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List of Abbreviations

ADB	Asian Development Bank
CGPC	Central Government Procurement Centre established by Government Offices Administration of the State Council as the centralized purchasing agency for central government departments
E-GP	Electronic Government Procurement
ESL	Electronic Signature Law
GFMIS	Government Financial Management Information System
GPA	the WTO Agreement on Government Procurement
GPL	Government Procurement Law
GPMTS	Government Procurement Management and Trading System, i.e. China's Nation-wide Integrated E-GP System
ICT	Information Communication Technology
IPMGP	Institute of Public Market and Government Procurement, University of International Relations, China
IRTL	Draft State Council Implementing Regulation for the Tendering Law
IRGPL	Draft State Council Implementing Regulation for the Government Procurement Law
MIIT	Ministry of Industry and Information Technology
MOC	Ministry of Commerce
MOF	Ministry of Finance
NDRC	National Development and Reform Commission
NPC	National People's Congress
OSCCA	Office of State Commercial Code Administration
TL	Tendering Law
WB	World Bank

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EXECUTIVE SUMMARY

The development of electronic government procurement (e-GP) in China is now at a crossroad. Whilst the importance of e-GP has been widely appreciated and pilot programs have flourished in recent years, the future success of e-GP in China remains uncertain due to a number of factors such as the absence of a nation-wide e-GP platform, the lacking of adequate legal basis and unified technical standards for e-GP, as well as the persistence of the fragmented institutional framework for government procurement regulation.

On the one hand, alongside the development of e-government, e-commerce and the government procurement reform in China in the last decade, e-GP in China has made a breakthrough. The benefits to the transparency and efficiency of the procurement process offered by electronic means, especially internet, have been universally recognized by both policy makers at the top level and procuring officers in public and private sectors. E-GP has become one of the priority tasks for China's e-governance development and government procurement reform.

Over the years, especially since 2010, a number of pilot e-GP systems/platforms have been established at the central government level by the centralized purchasing body of the State Council as well as at the sub-central level by a number of provincial/municipal procurement regulators. These initiatives have far-reaching goals that are not limited to electronic communication of procurement documents (contract notices, contract award decisions and results of bid challenges), but to achieve "paperless procurement" from the beginning (budget planning) to the end (contract administration).

Whilst their maturity vary in practice, these e-GP platforms normally consist of two main subsystems: i) an administrative system enabling the government procurement budgets to be submitted and approved, the process supervised by relevant authorities, and the statistics to be gathered; ii) a operational system enabling framework procurement, competitive negotiation, electronic reverse auction and competitive tendering to be conducted. These sub-systems in turn consist of components such as a supplier registry, databases for evaluation experts and certified procuring agencies, sometimes e-catalogue and e-supermarket, and facilities for tendering and bid evaluation online as well as electronic reverse auction. It is encouraging to see that the technical solutions supporting these systems have been offered by domestic (in most cases local) software developers.

On the other hand, however, the development of e-GP in China is facing significant challenges. First of all, the regulation of e-GP has fallen far behind its practice. In the absence of any explicit reference to e-GP in national government procurement legislation, legal uncertainty is inevitable. Secondly, the efforts to establish a unified legal and institutional framework for e-GP are unlikely to be fruitful when the regime for government procurement regulation is fragmented. The co-existence of, and sometimes conflicts between, Government Procurement Law and Tendering Law is the "bottleneck" of Chinese government procurement reform. E-GP, instead of offering a cure, became another victim, which is evident in the parallel drafting of technical standards for e-GP and e-Tendering by rival authorities. Thirdly, the long term unity and interoperability of pilot programs at sub-central level is questionable. The burden for suppliers to register with increasing numbers of e-GP platforms should not be underestimated. Without a nation-wide platform or the interoperability of local platforms, the national procurement market may suffer from local protectionism caused partitioning. At last, but not least, China needs to consider whether these practices are complying with the provisions of the WTO Agreement on Government Procurement on the use of supplier list and electronic procurement.

I. Introduction

Since the 2003 China's Readiness for Electronic Government Procurement (e-GP) Survey commissioned by the Asian Development Bank (ADB)¹, e-GP in China has attracted increased attention from policy makers at the top and stronger support from the general public, and achieved wider coverage and technical advance through pilot programs the number of which increases rapidly in recent years. However, significant challenges lie ahead: such as the lacking of adequate legal basis and unified technical standards, the challenge to integrate various e-GP systems into a nation-wide e-GP platform, the need to consolidate the fragmented institutional framework for government procurement as well as e-GP regulation, and the challenge to comply with the relevant provisions of the WTO Agreement on Government Procurement (GPA). It is arguable that while e-GP in China has entered into a "fast track", it also reaches an important crossroad.

In this context, this case study examines the current development of e-GP in China- its legal foundation, current initiatives, future plans indicated in government policies and key challenges. It is prepared for the ADB as part of Asia Pacific Procurement Partnership Initiatives and is intended to form part of the studies of selected e-GP initiatives that will be presented in the planned Asia Pacific Conference on e-GP in late 2011.

The methodology of this case study is largely doctrinal with a special focus on the regulatory environment for e-GP in China. However, relying on publicly available information from reliable sources such as official government websites and designated media for publication of procurement information, a survey of current e-GP initiatives at various level of Chinese government will also be conducted. Whilst it is desirable for such survey to be conducted using quantitative and qualitative methods such as on-site investigation and interviews, the current study, limited by its scope, will only be able to provide a snapshot based upon secondary sources such as news reports. Nevertheless, the extensiveness of the e-GP practice in China as shown by the survey, in contrast with the lack of unified legal and institutional framework as identified in the analysis below, in turn informs the gap in state legislation and policy to be addressed in the future.

Section II provides an overview of the government procurement in China. The development of e-GP is not sustainable without adequate legal and institutional framework for government procurement in general. China's government procurement reform since late 1990s has great achievements with more and more government purchasing activities subject to regulation and conducted through transparent procedures. However, the deficiencies of the government procurement regime remain significant. Most notably, Government Procurement Law (GPL) drafted and administered by the Ministry of Finance (MOF) and Tendering Law (TL) drafted and administered by National Development and Reform Commission (NDRC) co-exist and are sometimes in conflict. This "two dimensional" structure is arguably the "bottleneck" of Chinese government procurement reform. Apart from the unwillingness of government agencies to give up administrative prerogatives, it is difficult to explain why the regulation of tendering activities needs to be outside of the scope of GPL. This fragmented legal and institutional framework has impeded the development of e-GP as demonstrated (in

¹ Available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=676149>, retrieved on 3 Sep. 2011.

section IV.D) by the co-existence of e-GP and e-Tendering initiatives at the sub-central level and the parallel drafting of technical standards for e-GP and e-Tendering by rival authorities with no sign of coordination.

Section III examines the extent to which e-GP is regulated in national procurement laws (GPL and TL) and their forthcoming implementing regulations; the drafting process of a specific measure on e-GP at the national level; and the attention to e-GP in China's national policies. Whilst e-GP is always one of the priorities identified by the Chinese government in its master plans for long term development, government procurement reform, as well as e-government and e-commerce, it is consensus among legal scholars that the building of legal foundation for e-GP falls far behind the e-GP practice.

Section IV then provides a survey of such practice looking at the current e-GP initiatives at the central and sub-central level, including the initiative led by the MOF to establish a nation-wide e-GP management and trading system. Over the years, especially since 2010, a number of pilot e-GP systems/platforms have been established at the central government level by the centralized purchasing body of the State Council as well as at the sub-central level by a number of provincial/municipal procurement regulators. These initiatives have far-reaching goals that are not limited to electronic communication of procurement documents (contract notices, contract award decisions and results of bid challenges), but to achieve "paperless procurement" from the beginning (budget planning) to the end (contract administration).

