

A review of the supervision of PPP legal system in China

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Abstract

Since 2014, the PPP project as a new financing mode of our country such as bamboo shoots after a spring rain swept on both sides of the Changjiang River, and also introduced a number of laws and policies for the escort, but from the industry point of view, the top-level design of the PPP field is the national level rules in some key issues is blurred, it is difficult to form a stable security policy PPP project. By combing the current legal system of PPP, the status quo of supervision, this paper points out the problems that need to be solved in the development of PPP, and puts forward personal suggestions.

Keywords

PPP project; legal supervision; settlement measures.

1. Introduction

The reason is that the legal system construction of PPP model in our country has not been perfected: the superior law has not been established yet, and the lower law has overlapping and conflicting phenomena. At present, our country according to the law PPP the model by the Ministry of finance, the national development and Reform Commission and the local government, not only the lack of the law, and there is scope, the concept of conflict, bring difficulties to the PPP project landing, hidden danger to the stable operation of the PPP project. Therefore, the need to accelerate the launch of the host computer, the ministries requires close communication, efforts to resolve legal disputes, to promote the PPP project breakthrough "the exploration stage", into "the practice stage".

2. The current situation of PPP legal supervision and construction

In recent years, PPP model has been widely used in city infrastructure construction in China and in the public service, but because of China's PPP is still in the exploratory stage, the legislation is not perfect, there is "no legal basis". At present, most of the laws for PPP projects are formulated by the State Council, the Ministry of finance, the national development and Reform Commission and other government departments and local government departments, including:

Legislative body	Ppp specialized law and policy	Ppp related laws and policies in the field
The State Council	"guiding opinions on innovation in key areas of investment and financing mechanism to encourage social investment", "notice on the promotion of PPP guidance in the field of public service", "Several opinions on encouraging and guiding the healthy development of private investment", "Opinions on deepening the reform of the investment and financing system", etc	"Guiding opinions on promoting the construction of sponge cities", "Opinions on further improving the work concerning the reform of urban shanty towns and urban and rural dangerous buildings and the construction of supporting infrastructure projects", "Guiding opinions on promoting the construction of underground comprehensive pipe gallery in urban areas", "on the electric vehicle charging infrastructure construction guidance", "on the health and pension services combined guidance", "on the full liberalization of pension services market to enhance the quality of service pension opinions" etc.
the Ministry of Finance	Circular on issues related to the promotion of the use of PPP models", "on the further advance in the field of public service Public-Private Partnership work notice", "on the Public-Private Partnership demonstration project implementation related issues notice", "on the issuance of Public-Private Partnership of operation guide (Trial) the notice" and "on the norms of Public-Private Partnership contract management work notice", "on the issuance of the Public-Private Partnership project financial capacity proof guidelines notice", "on the implementation of the Public-Private Partnership projects Yijiangdaibu	"On the implementation of local government debt limit management advice", "on the issuance of the" government investment funds Interim Measures for the administration of "notice", "on the solution of local government financing platform for financing for projects under construction issues" and "on the issuance of the" city network special funds management procedures "notice", "on the issuance of the" Public-Private Partnership project financial management procedures "notice", "on the issuance of the" central government of water conservancy development funds management approach "Circular" etc.

