other administrative bodies or administrative relative people, in order to achieve specific administrative goal. Administrative contract has the following characteristics: firstly, from contract subject, the party is fixed to be the administrative body that engages in administrative management and executes public affairs. Secondly, the contract is to achieve the administrative purpose. The main purpose of the administrative contract is to implement the administrative management and produce, change or eliminate administrative law relations by the contractual form to fulfill the objective of the exercise of administrative power and administrative duties. Thirdly, the content of the administrative contract is public affairs of the administrative management, which has the public welfare. The promissory contents in the administrative contract, in essence, belongs to a category of the autonomy between two parties, but still can not get rid of the nature of public law. Fourth, based on the special nature of the administrative contract, from the perspective of the status of the parties to the contract, the party of administrative body enjoys the administrative prior rights in the performance, modification and termination of the contract. The government service outsourcing contract is completely in accordance with the definition and characteristics of the general administrative contract. Therefore, the nature of government service outsourcing contract is defined as administrative contract, which is the primary premise of regulating and improving the whole system of service outsourcing, which is directly related to the status and regulation of the institution in the law and the success or failure of the administrative reform of the money to raise money. It has great significance of administrative law.

3.2 The realistic predicament in the operation of the government service outsourcing contract

Administrative subject's ultra vires outsourcing

Currently, administrative ultra vires phenomenon exists in government service outsourcing contract, i.e., in the process of outsourcing contract signed, the administrative body implement a kind of illegal administrative acts beyond the statutory administrative authority or authorized administrative authority. For example, the administrative body ignores the protection of state-owned assets of the original institution in the service outsourcing agreement, and allows service organization to freely control and dispose equipment of state-owned assets; the contractual authority of security defense units and personnel lack of detailed guidelines and conventions and the legal constraint, existing administrative penalty beyond the authority, illegal detention and other issues; urban management outsourcing turn law enforcement assistance into law enforcement in disguise. Violent law enforcement appearing in practice leads to conflict and social opposition.

Administrative body abuse prior right and lack of constraint in the responsibility of breach of contract. The administrative subject enjoys a strong administrative control in the process of the conclusion and implementation of the administrative contract, such as the right of choice for the parties to the contract, the right of guidance and supervision over the fulfillment of the contract, the right of unilateral termination of contract, and the right to sanction the parties to the contract. But the exercise of the administrative prior right must be moderate, with balance of the establishment of rights and obligations. Otherwise, it will greatly damage the legitimate rights and interests of the weak side of the contract. However, there is a generally serious imbalance in the distribution of rights and obligations between the two parties in the process of the operation of the government service outsourcing contract. The weak party in the administrative contract is often forced to accept some unreasonable conditions. The contract often has a relatively greater number of obligations and less right or offer for the contract relative person, and has a variety of restrictive conditions. In addition, due to the administrative subject at a strong position in the process of government service outsourcing, at the time the contract was made, administrative subject often controls service provider's default behavior through setting assessment and funding stage for the allocation, but the administrative body's breach of the contract is often not involved or vague. This is obviously contrary to the principle of equity. It leads to the administrative subject abusing administrative prior right, existing the phenomena of unauthorized modification, termination of contract and delay in payment of the contract.

The current government service outsourcing contract lack of clearly designs and unified regulations to relief way

In the contract, it is not clear how the service provider requests consultation, how to make a complaint or apply for reconsideration to the higher authorities and how to claim state organs or specialized supervision organs to carry out the ruling, and how to institute an administrative litigation to court. It does not formulate a special and unified guidance law for the relief system of the outsourcing contract. The disputes of government service outsourcing contract may cause significant loss to the contracting parties and the public interest. And how to get the timely relief in legal ways is an urgent need to be clarified.

4. Regulation and perfection of government service outsourcing contract

4.1 The administrative body's rights in outsourcing contract should be constrained by the principle of administration by law

The administrative subject shall not expand the activities' legal space by contract agreement, some behavior modes like administrative punishment; administrative enforcement shall not be replaced by outsourcing contracts. The functions and powers of the administrative organs that should be fulfilled by itself shall not be re-consigned in disguised form by the contract, that is it just sign the contract in their own jurisdiction and shall not sign the contract beyond their authority. In the scope of binding administrative act, when the law has clearly defined that a specific administrative act must be implemented by the administrative organs, the executive can not be a blatant violation of the law to outsource it. In short, the government service outsourcing system should adhere to the principle of market opening and benefiting the participation of the majority of social main body to encourage the diversity and universality of public service projects. Outsourcing contract with the content of administrative planning, administrative licensing, administrative penalties and other issues must comply with the "Administrative licensing law of the People's Republic of China", "Administrative punishment law of the People's Republic of China" and other laws and regulations, and shall not exceed the administrative authority and the scope of the delegated authority. The authority to set up the contract shall be uniformly regulated according to the relevant laws and regulations or standards of the state.