Whilst their maturity vary in practice, these e-GP platforms normally consist of two main subsystems: i) an administrative system enabling the government procurement budgets to be submitted and approved, the process supervised by relevant authorities, and the statistics to be gathered; ii) a operational system enabling framework procurement, competitive negotiation, electronic reverse auction and competitive tendering to be conducted. These sub-systems in turn consist of components such as a supplier registry, databases for evaluation experts and certified procuring agencies, sometimes e-catalogue and e-supermarket, and facilities for tendering and bid evaluation online as well as electronic reverse auction. It is encouraging to see that the technical solutions supporting these systems have been offered by domestic (in most cases local) software developers.

As mentioned above and further explained in section II below, tendering activities in China are regulated by separate legal instruments (TL and its implementing regulations/measures) and by separate institutions (NDRC and a number of sector ministries). Without a choice, section IV.D will also appraise the current e-Tendering initiatives led by such institutions as a distinctive issue.

On the basis of the appraisal of current law and practice, section V provides a critique highlighting key challenges faced by the sustainable and healthy development of e-GP in China, such as the inadequacy of regulatory and institutional framework, the lack of unity and interoperability of pilot programs which might entrench local protectionism, as well as the challenge to comply with the GPA to which China is in the process of acceding.

Section VI provides concluding remarks and some suggestions for the way forward.

II. Background: Government Procurement in China

A. Government Procurement Context

Government procurement did not exist in pre-reform centrally planned Chinese economy (1949-1978). The needs of public entities to provide essential services were met by goods, services and works allocated to them under fixed terms through a central plan. Since the launching of the economic reform in 1978, central planning has started to give way to market forces. In mid-1980s, state manufacturing enterprises were allowed to freely use capacity in excess of planned output to produce directly for the market. This created inter-enterprise market relations and product markets.² Against this background, government procurement soon emerged and the tendering system was introduced in early 1990s. Since then, certain procurement of public entities, especially procurement of construction works using public funds and procurement of mechanical and electrical equipments by state enterprises, have been subject to tendering requirements as finally codified in the Tendering Law (TL).

However, it is important to note that in the Chinese context, government procurement does not mean government entities (including state agencies, local governments, public bodies and state enterprises) purchasing goods, services and works in a competitive market). The Government Procurement Law (GPL) surprisingly adopted a narrow definition of “government procurement” (further explained below in section II.B) which excludes procurement by state enterprises. Therefore, official statistics arguably do not reflect the real size of China’s government procurement market.

Nevertheless, according to MOF reports, “government procurement” in this narrow sense has increased from 3.1 billion Yuan in 1998 to 842.2 billion Yuan in 2010, an impressive average 47% annual increase (see Figure 1 below). Government procurement expenditure in 2010 accounts for 9.4% of the annual fiscal expenditure and 2.1% of China’s GDP³ which is much lower than the world average of 8% of GDP.⁴

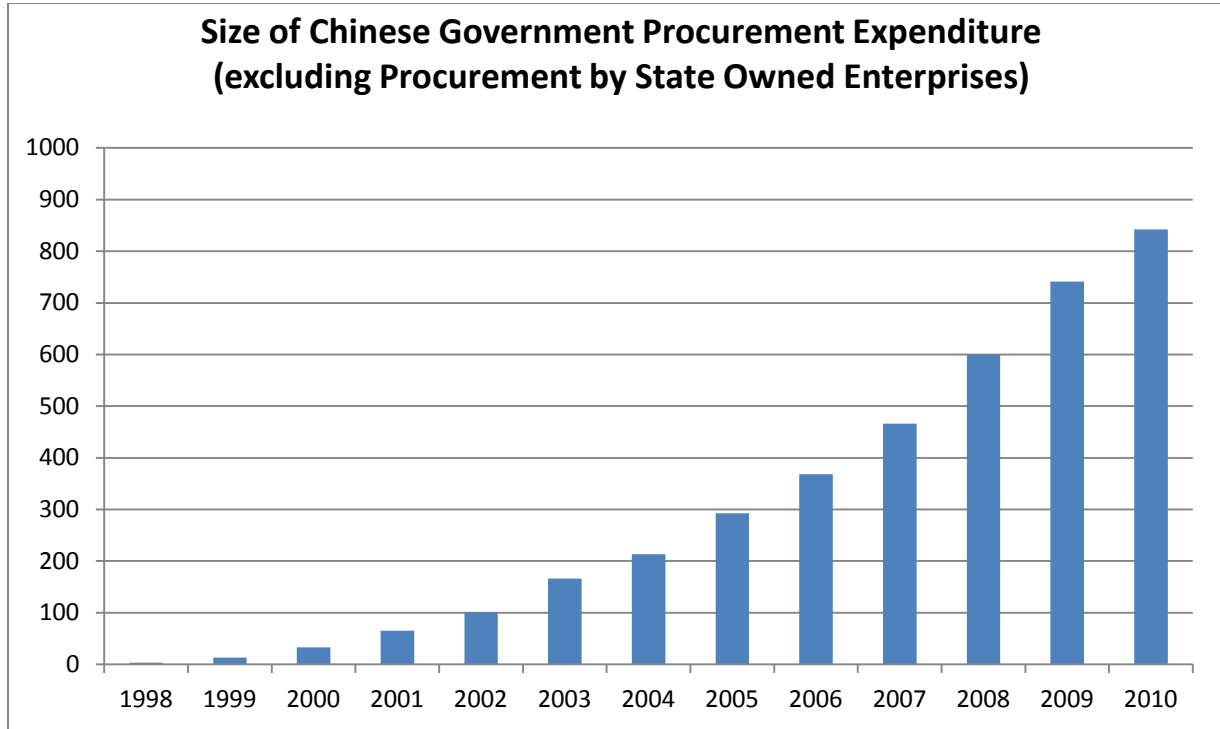
In 2010, the size of goods, works and services procurement is respectively 317.63 billion RMB, 453.66 billion RMB, and 70.91 billion RMB; account for, respectively 37.7%、53.9% and 8.4% of annual government procurement expenditure (see Figure 2 below). It is abnormal that works procurement accounts only for such a small proportion. As further explained below in section II.B, this is largely due to the fact that in China, large infrastructure projects involving billions of investment, such as the Beijing-Shanghai High Speed Railway system and Three-Gorgeous Dam, are procured by state-owned enterprises specially set up for such projects; and their procurement, while subjecting to tendering rules contained in TL, is outside of GPL and not incorporated into official government procurement data.

² Huang, Y. P. and Duncan, R. “How Successful Were China's State Sector Reforms?” (1997)24(1) *JOURNAL OF COMPARATIVE ECONOMICS* pp. 65-78, at 68-69

³ http://www.cccp.gov.cn/gzdt/201009/t20100929_1284061.shtml, visited on 25 Sep.2011.