	policy notice ", "On the issuance of the" PPP value evaluation guidelines (Trial) "notice", "on the issuance of the" Public-Private Partnership project financial management procedures "notice", "Public-Private Partnership value evaluation guidelines (Revised Draft)" etc.	
The NDRC	"On the Public-Private Partnership guidance", "infrastructure and public utility franchise management approach", "national development and Reform Commission, the Ministry of Finance on the use of government investment to support social investment projects notice", "the national development and Reform Commission Chinese Commission on promoting the traditional infrastructure of Public-Private Partnership (PPP) project asset securitization related work notice", "on the issuance of" traditional infrastructure implementation of Public-Private Partnership projects - "notice", "on the proper traditional infrastructure of Public-Private Partnership related work notice", "The national development and Reform Commission, the Ministry of housing and urban construction on major municipal engineering field of Public-Private Partnership (PPP) innovation work notice", "on the national highway network construction of Public-Private Partnership project approval notice", "on the way to promote the agricultural areas of Public-Private Partnership guidance" etc.	"The national development and Reform Commission, Ministry of Finance and Ministry of water resources to encourage and guide social capital to participate in major water conservancy construction and operation of the implementation of views", "on Further Encouraging and expanding the social capital investment in the construction of the railway executive opinion", "on the strengthening of city parking facilities construction guidance", "on the banks to support key areas of major the construction of the guidance", "on the city underground pipe gallery to implement the system of paid use of the guidance", "on promoting the health and pension services Construction Notice" etc.
Other ministries	Ministry of housing, "Municipal Public Utilities Franchise Management Measures" and so on	Circular of the Ministry of transport on the issuance of a pilot scheme for comprehensively deepening the reform of transport and transport, and the opinions of the Ministry of Civil Affairs on encouraging private capital to participate in the development of the pension service industry
local government	Sichuan Province in the field of public service "on the promotion of Public-Private Partnership, the implementation of the views of" Shandong province "on the promotion in the field of public service Public-Private Partnership mode guidance notice" etc.	Sichuan Provincial People's government "on innovation in key areas of investment and financing mechanism to encourage social investment advice", "to further strengthen the management of state-owned property rights transfer notice", "on the issuance of the Sichuan provincial government debt management notice" etc.

By the State Council, ministries and local governments formulated for the PPP model of administrative regulations and departmental regulations constitute a set of PPP model of legal document system. Because of these Provisions ", which caused the each department acting on its own" different standards and regulations related to chaos. Obviously, in the absence of a unified law and management system, PPP project supervision in "dragon water" situation, if there are problems, easy to produce the phenomenon of wrangling with each other, this is not conducive to long-term development of PPP in china.

3. PPP mode legislation present situation and its existence question

PPP is not a temporary model, but a new mode of cooperation between government and social capital under the new conditions. The purpose of developing PPP project in our country is to change government functions and establish clear legal environment of power, responsibility and profit. Although the promotion and implementation of the central government ministries in mode PPP has launched a series of rules and regulations, and has achieved certain results, but compared with the mature PPP practice, legal environment of China's implementation of PPP still exist in the upper law and the lack of law deficiency.

3.1 There are institutional and policy conflicts between the two ministries

At present, China's PPP model legislation process, mainly the Ministry of Finance and the national development and Reform Commission, two ministries, respectively, leading and promoting the PPP project legislation. However, due to the two ministries to carry out their duties, the starting point is different, there is a big gap between the understanding on PPP mode attribute and the regulatory body, a direct result of the two ministries to develop PPP policy in late is not consistent, and thus hinder the effective implementation of PPP project. In view of the different position, there is a big difference in the Ministry of Finance and the national development and Reform Commission PPP in the legislative

process, the comparative analysis of laws and regulations between the two departments, two departments pointed out that the "fight" contradictions.

3.1.1. Overlap coverage

In the past two years, the NDRC and the Ministry of finance have issued a number of important PPP regulations, which have been divided into areas in charge, scope of application and boundaries. However, there are still overlapping and unclear boundaries. The national development and Reform Commission "on the proper Public-Private Partnership in traditional infrastructure related work notice" (NDRC [2016] 1744) Interim Measures for the financial management of the Public-Private Partnership projects and the Ministry of finance "(MOF [2016] 92) respectively to the NDRC and the Ministry of Finance in charge of the PPP project the field has been divided, are under the jurisdiction of the field of infrastructure and public services. However, the Ministry of Finance for public services completely covers the infrastructure development and Reform Commission under the jurisdiction of the field, including energy, transportation, water conservancy, environmental protection, agriculture, forestry, municipal engineering and other seven major areas. At present, most of the properties of PPP project has both the infrastructure and the nature of the public service, the two areas of policy not clear boundaries will lead to specific PPP during the implementation of the project is ready to accept either course make local government puzzled.