4.2 The setting of the entity right and obligation in the outsourcing contract should follow the principle of reasonable allocation

After the introduction of the concept of equality, voluntary, autonomy, honesty and justice in the civil contract, the equality of the rights and obligations in the administrative contract shall be implemented. The government service outsourcing contract is no exception. Its goal is to achieve the desired specific administrative purpose of the contract effectively, but also to take the essential principles to achieve specific administrative purpose as limitation to prohibit unreasonable links in the rights and obligations. The executive relative in a weak position must be leaved room for bargaining about the specific content of the contract. Otherwise, it is difficult to say it is an administrative contract without any autonomous meaning of administrative counterpart. It essentially becomes an executive order. In addition, given that the administrative contract is the unity of administrative and contractual, the settlement of administrative prior right should comply with the statutory conditions, and be limited by the principle of fair, reasonable, legal and so on. In particular, the standard of administrative body's liability for breach of contract helps the whole government service outsourcing mechanism operate smoothly. Specifically, the contract should clearly define the contents about the form of default behavior, the way to undertake the liability of default, the information and the identification process of breach of contract, so as to facilitate service providers to maintain their own interests in the contract timely.

4.3 The disputes of outsourcing contract should be remedied in accordance with the basic principle "damage to the relief" through the main form of administrative relief and judicial relief

Because of the exercise of administrative powers, different degrees of executive power intervene in the stage of signing, performance and termination of government service outsourcing contract. Therefore, the remedy of this kind of contract should be included in the administrative law system firstly. "Administrative review law of the People's Republic of China" second provision is that if citizens, legal persons or other organizations think that the specific administrative acts of the administrative organs infringe on their legitimate rights and interests, they can apply to the administrative authorities for reconsideration. Township administrative outsourcing contract is not in those many specific applicative situations listed in Article 6, but the (the 11) uses a principled transparency provisions that when the other specific administrative acts of the administrative organs infringe upon their lawful rights and interests, citizens, legal persons or other organizations can apply for administrative reconsideration. But in our country's administrative law circle, it has become a universal acknowledged viewpoint that the administrative contract is the concrete administrative behavior. And comparing with the "administrative review law" sixth article sixth, if administrative relative person thinks that the administrative authority change or abolish the agricultural benefit contract and infringe upon the lawful rights and interests, they can apply for administrative reconsideration. It has been proved that the administrative reconsideration law clearly recognizes that the relative person can apply for administrative review about some administrative contract disputes. Similarly, the administrative reconsideration of the government service outsourcing contract dispute doesn't have rigid institutional barriers. It can be completely legally reviewed. The competent authorities may choose some common disputes to deal with, so as to provide a typical reference and guidance for the settlement of government service outsourcing contract dispute. Besides, based on the desirability of administrative contract, we can try to introduce the administrative mediation mechanism into government service outsourcing contract. That is reaching reconciliation on the basis of the autonomy of the administrative subject and the service provider under auspices of the competent authorities at the higher levels, which facilitates to resolve the contract disputes rapidly and effectively, maximize the administrative efficiency and reduce social costs. If the dispute cannot be resolved through administrative means, it is feasible to enter the administrative proceedings. "Administrative procedure law of the People's Republic of China" does not expressly stipulate that the administrative contract is the subject of administrative litigation. But it is not ruled out because that the administrative litigation law twelfth clearly states that the state act, abstract administrative act,

internal administrative act and final administrative act can not bring an administrative lawsuit, so the administrative contract is clearly not excluded. Only the administrative relative people's rights and interests of the contract get a timely and effective recovery and reasonable compensation, outsourcing contracts are seriously implemented in the legal relief level, the effective and mature government service outsourcing system can effectively be established.

5. Conclusion

After government service outsourcing, if enterprises lack the effective supervision from government, the essence of enterprise profit maximization will make it impossible to fully consider the social justice and public responsibility. This will produce moral hazard; result in the loss of public trust and further deriving the government's legitimacy crisis. Therefore, in view of the particularity and complexity of government service outsourcing reform, the publicity and the materiality of the interests involved, the correlation and linkage of the vertical administrative system, on the basis of the experiences and lessons of the reform in some areas, it is necessary to carry out the basic concept of administrative relief priority, judicial terminal and the administrative supervision throughout. That is the supervision and guidance of the government special departments should be further strengthened, and in this process, power agencies, audit departments, discipline inspection and supervision departments and other departments should be brought in to set up a special agency jointly to strengthen the monitoring of each link of the operation of the contract.

Acknowledgements

Jingzhou science and technology development project (2015AD52);
Legislative Research Project of Jingzhou People's Congress Standing Committee (15JZLF02);
Youth Foundation of Yangtze University (2015cqn01);
Society Science Foundation of Yangtze University (2015csz009);
Innovation Foundation of Social Assistance Research Center of Yangtze University (15JZ03).

References

- [1] Bo Liang, Hai Fengliu, Gui Ninggeng, Guang Yang, The Study of Risk Management of Government IT Service Outsourcing. *Advanced Materials Research*, 2014, Vol.3326 (989), pp.5112-5115.
- [2] Bai Xiuyin, Hanif Muammad Imran, Study on Accountability Mechanism of Public Service Outsourcing in China. *Proceedings of 2013 International Conference on Public Administration (9th)(Volume II)*.
- [3] Wei Wang, Jun Fengcheng, Analysis of the Competitiveness of Service Outsourcing Demonstration City in China. *Applied Mechanics and Materials*, 2010, Vol.1016 (33), pp. 394-398.
- [4] Shao Baodong, Zhou Enyi, Research on Administrative System Reform of Province-Controlled County Based on Flattening Theory. *Proceedings of 2014 International Conference on Public Administration (ICPA 10th) (Volume II)*.
- [5] Yong Guo, Political culture, administrative system reform and anticorruption in China: taking the official car management institution reform as an example. *Crime, Law and Social Change*, 2010, Vol.53 (5), pp.493-508.