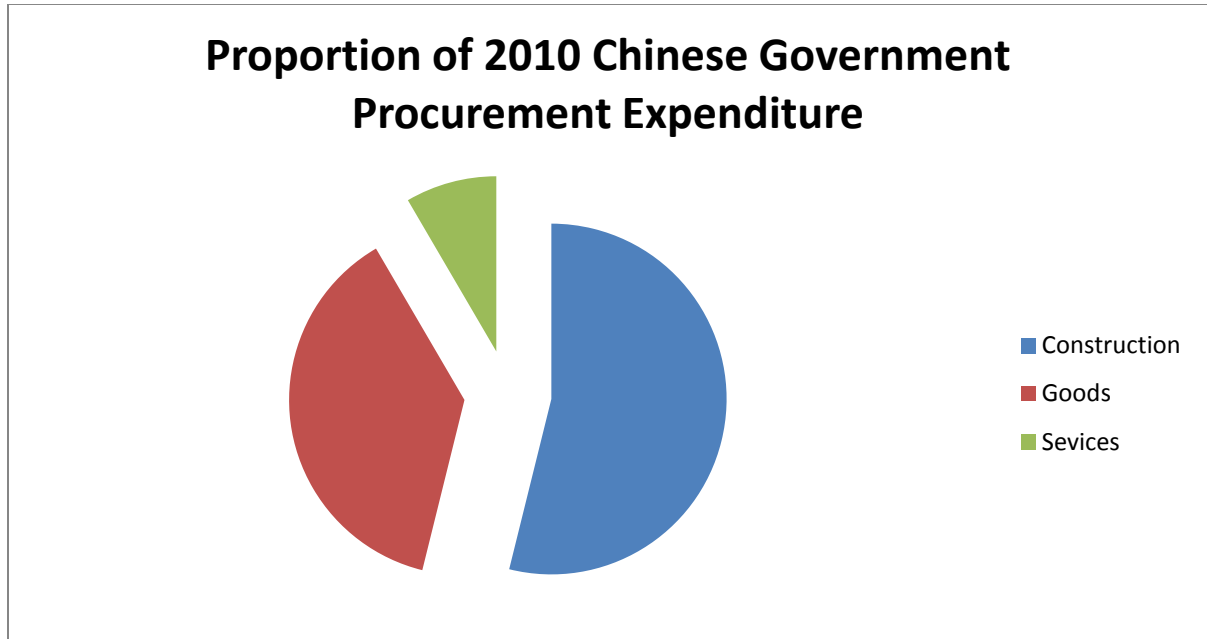
⁴ For the figure of the world average see OECD, *The Size of Government Procurement Market*, offprint from (2003)1(4) *OECD Journal on Budgeting*.

Figure 2 Size of Chinese Government Procurement Expenditure 1998-2010 (Unit: Billion Yuan)



Source: compiled from data available at www.ccgp.gov.cn, and <http://gks.mof.gov.cn/>

Figure 2 Proportion of 2010 Chinese Government Procurement Expenditure (Unit: Billion Yuan)



Source: compiled from data available at www.ccgp.gov.cn, and <http://gks.mof.gov.cn/>

B. The Evolving Legal Framework for Government Procurement in China

1. *The legal Hierarchy*

China's *Legislation Law* established the hierarchy of regulatory norms in Chinese legal system.⁵ The Constitution is at the top, followed by primary legislation, namely national laws enacted by the National People's Congress (NPC) and its Standing Committee. The third level consists of implementing Ordinances and Administrative Regulations enacted by the State Council (i.e. Chinese central government). The fourth level contains not only Ministerial Regulations/Measures, but also local legislation adopted by regional People's Congress. The Ministerial Measures/Regulations are strictly forbidden from stepping out of authority or being inconsistent with the national law which serves as their legal base. The third and fourth levels contain so-called secondary/implementing legislation.

2. *Historical Review*

Since the introduction of competitive tendering in procurement of public construction works in the mid-1980s, government procurement regulations in China have boomed in the last two decades. Hundreds of regulatory documents, including two national laws⁶, numerous ministerial regulations and provincial or sub-provincial legislative acts have been promulgated. However, the competition — instead of coordination — of various procurement rules forms the theme in the evolution of the Chinese legal framework for public procurement.

It is noteworthy that Chinese government procurement was regulated at the beginning in a way that focused mainly on tendering procedures rather than the whole concept of government procurement. The first public procurement legislation drafted by the State Development and Reform Commission (NDRC, then State Planning Commission) and enacted by the NPC in 1999 was titled *Tendering Law* (TL) which applies to tendering activities of **both public and private** sectors, and lacks many features of modern public procurement legislation such as a clear definition of public procurement and procurement methods other than competitive tendering procedures.

From mid-1990s, the Ministry of Finance (MOF) and its local branches initiated a new wave of government procurement reform as a part of the budgetary reform. Significant improvement of this new initiative, such as using widely accepted public procurement concepts, terms and techniques could easily be identified. However, the "fruit" of this new initiative — China's *Government Procurement Law* (GPL) enacted in 2002 — is not as comprehensive as expected.

⁵ Chinese Legislation Law was enacted on 15 March 2000 and entered into force on 1 July 2000, see State Council, *Notice on the Implementation of Legislative Law*, No. 11, 8 June 2000.

⁶ The *Tendering Law* (TL) enacted on 30 August 1999 which entered into force on 1 January 2000; and the *Government Procurement Law* (GPL) enacted on 29 June 2002 which entered into force on 1 January 2003.

3. *The Tension between GPL and TL with regard to coverage*

Due to the failure to absorb the TL in the legislative process, the GPL provided a narrow definition of “government procurement” which refers to “procurement of construction works, goods and services listed in certain catalogues or above certain threshold (as promulgated annually by authorities at provincial level or above) by government agencies at all levels, public institutions and social organizations using fiscal funds. Key factors of this definition are the nature of the procuring entity (government departments, institutions and social organizations under budget control such as public hospitals, state schools and universities, cultural organizations, state-owned news agencies, sports organizations and scientific research institutes excluding state enterprises) and the source of the fund. Procurement of state enterprises, commonly regarded as public procurement, and subject to existing regulations including the TL, is not within the scope of “government procurement” defined by the GPL.

There has been a tension between GPL and TL which is manifested, in particular, on the issue of coverage.⁷ The TL in principle applies to “all tendering proceedings [open and selective tendering] within the territory of the People’s Republic of China”, be it public procurement or private procurement.⁸ The TL also requires that procurement of certain construction projects and procurement of services (such as ground exploration, design and monitoring) and goods (important materials and equipments) incidental to such construction projects must be conducted through tendering proceedings.⁹ These construction projects include [i] projects that concern public interests or security, such as large infrastructure, public utility etc.; [ii] projects funded wholly or partly by state-owned or state-borrowed capital; [iii] projects funded by loans or aids from international organizations or foreign governments. Procurement of these construction projects and that of associated services and goods may be regarded as the mandatory scope of application of the TL although other procurements where tendering proceedings are conducted may also apply the TL on a voluntary basis. This mandatory scope is further defined by a ministerial regulation approved by the State Council.¹⁰

⁷ See Wang, P. “China’s Evolving Legal Framework on Public Procurement” (2004) 13 *Public Procurement Law Review* 285-318.

⁸ Article 2 of the *Tendering Law*.

⁹ Article 3 of the *Tendering Law*.

¹⁰ *Regulation on the Scope and Threshold of Construction Projects Subject to Tendering*, State Development and Planning Commission with the approval of the State Council, 1 May 2000. It provides that [i] infrastructure projects that concern public interests or security include projects concerning energy, transportation, post, telecommunication, water (dams, flood control facilities), refuse, road and bridges, parking, environmental protection and so on; [ii] public utility projects that concern public interests or security include projects concerning supply of water, electricity, gas and heat to the public, technology, education, culture, sport, tourism, hygiene, social welfare, housing etc.; [iii] projects funded by state-owned capital include projects funded by state budget of various level, specialized governmental construction funds run by financial departments, or fund of state-owned enterprises and institutions provided that the investor has *de facto* control of the project; [iv] projects funded by state-borrowed capital include projects funded by national bond, loans borrowed or guaranteed by the state, loans of policy from the state, loans borrowed by the investor but authorized by the state. On threshold, it provides that the mandatory tendering requirement shall apply to any construction contract the estimated value of which is above 2 million RMB; any goods (materials and equipments) or contracts the estimated value of which is above 1 million RMB; any relevant services contract the estimated value of which is above half of a million RMB; or any contracts in a project worth more than 30 million RMB.