3.1.2. There is a difference in the duration of cooperation

The Ministry of finance "Public-Private Partnership law (Draft)" provisions "determine the cooperation period is generally less than 25 years" on the basis of the comprehensive factors, the national development and Reform Commission "infrastructure and Public Utilities Franchise Management Measures" provisions of the concession period is determined according to the comprehensive factors, "a maximum of 30 years", "for the franchise project management of large scale of investment, long payback period can exceed the duration of the concession agreement". It is easy to see that the two laws conflict in the provisions of the term of the project cooperation.

3.1.3. The project evaluation and demonstration procedures are inconsistent

"PPP law (Draft)" thirteenth clearly stipulates that into the Public-Private Partnership guidance directory of the project should be through financial capacity demonstration and value for money evaluation. The national development and Reform Commission requirements on the evaluation and demonstration of the more relaxed, "franchise management approach" article eleventh stipulates "project departments to carry out the franchise feasibility assessment, improving the implementation plan of concession project. If the government needs to provide feasibility gap subsidies or carry out value for money assessment, the financial department shall be responsible for the relevant work". Thus, the development and Reform Commission of the "two assessment" is not too concerned about the financial capacity to demonstrate and value for money evaluation is not a necessary part of franchising. If the two laws can not be unified, then we should draw a clear line between the two, to avoid the same problem in the two laws to find two different legal basis for the plight.

3.1.4. The definition of social capital is ambiguous

The Ministry of finance "of Public-Private Partnership model guidelines (Trial)", "the Public-Private Partnership guidelines (Trial)" inside and outside the corporate social capital is already specified in the establishment of modern enterprise system, but does not include the level of government financing platform companies and other state-owned holding enterprises. The national development and Reform Commission "on the Public-Private Partnership guidance" designated subjects of social capital, should be in line with the conditions of the state-owned enterprises, private enterprises, foreign invested enterprises, mixed ownership enterprises, investment, or other business entities. From the definition of social capital by the two ministries and commissions, the development and Reform Commission has stipulated that the scope of the NDRC is more extensive than that of the Ministry of finance.

3.2 PPP law applies: "government procurement law", vs "Bidding Law";

3.2.1. Social capital side selection

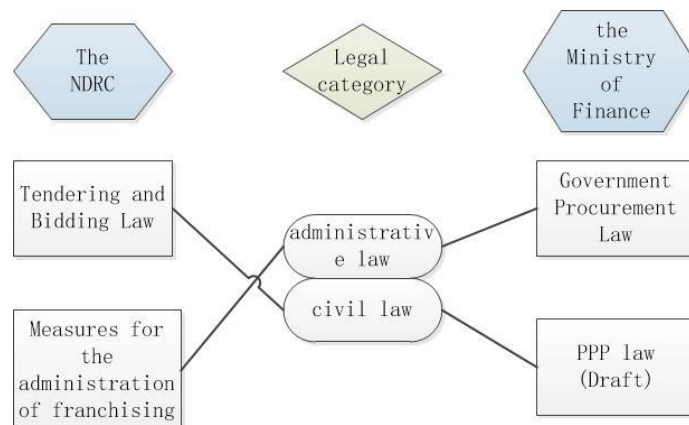
The two sector is divided in its choice of social capital. The Ministry of finance is more inclined to adopt the government procurement law, the reason is that most PPP projects require the government to use financial funds to purchase public services according to law, and should be included in the scope of government procurement. The NDRC is more willing to adopt the bidding law, that the domestic PPP project is basically the construction project, and moreover, the engineering company is more familiar with the bidding law, the government procurement law is not very understanding. There are two difficulties: 1, at the same time for construction projects, the use of fiscal funds subsidies of the two PPP projects may be at a loss. 2, neither of the two laws of the PPP project - that is, user paid non engineering projects, may be "impossible".