The TL covering all tendering proceedings and the GPL covering government procurement overlap when government procurement of construction works, goods, and services is conducted through tendering proceedings. The GPL tried to address this clash with one simple sentence in Article 4 that limits the application of the *Tendering Law* vis-à-vis government procurement to **tendering proceedings** in government procurement of **construction works**.¹¹ In other words, Article 4 of the GPL arguably is implying that: [i] the TL does not apply to tendering proceedings in government procurement of goods and services; [ii] the TL does not even apply to government procurement of works in which procurement methods other than open and selective tendering are used. This provision of the Government Procurement Law has substantially altered the scope of application of the *Tendering Law*.¹²

However, there are still certain ambiguities regarding the demarcation line between these two laws. First of all, it is not entirely clear whether government procurement of goods (materials and equipments) and services closely related to a construction project should be covered by the TL or the GPL, although the definition of goods and construction provided in the GPL suggests that it should apply.¹³ Secondly, it is not clear whether government procurement of construction through tendering proceedings is completely outside of the realm of the GPL or it still applies to such procurement with respect to issues other than tendering procedure such as “buy national” policy, secondary policy, rules on publicity, challenge and review mechanism.¹⁴ Thirdly, the GPL itself contains no detailed rules on tendering proceedings even in government procurement of goods and services. This gives the impression that the TL might be of some significance after all in government procurement of goods and services.

4. *The Tension manifested in relevant ministerial implementing regulations*

Furthermore, these potential conflicts soon became apparent since various ministries, especially MOF and NDRC, have been engaged in a race to adopt their own secondary/implementing Ministerial Regulations that are sitting at the fourth level of the legal hierarchy laid down by the *Legislation Law* as explained above.

¹¹ Article 4 of the Government Procurement Law provides that the “*Tendering Law* shall apply to tendering proceedings in government procurement of construction.”

¹² It is argued by this author that although the doctrine of *lex posterior derogat priori* has been established in legal interpretation by the *Legislation Law* effective on 1 July 2000 (Article 83), it remains hard to reconcile the limitation conferred by the Government Procurement Law with the directly conflicting provision of the *Tendering Law* (namely that the *Tendering Law* is applicable to “all tendering activities within the territory of People’s Republic of China”). An amendment of the *Tendering Law* itself might be necessary.

¹³ It is defined in Article 2 of the Government Procurement Law that “Goods refers to all forms and kinds of objects, including *materials*, fuel, *equipments*, products etc. [...] Construction refers to all work associated with construction, reconstruction, extension, decoration, demolition and repair or renovation of a building or structure.”

¹⁴ This question is particularly acute since the *Tendering Law* has not provided any challenge mechanism.

In the second half of 2004, MOF adopted three regulations implementing the GPL.¹⁵ Among them, the *Tendering Regulation* applies to “tendering proceedings in government procurement of goods or services”; but “tendering proceedings in government procurement of mechanical and electronic products from abroad shall be conducted in accordance with **relevant national measures**.”¹⁶ Goods and services are not defined in the *Tendering Regulation* so the definitions contained in the GPL Article 2 shall apply. In the absence of any limitation on scope of application, the *Publicity Regulation* and the *Review Regulation* should in principle apply to all government procurement arguably including government procurement of construction.

NDRC, on the other hand, enlisted a number of sector Ministries as allies such as Ministry of Construction, Ministry of Railway, Ministry of Transportation, Ministry of Information Industry, Ministry of Water Resources and General Administration of Civil Aviation. Collectively, they adopted two regulations to implement the TL: the *Measure on Tendering in Procurement of Goods in Construction Projects* (“*Tendering Regulation on construction-related goods*”)¹⁷ and the *Measure on the Handling of Complaints on Tendering Proceedings in Construction Projects* (“*Review Regulation on construction tendering*”)¹⁸. Articles 2 and 61 of the “*Tendering Regulation on construction-related goods*” provide that the regulation applies to “tendering proceedings in procurement of goods related to construction projects subject to mandatory tendering requirements” and “tendering proceedings in procurement of goods classified as fixed assets investment” with “goods” referring to “important equipments, materials etc. related to the construction project.”

The clash between these regulations, especially regarding coverage, is astonishing. According to their scope explained above, both the *Tendering Regulation* implementing the GPL and the “*Tendering Regulation on construction-related goods*” implementing the TL applies to tendering proceedings in procurement of goods closely related to construction projects, notably procurement of materials and equipments. For example, if

¹⁵ On August 11, 2004, the MOF, instead of the State Council as required in the *Government Procurement Law*, enacted three ministerial regulations for the implementation of the GPL: (i) *Measure on the Administration of Tendering in Government Procurement of Goods and Services* (“*Tendering Regulation*”); (ii) *Measure on the Administration of the Publication of Government Procurement Information* (“*Publicity Regulation*”); and (iii) *Measure on the Handling of Complaints Submitted by Suppliers Participating in Government Procurement* (“*Review Regulation*”). These regulations became effective on September 11, 2004.

¹⁶This is arguably giving way to the MOC *Implementing Measure on International Tendering in Procurement of Mechanical and Electronic Products* (“*Tendering Regulation on M&E products*”). This regulation was enacted by the Ministry of Commerce (MOC) on November 1, 2004 and entered into force on December 1, 2004. Its legal base is the *Tendering Law*. It provides in Article 2 that “the regulation applies to all international tendering proceedings in procurement of mechanical and electronic products conducted in the territory of China.” Article 8 further provides the scope of mechanical and electronic products procurement subject to mandatory international tendering requirements which includes procurement of mechanical and electronic products from abroad in: [i] projects that concern public interests or security, such as large infrastructure, public utility etc.; [ii] projects invested wholly or partly by state-owned or state-borrowed capital; [iii] projects funded by loans or aids from international organizations or foreign governments; and [iv] *government procurement*.¹⁶ The “*Tendering Regulation on M&E products*” also contains a chapter on publication and challenge.

¹⁷ Enacted on 18 January 2005 and entered into force on 1 March 2005.

¹⁸ Enacted on 21 June 2004 and entered into force on 1 August 2004.

a local government wants to procure the key equipment for its refuse recycling plant being built through competitive tendering, the procuring officer will find it very hard, if at all possible, to decide which tendering regulation should be followed. The “*Tendering Regulation on construction-related goods*” clearly steps out of the boundary set up by Article 4 of the GPL within which the reach of the *Tendering Law* vis-à-vis government procurement should remain in procurement of construction. In the UNCITRAL Model law, the term “construction” includes “services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself.”¹⁹ However, the definition of “construction” in the GPL does not seem to have any intention to include goods or services. It can be argued that the “uneasy peace” between the GPL and the TL achieved by Article 4 of the GPL has been broken by the enactment of the “*Tendering Regulation on construction-related goods*.”

5. *A new step towards coordination or just another episode of conflict: the drafting of State Council implementing regulations*

Currently, two implementing regulations at the State Council level – the Implementing Regulation for the TL (IRTL) and the Implementing Regulation for the GPL (IRGPL)- are being drafted respectively by the NDRC and the MOF. The drafts were published by the State Council Legislation Office respectively on 29 September 2009 and on 11 January 2010 to solicit public opinions.²⁰ Sitting at the third level of the legal hierarchy laid down by the *Legislation Law* as explained above, these drafting State Council implementing regulations have the potential to address the tension identified above between national laws and ministerial regulations.

On the one hand, the coordination between the two dimensions of Chinese procurement law has been explicitly recognized by the note of State Council Legislation Office accompanying both drafts.²¹

However, on the other hand, IRTL maintains in Article 2 that TL and the IRTL apply to procurement of construction works, goods and services via tendering, and works should include works related goods and services. IRGPL, in contrast, defines works as construction and related services in Article 4 and further requires in Article 5 that with regard to government procurement of works, if tendering is not used, GPL should apply.

Therefore, the potential jurisdiction conflicts, especially regarding the coverage of work related goods, persist. Although IRTL in Article 3 limits work-related goods to those forming integral parts of the construction/building and indispensable to the achievement of the basic function of the work, this will not promote coordination in the absence of similar provision in IRGPL.

At present, it is unclear which implementing regulation will be enacted first. Both MOF and NDRC claim that the draft of the implementing regulation that they are responsible

¹⁹ Article 2(d) of the UNCITRAL Model Law.

²⁰ The Chinese version of IRTL is available at http://www.gov.cn/gzdt/2009-09/30/content_1430659.htm, visited on 25 Sep. 2011; the Chinese version of IRGPL is available at http://www.china.com.cn/policy/txt/2010-01/11/content_19215879.htm, visited on 25 Sep. 2011.

²¹ *Ibid.*

for, IRGPL and IRTL respectively, is more advanced in the legislative process and expected to be adopted imminently.²²

As further explained below in section III: C, IRGPL does contain specific, albeit insufficient and arguably inconsistent, provisions on e-GP. However, with regard to government procurement in general, it is arguable that IRGPL and IRTL have achieved little in resolving the tension between TL and GPL.

6. *Procurement methods and organization*

For the purpose of later discussion on e-GP, it is important to note at the outset that the special characteristics of procurement methods and organization in China's procurement regulations.

TL provides for only open and selective tendering and prohibits any negotiation. GPL provides for, in addition to open and selective tendering, competitive negotiation, single source procurement, request for quotation or any other method approved by MOF.²³ However, as further explained below in section III: C and IV, the most popular procurement method with which e-GP has been used, i.e. framework procurement (including both multiple suppliers and single supplier framework), is not mentioned at all in GPL and only provided very briefly in IRGPL.

Open tendering is the preferred procedure under TL and GPL. Any deviation from open tendering needs to be justified and *ex-ante* approved by relevant authorities. Under the GPL, contracts above certain threshold (as set by the centralized purchasing agency for the central government and each provincial government) are subject to open tendering by default. For example, Beijing municipal government announced on 10 Oct. 2011 that for 2012, any procurement valued above 1 million RMB shall be conducted through open tendering unless otherwise permitted; those below the threshold may be purchased through framework agreement.²⁴

Therefore, it is not surprising to see that according to the official data, the procurement via open tendering accounts for the lion share of Chinese government procurement with the proportion for framework procurement not even reported until 2010(see Figure 3 below).

Another important feature is that expert panels (so-called bid valuation committee, negotiation group or quotation soliciting group), consisting of experts randomly appointed from official registry/database, are widely used to evaluate the bids, conduct competitive negotiation or seek quotation, and decides the winning contractor on behalf of the procuring entity, especially in tendering procedures (Article 53-54 IRGPL). The

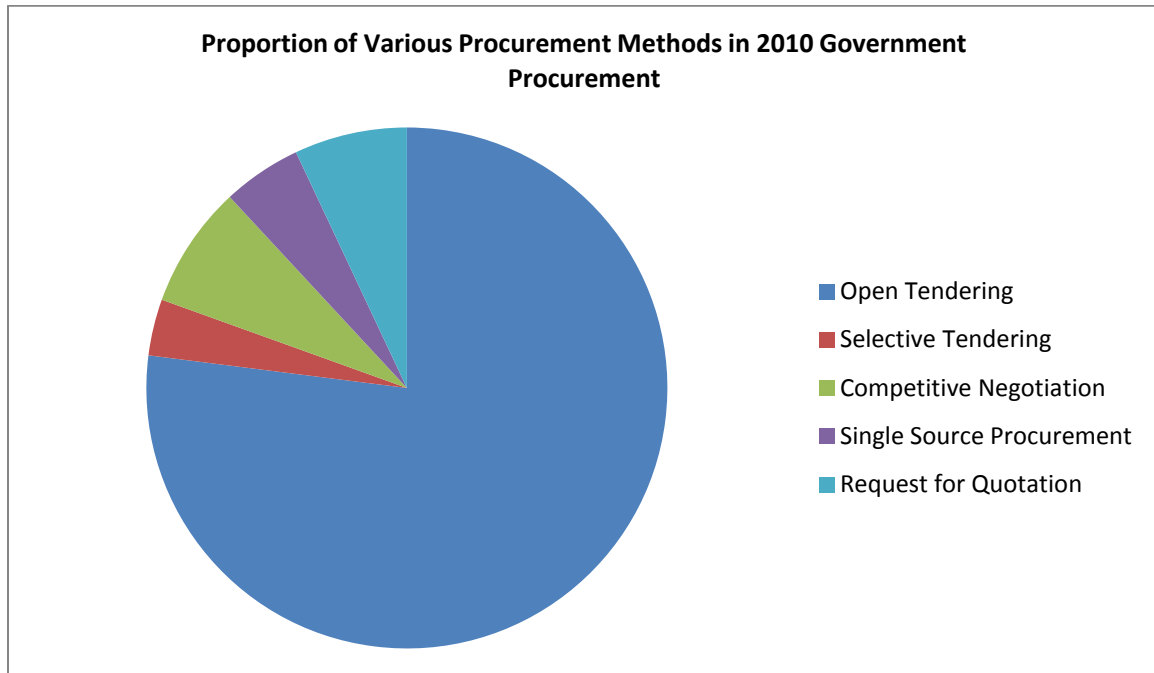
²² www.chinanews.com/gn/news/2010/01-11/2065909.shtml, and <http://www.chinabidding.com.cn/zbw/zxzx/zt110705/zhaobiao.html>, in Chinese, visited on 25 Sep. 2011.

²³ Article 26, 27, 29, 30, 31 and 32 of the GPL

²⁴ Financial Bureau of Beijing Municipal Government, Notice on Procurement Thresholds and Catalogue for 2012, No. 2182, 10 Oct. 2011, the Chinese version is available at http://www.caigou2003.com/theory/list/20111017/list_200951.html, visited on 20 Oct. 2011.

discretion of the procuring entity/agency is greatly limited by the rigid requirement to follow expert panel's recommendation (albeit with the possibility for the procuring entity to ask the panel to reconsider). As further explained in section IV below, these institutional settings have to be reflected in the construction of electronic platform for e-GP.

Figure 3 Proportion of Various Procurement Methods in 2010 Government Procurement



Source: compiled from data available at www.ccgp.gov.cn, and <http://gks.mof.gov.cn/>

C. The Fragmented Institutional Framework for Public Procurement Regulation in China

As the evolution of the legal framework demonstrated, there are numerous state and local organs involved in regulating public procurement. The reason for the two dimensional legal framework with TL and GPL operating in parallel and sometimes in conflicts, is arguably the fragmented institutional framework.

As history shows, MOC started importing electronic and mechanic equipments through international tendering to identify suitable domestic substitutes in late 1980s and until present controls the procurement of imported electronic and mechanical products by government agencies and state enterprises. NDRC drafted and implemented TL and now pushing the adoption of IRTL. On the other hand, MOF is the guardian of GPL.