3.2.2. Two strokes change a trick

Whether the PPP project meets the "two stage bidding" or "one-off recruit" has always been controversial. Article ninth of the regulations on the implementation of the bidding law stipulates that "the franchise project investors selected by means of bidding can build, produce or supply them according to law, without bidding.". Notice of the Ministry of finance "on further promoting the work of the Public-Private Partnership in the field of public service" (MOF [2016] 90) ninth points: "The PPP project involves construction, equipment procurement or service outsourcing, according to the government procurement law has selected social capital partners, partners can legally self construction, production or service," Regulations for the implementation of the provisions of article ninth in accordance with the "bidding law, partners can no longer be tender." However, according to the bidding method of bidding only public bidding and invitation for non bidding, competitive negotiation, competitive negotiation can apply the "two strokes become a trick, and not required, the construction and operation of Party's choice in a dilemma.

3.2.3. Judicial application

In the process of promoting the landing of PPP projects, the legal responsibility stressed by the two departments is very different, especially the disputes arising from the licensing agreement, whether applicable to civil litigation or administrative litigation, are still controversial. According to the foregoing, the NDRC stipulates that the implementing agencies shall select social capital in accordance with the bidding law and sign a franchise agreement with the franchise operators selected according to law, which shall apply to the franchise management measures. "The bidding law" belongs to the category of civil law, in order to standardize the tendering and bidding activities and the parties involved in the behavior, is a kind of civil action, for equality, autonomy, free trade, that is the civil liability. According to the regulations on franchise management, franchise operators may exercise administrative reconsideration or administrative litigation rights according to law. As can be seen, the NDRC considers franchising to be an administrative legal category. However, the legal responsibility stressed by the Treasury is entirely the opposite. The Ministry of finance is more willing to adopt the government procurement law to select the social capital side and sign the PPP agreement with the social capital or item company, Follow the PPP Act (draft). The category of "government procurement law" belongs to administrative law, standardize the government procurement behavior of government organs and units, the emphasis is the administrative responsibility; "PPP law (Draft)" that may bring a civil litigation or arbitration to solve the dispute between project partners, we can see that the Ministry of finance, the PPP project belongs to the category of civil law. The two departments have different understanding of legal liability, which leads to the dispute can not be effectively implemented.



4. Suggestions

4.1 Accelerate the improvement of legislation

Through the PPP mode, the government to solve the lack of funds and lack of efficiency of the "two shortage" problem, enterprises obtain a reasonable return on long-term stability, the efficiency and fairness of government led enterprises to pursue effectively combine to solve the market failure and government failure "two". Vigorously the introduction of social capital especially private capital participation in municipal infrastructure investment, construction and operation, broke the monopoly of state-owned enterprises, to create the conditions for the participation of social capital investment in construction and operation. However, the absence of the superior law and the conflict and repetition of the lower law have always been a criticism of the PPP law". PPP project has a large amount of investment, a long cycle, and faces the government change, and both the social capital and the government bear greater risk. A complete and perfect PPP law can escort the PPP project, and it has irreplaceable practical significance for its smooth operation.

First, determine the legislature. At present, the NDRC and the Ministry of finance, as the legislative body of the PPP project, have issued a number of PPP laws, which have laid a solid foundation for the development of the PPP project. However, due to the different starting point of the two departments, the legal content of the collision part of each other, in view of this, the State Council led the establishment of PPP project legislative functions, to resolve disputes between departments, and jointly promote the legislative work.