It can be argued that the conflicts of procurement regulations at various levels are inevitable given this fragmented institutional framework. The MOF as the “bookkeeper” of the state, the NDRC as the “investor” for the state and the MOC as the “trader” for the

state are all building their own “fortress of regulation” on public procurement. As we have seen above, they, especially NDRC and MOF, often concurrently enact competing rules on tendering proceedings, expert databases, approved procuring agencies, designated media, publicity, review procedure and so on. This has caused not only duplication and waste of resources, but also inconsistency which jeopardizes legal certainty in China’s evolving legal framework on public procurement.

It is not fair to say that the central government, i.e. the State Council, has been ignorant of this problem. The State Council issued an “*Opinion on Further Regulating Tendering Activities*” on July 12, 2004.²⁵ On that basis, the *Interim Measure on Inter-Ministerial Coordination Mechanism on Tendering Proceedings* (“*Interim Measure on Coordination Mechanism*”) that entered into force on September 1, 2005 has established an inter-ministerial coordination mechanism. The main duties of this coordination mechanism include: [i] analyzing the status of tendering regulations and discussing possible solutions for regulating tendering activities involving multiple government organs; [ii] coordinating conflicts between different government departments regarding the administrative supervision of tendering; [iii] exchange of information; [iv] *coordinating the promulgation of tendering regulations by different departments*; [v] communicating of the enforcement of tendering rules; and [vi] joint survey and research.²⁶

On the one hand, it is encouraging to see that all “major players” in public procurement regulation, namely NDRC, MOF and MOC, are covered by this mechanism with the NDRC playing the leading role; and coordinating the coverage of different regulations has been identified as one of the main objectives. On the other hand, it is doubtful whether the scheduled liaison meeting every six months and summit every year²⁷ will make any real difference to the current situation, especially when MOF, instead of NDRC, has been designated as China’s negotiator for the accession to WTO Agreement on Government Procurement (GPA).

With regard to e-GP, fragmented institutional framework for general procurement regulation can only make the situation worse since e-GP is characterised by the high demand for unified legal rules and technical standards as well as the interoperability of systems. Furthermore, e-GP will involve more stakeholders, such as authorities incharge of technical regulations and internet security.

“Government procurement” and “tendering” have been referred to in China as disjunctive terms. As section III below will show, there is a growing concern that e-GP and “e-tendering” will also be artificially severed and subject to different specific regulations and inconsistent technical standards.

²⁵ State Council Secretariat, [2004] No. 56.

²⁶ (Article 4)

²⁷ (Article 6, 10)

III. The Legal Foundation of E-GP in China

A. E-GP in China's National Policies

It is apparent that the attention to e-GP has increased significantly in recent years with the development of e-government and e-commerce initiatives in China.

In China's *National Strategy for Information Development 2006-2020*, e-government is made one of the top priorities together with the development of information industry and internet security.²⁸ Although e-GP or e-tendering were not explicitly mentioned therein, they will nevertheless benefit from the general advance of e-government.

For example, Chinese e-GP development at the local level, as further discussed below in section IV, clearly benefited from the most important e-government initiative in the area of public finance administration--Government Financial Management Information System (GFMS, so-called “金财工程” in Chinese).²⁹ The planned construction period for GFMS was 2003-2008. It consists of two parts: i) the hardware construction of vertical secured network links among central, provincial and municipal financial authorities, as well as horizontal links among financial authorities, central banks and government agencies financed by state budget; ii) the software system consisting of 11 components/subsystems enabling the monitor of the whole public finance process from budget formulation to treasury payment and macro-economic prediction.

Government procurement management system was designated as one of the 11 components. It aimed at supporting government procurement with network and advanced technology, enabling data sharing and linked operation with other subsystems such as budget control, treasury payment and fixed assets management. Government procurement management system, as a subsystem of GFMS, is expected to include four building blocks: i) a project approval and management system; ii) a procurement information publication system; iii) a procurement order management system; and iv) an auditing and supervision system. As section IV below will show, a number of e-GP initiatives at provincial or municipal level were actually established as part of the GFMS construction and include, but are not limited to, those components mentioned above.

E-GP also forms an important part of China's drive for the development of e-commerce. In its 2005 *Opinions on Speeding Up the Development of E-Commerce*, State Council Secretariat made a clear statement that “[G]overnment procurement shall utilize e-commerce proactively”.³⁰ E-GP has also received attention in *China's E-Commerce Report (2008-2009)*³¹ prepared by the MOC where the support for e-GP from the central government (the State Council) was highlighted in Chapter 3 section 3.3.1.

The most recent national policy instrument on government procurement also landed unreserved support and provided mandate for the development of e-GP in China. In its 2009 *Opinions on Further Strengthening Government Procurement Management*, State

²⁸ Available at http://www.gov.cn/gongbao/content/2006/content_315999.htm, visited on 25 Sep 2011.

²⁹ For an overview of the GFMS, see <http://www.china.com.cn/chinese/zhuanti/283775.htm>, visited on 28 Sep. 2011.

³⁰ Article III:8, State Council Secretariat [2005] No. 2, 08/01/2005, Chinese version available at http://www.gov.cn/zwggk/2005-08/15/content_21825.htm, visited on 22 Sep. 2011.

³¹ See www.gov.cn/gzdt/2010-08/30/content_1691561.htm, visited on 22 Sep. 2011.

Council Secretariat has recognized e-GP as an important content of government procurement reform and required all local governments, led and coordinated by financial authorities, expand the use of modern electronic technology in government procurement.³² The objectives of e-GP stated therein include full functionality, open and transparent transactions, unified operation code, and network security. State Council Secretariat also recognized the need for unified leadership and organization. Although the gradual approach is inevitable at present, the ultimate goal set in this policy statement is ambitious--an integrated national electronic platform for e-GP trade and management enabling full-scale data sharing and paperless procurement.

The policy guidance on e-GP provided by the central government is unequivocal and encouraging. However, the extent to which such statement, albeit made by the top level, can solicit cooperation among powerful ministries (such as NDRC and MOF), or coordination among provincial governments regarding their e-GP initiatives.

B. E-GP in National Government Procurement Laws

The backing for e-GP contained in state policies certainly does not change the fact that national procurement laws, namely TL and GPL, are silent on electronic procurement. This is largely due to the fact that e-GP simply had not received much attention when these two laws were drafted a decade ago.

The only reference to e-procurement can be found in Article 16 of TL which requires that if open tendering procedure is used, “the call for tender shall be publicized via newspaper/magazines, *information network* or other media designated by the State”. There is no accompanying provision elaborating whether publication through electronic means will entail any advantage such as speeding up the procurement process.

C. E-GP in Secondary/ Implementing Procurement Regulations

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

As explained above in section II.B, the most important implementing regulations to be considered at present are IRTL and IRGPL. Although at the drafting stage, these regulations, once adopted, will play a central role in defining the legal environment for e-GP since the national laws and existing ministerial regulations are outdated with regard to electronic procurement.

1. E-Tendering in IRTL

³² Article VI, State Council Secretariat [2009] No. 35, 10/04/2009, Chinese version available at http://www.gov.cn/zwqk/2009-04/13/content_1283914.htm, visited on 23 Sep. 2011.

Article 12 of the IRTL, in addition to the provision of Article 16 of TL, requires that call for tender published on an information network shall remain available until the deadline for the submission of tender. However, no further guidance was given regarding whether publication via electronic means will reduce the time period for bid preparation.

In addition, Article 64 of the IRTL, titled “e-tendering regime”, provides:

“[S]ould the whole or part of tendering activities be conducted via electronic systems, security, efficiency, speed and ease for use should be guaranteed. Specific measure on e-tendering is to be promulgated separately. E-tendering shall have the same legal effect as tendering activities conducted via other written means.”