Secondly, we should accelerate the legislative process of PPP. (1) under the guidance of the State Council, coordinate and coordinate the various ministries and commissions in consideration of factors, and further clarify the division of labor, coordination, examination and approval, supervision and other issues among the executive departments. (2) in the process of legislation, the rights and obligations to clear all aspects of project preparation, project identification, project transfer bidding, project implementation, project implementation and stakeholders, in the PPP project, the government and investors are equal subjects, should be in accordance with the civil procedure law to resolve the dispute, the government can of course resolved in accordance with the administrative punishment procedures and administrative litigation law as the supervisor of administrative punishment. (3) comprehensive consideration of PPP related financial, investment project management, bidding, financing, price management and public services, and many other aspects of work. (4) in the legislative process, play a strong support of the existing laws, to avoid duplication and conflict, further promoting mastery between the law, to further improve the legal basis of PPP, the formation of legal efforts be made one form a complete, standardized, specialized and special PPP legal system.

4.2 Clear judicial application

In the selection stage and the stage of social capital licensing dispute, because the Ministry of Finance and the national development and Reform Commission to the understanding of PPP, gives the corresponding judicial treatment of different ways, resulting in disputes once faced to seek effective judicial solution. In the selection of social capital, we should first determine the mode of selection,

procurement or bidding, because the government procurement law and the bidding law correspond to administrative law and civil law respectively. At present, the "Bidding Law" only two clear tender, may be difficult to meet the diverse needs of the PPP project, and set before the winning bidder is determined, the tenderer may not negotiate with the bidders on such substantive contents of the bid price, brought great distress to the PPP project cooperation. By contrast, the six procurement methods of the government procurement act are more flexible and provide greater scope for PPP project cooperation. However, the government procurement law emphasizes administrative responsibility, and the government and social capital belong to equal principal position in the PPP project, which is benefit sharing, risk sharing, and more in line with the spirit of the civil law. The author suggests that the bidding procedure should be optimized and a special civil law in line with the PPP project shall be formulated. In accordance with the law through open tender bidding, competitive negotiation, competitive negotiation, fair choose social capital, refers to the administrative act as part of the special civil law administrative law to restrict the relevant provisions.

Authorization stage, enhance caliber, clear the legal responsibilities of all parties. At the stage of authorization, the subject of legal responsibility is not clear, the key is to define the boundaries of infrastructure and public services. In the process of legislation, the NDRC and the Ministry of finance to further enhance the understanding of PPP and franchising, to improve the government purchase service and franchise awareness, raise awareness on the limits of the field of infrastructure and public services. I think a lot of infrastructure and public services is difficult to separate, such as education, health and other PPP projects, community access to public services through infrastructure, and forced to be arranged, PPP affect the overall efficiency, as a unified caliber at a higher level, to further clarify the legal responsibility.

5. The thinking of social capital withdrawal mechanism

In the course of the interim handover, the current PPP laws and policies have made a clear framework for the withdrawal mechanism, but the specific exit mechanism is not clear. The regulations on the administration of franchising and other policies stipulate that the infrastructure and public utilities will be handed over to the government at the time of expiry". The guidelines for the operation of Public-Private Partnership (for Trial Implementation), the guidelines for the implementation of Public-Private Partnership projects in the field of traditional infrastructure, further define the process of project transfer: For the project which has been handed over for the time being, a transfer team shall be established before the end of the cooperation period (transition period) to assess the assets and to be responsible for the handover of the project. "The government should respond to the State Council and investors a clear exit path of the PPP project, sustained and stable operation of protection project requirements, development and Reform Commission in the" guidance on carrying out the Public-Private Partnership "(NDRC [2014] 2724)" to strengthen the standardized management of Public-Private Partnership projects, will "exit mechanism" as an important part to be standardized, and put forward the government to rely on all kinds of property rights, equity market, To provide diversified, standardized and market-oriented exit channels for social capital." However, the policy system is not specific on how the social capital to exit the item company to make further explanation, leading to the implementation unit and social capital also can not accurately grasp the fuzzy, skip, to project future transfer of work left serious hidden trouble.

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