It is clear from these provisions that e-tendering regulation is not a task to be fulfilled by IRTL but for another specific measure. IRTL nevertheless provides some guidance recognizing the legal effect of e-tendering activities as equal to that of normal ones. However, without putting such a general statement into context, it will have little impact on practice.

It is noteworthy that IRTL is calling for the drafting of specific measures on not e-GP but e-tendering.

2. *E-GP in IRGPL*

So far as e-GP is concerned, IRGPL is one step further than IRTL. Instead of calling for a specific measure to be adopted, IRGPL tries to regulate certain aspects of e-GP in its own provisions. These provisions include:

Article 14 The whole or part of government procurement may be conducted through electronic systems with a view to ensuring openness, unity, security, high efficiency and convenience in government procurement.

Article 33 All procurement methods may be conducted via electronic means. Price competition online/electronic reverse auction applies to procurement using request for quotation method.

Article 34 MOF shall take the leading role in organizing the unified construction of e-GP and integrated national electronic platform for e-GP transaction and management.

Article 63 Documents generated in the procurement process may be preserved in electronic forms, provided they are identical with the original records.

While both IRTL and IRGPL are permissive towards conducting procurement/tendering via electronic means, the draft of IRGPL certainly provides more guidance. However, it can be argued that IRGPL also creates confusion.

First of all, apart from the provisions mentioned above, IRGPL also mentions “in writing” 17 times in other articles, especially with regard to the communication between the aggrieved supplier on the one hand and the procuring entity and the administrative review body on the other in the context of supplier challenge procedures (e.g. Articles 65, 68, 69, 75-77, 81). It is not clear whether electronic communication could be

regarded as “in writing” under those articles since Article 63 mentioned above is only related to archiving.

Secondly, IRGPL does not provide a solution to the situation where electronic document is not identical with the paper documents (see Article 63).

Thirdly, while it is encouraging to see that electronic reverse auction is mentioned in the draft IRGPL, no definition or conditions for its use have been provided.

Fourthly, it is unclear why electronic reverse auction shall be confined to the request for quotation procedure. In contrast, EU procurement Directives provide that electronic reverse auctions may be used as part of open, restricted or negotiated procedures, and also when awarding contracts through framework agreements or dynamic purchasing systems.³³ In other words, electronic reverse auction is not a separate award procedure but simply a particular way of conducting the award process in one of the ordinary procedures.³⁴ While the revised text of the WTO Agreement on Government Procurement (GPA) introduced electronic auction, it does not confine its use to certain procedure.³⁵

Such a limitation as contained in the draft IRGPL does not reflect the current practice either. As section IV below will show, electronic reverse auctions have been used by a number of provincial centralized purchasing agencies when awarding contracts through framework agreements.

Furthermore, it is arguable that the request for quotation procedure as provided by the GPL is actually the one procedure where electronic reverse auction could not be used. Article 40(3) of GPL provides that when request for quotation procedure is used, “3 suppliers selected by the expert panel will be required to provide a **one-off quote which may not be subsequently changed**”. However, electronic reverse auction, as defined in the EU procurement Directives and the revised text of the GPA, is by nature a “**repetitive**” or “**iterative**” process. Therefore, electronic reverse auctions simply cannot comply with the GPL’s provision on request for quotation. It is submitted that Article 33 in the current draft IRGPL needs to be amended before adoption to avoid confusion and reflect international best practice.

³³ EU Public Sector Directive, 2004/18, Article 54; EU Utilities Directive, 2004/17, Article 56. See further Arrowsmith, “Electronic reverse auctions under the EU public procurement rules: current possibilities and future prospects” (2002) 6 *Public Procurement Law Review* 299.

³⁴ EU directives define an electronic auction as “a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which is held after an initial full evaluation of tenders, enabling them to be ranked using automatic evaluation methods” (EU Public Sector Directive Article 1(7); Utilities Directive Article 1(6)).

³⁵ Article XIV, GPA/W/313, 16 December 2010. The final adoption of the revised text is still subject to a mutually satisfactory outcome to the related negotiations on the coverage of the GPA which is ongoing at present. Electronic auction is defined as “an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders” (Article I(f)).

Last but not the least, the draft of IRGPL made no attempt to coordinate e-GP and e-tendering. Therefore, it is not surprising that NDRC and MOF, while the race between the adoption of IRTL and IRGPL is still ongoing, have embarked on a quest to promulgate specific measures on e-tendering and e-GP respectively.

D. The Race to Adopt Specific Measures on E-GP and E-Tendering

1. Draft of Administrative Measures on Electronic Government Procurement

It is reported in the news that an *Expert Draft of Administrative Measures on Electronic Government Procurement* has come to exist since as early as 2008.³⁶ The draft and necessary amendments to GPL were discussed in Beijing on 14 June 2008 during the “Conference on Establishing Legal Regime for E-GP” organized by the Institute of Public Market and Government Procurement (IPMGP) of China’s University of International Relations.³⁷ This conference was part of a World Bank e-GP capacity-building initiative and the IPMGP was selected by MOF to conduct research on e-GP legislation.³⁸

During the conference, it is reported that participants also considered the following issues³⁹:

- the alignment of the *Draft Administrative Measures on Electronic Government Procurement* with GPL with regard to key definitions such as electronic reverse auction;
- how to resolve discrepancies between electronic and paper documents;
- the need to have common procurement vocabulary/codes for products and services;
- the need to have integrated platform and unified registries;
- the issue of internet security and the impact of e-GP on national security;
- the need to promote domestic ICT industry and to use domestic technology.

Since the draft of *Administrative Measures on Electronic Government Procurement* and the conference proceedings are not in the public domain, it is difficult to access their legal and practical implications. Nevertheless, such report provides clear evidence that legislative efforts on e-GP are ongoing.

³⁶ The Chinese reports are available at http://china.ec.com.cn/article/cnpicnews/200808/643166_1.html, http://finance.ce.cn/macro/gdxw/200808/25/t20080825_13533909.shtml, and <http://www.chinabidding.com/zxzx-detail-3402189.html>, visited on 23 Sep. 2011.

³⁷ <http://www.insgp.org>. IPMGP is one of the leading academic research centers on government procurement and has developed a special research interest on e-GP.

³⁸ As reported at http://www.ccg.gov.cn/gdwzxw/201009/t20100929_1259035.shtml (in Chinese), visited on 23 Sep. 2011. The World Bank has also provided capacity-building initiatives in the past including an international conference in April 2006. See World Bank, *Electronic Government Procurement*, June 2006, http://siteresources.worldbank.org/INTPROCUREMENT/Resources/eGP_Note_V1-1.doc, retrieved on 23 Sep. 2011.

³⁹ As reported at http://www.ccg.gov.cn/gdwzxw/201009/t20100929_1259035.shtml (in Chinese), visited on 23 Sep. 2011.

2. Draft of Specific Measures on E-Tendering

On the other hand, the Legal Department of NDRC initiated in 2009 a public consultation soliciting opinions on specific e-tendering legislation.⁴⁰ The consultation document asked for the following information:

- Basic statistics including the number and value of contracts awarded through e-tendering, the nature of enterprises engaged in e-tendering;
- Distinctions between e-tendering of works, goods and services;
- Main difficulties encountered in conducting e-tendering and examples for failure;
- Advantages and disadvantages of e-tendering in comparison with traditional approach;
- Relevant measures adopted by individual units or local authorities;
- The possibility of remote bid/tender evaluation;
- The issue regarding co-existence of paper and electronic tender;
- The possibility for qualification evidences and deposit to be submitted online;
- The role to be played by supervisory bodies, especially NDRC;
- How to ensure security in e-tendering, e.g. preventing fraud and data manipulation.

The questions suggest that the survey was mainly targeting NDRC's local branches and other authorities. However, the result of the survey is not in the public domain. While these questions are highly relevant, it is difficult to assess their impact with limited information. Nevertheless, the intention of NDRC to engage in legislating on e-tendering is clear.

E. Other Supporting Legislation

In recent years, China has also introduced a growing body of technical legislation with a view to supporting e-government and e-commerce. These include:

- 2005 *Electronic Signature Law*⁴¹;
- State Council 1999 *Regulation on the Administration of Commercial Code*⁴²;
- State Council 1996 *Interim Regulation on the Administration of Computer Network & Internet*⁴³
- MIIT 2009 *Measures on the Administration of Electronic Certification Services*⁴⁴;

⁴⁰ The Chinese version of the consultation letter can be found at <http://www.ctba.org.cn/EBidding/>, retrieved on 20 Sep. 2011.

⁴¹ It was adopted by the Standing Committee of the NPC on 28/08/2004, entered into force on 1/04/2005. The Chinese version is available at http://news.xinhuanet.com/newscenter/2004-08/28/content_1908927.htm, retrieved on 26 Sep 2011.

⁴² State Council Order [1999] No. 273. It was adopted by the State Council on 07/10/1999 and entered into force on the same date. The Chinese version is available at <http://www.xjhc.gov.cn/zcfg/ShowArticle.asp?ArticleID=2417>, retrieved on 26 Sep 2011.

⁴³ State Council Order [1996] No. 195. It was adopted by the State Council on 1/02/1996 and entered into force on the same date, as amended on 20/05/1997. The Chinese version is available at <http://www.cnnic.net.cn/html/Dir/1997/05/20/0646.htm>, retrieved on 26 Sep 2011.

- State Code Administration 2005 *Measures on the Administration of Code in Providing Electronic Certification Services*⁴⁵;
- State Code Administration 2009 *Measures on the Administration of Electronic Certification Services Provided for the Purpose of E-Government*⁴⁶;

These regulations have set up the administrative procedure and relevant criteria for electronic certification service providers (certificate authorities) to apply for the official approval. None of these regulations mentioned e-GP explicitly.

The adequacy of these regulations, so far as e-GP is concerned, is unclear and subject to criticism in Chinese literature.⁴⁷ They are generally very brief and the relevant authorities, such as State Code Administration, have considerable margin of discretion in requiring additional information especially with regard to e-government. A number of technical issues relevant to e-GP, such as the time seal, the legality and effect of electronic contract and the use of the user key by unauthorised personnel in emergency, have not been addressed.

Furthermore, 2005 *Electronic Signature Law* provides in Article 3 that while in concluding civil contracts, parties may agree upon the use of electronic signature and such signature shall not be denied its legal effect, this general rule does not apply to, *inter alia*, contracts involving the provision of public utility services. Government procurement contracts (at least some of them), regarded as civil contracts (GPL Article 43, 50), may arguably fall under this exception due to the underlying public interest consideration.

IV. E-GP Practices in China

This section provides a survey of e-GP practice in China. It starts by looking at the progress made by the MOF to construct the nation-wide integrated e-GP platform. Then it will examine the current e-GP initiatives at the central government level as well as the sub-central level. A number of observations are important to note at the outset:

- China is advanced in the electronic communication of procurement documents such as contract notices, contract award decisions and results of bid challenges.
- All initiatives appraised have far-reaching goals to achieve “paperless procurement” from the beginning (budget planning) to the end (contract administration) but generally adopt a step by step approach.
- Current e-GP initiatives mainly involve electronic procurement of goods subject to single supplier/multiple suppliers framework agreements. Innovative methods such as electronic reverse auction, e-catalogue and e-supermarket have also

⁴⁴ MIIT Order [2009] No. 1, adopted on 18/02/2009 and entered into force on 31/03/2009. The Chinese version is available at http://www.gov.cn/gongbao/content/2009/content_1331180.htm, retrieved on 26 Sep 2011.

⁴⁵ It was adopted on 31/03/2005, entered into force on 1/04/2005. The Chinese version is available at http://www.oscca.gov.cn/Doc/17/News_1084.htm, retrieved on 26 Sep 2011.

⁴⁶ It was adopted on 20/10/2009, entered into force on 1/11/2009. The Chinese version is available at http://www.oscca.gov.cn/Column/Column_2.htm, retrieved on 26 Sep 2011.

⁴⁷ Liu, Hui, Director of IPMGP, “Considerations on the Construction of Legal Regime for and the Reform of for E-GP and E-Tendering” [2009] 100China Government Procurement 46-47, at 47, in Chinese.

- been experimented in the context of framework purchasing. However, as Figure 3 above shows, framework procurement accounts only for a small proportion of government procurement (the size not even reported in the official data). Conducting tendering required for high-value and complex procurement projects through e-GP platforms is less developed.
- The majority of practices are supported by *ad hoc* administrative regulations adopted by the provincial/municipal authorities or the centralized purchasing agencies.
 - There is little, if any, evidence that e-GP platforms run by different provinces are interoperable, which gives rise to the concern of local protectionism and “isolated island of information”.
 - E-tendering initiatives, especially in construction sector, exist in parallel with e-GP initiatives and there is no evidence of convergence.

A. Building of the Integrated National Platform for E-GP

As explained above in section III.A, State Council Secretariat has, in its 2009 *Opinions on Further Strengthening Government Procurement Management*, called for an integrated national electronic platform for e-GP trade and management enabling full-scale data sharing and paperless procurement. The MOF has taken the lead as required by the State Council Secretariat in this regard.

It is reported that a Working Group on the Construction of Nation-wide E-GP System has been formed with the Treasury Department of MOF taking the lead and various central and local agencies participating (such as Procurement Centre of the Central Government, Procurement Centre for the Communist Party Offices, Ministry of Water Resources, the Weather Administration, as well as provincial/municipal financial authorities from Beijing, Guangdong, Henan, Zhejiang, Hubei, Anhui, Liaoning).⁴⁸

During its second meeting held on 29-30 July 2010, the Working Group discussed the following issues:⁴⁹

- The structural blueprint of the Nation-wide E-GP System will be based on the current government procurement gateway (www.ccgp.gov.cn) administered by MOF and be connected with subsystems at central and sub-central level.
- Nation-wide data sharing shall be enabled with regard to four core databases (namely the registry for evaluation experts, the registry for suppliers, the registry for procurement agencies and e-catalogue for goods) on the basis of “unified standard” and “multi-tier administration”.
- Crucial controlling points to be incorporated into the construction of the integrated platform shall include at least procurement planning, procuring methods approval, importation approval, publication of contract notices, evaluation experts selection, publication of award notices, contract signing, contract performance checking and payments.

⁴⁸ www.zjzfcg.gov.cn/new/cgdt/275401.html, in Chinese, visited on 26 Sep. 2011.

⁴⁹ *Ibid.*

It is evident that the plan formed by the Working Group might have reached the implementation stage. ChinaSoft International Ltd. announced on 5 July 2011 that it won the bid for a Government Procurement Management and Trading System project (GPMTS, the official name for the Nation-wide Integrated E-GP System) awarded by MOF. Being one of the largest domestic providers of software and information technology services, ChinaSoft has been involved in a number of Chinese e-government projects including the GFMS (so-called “金财工程” in Chinese) mentioned above in section III.A.⁵⁰

It is reported that the core contents of GPMTS include one standardization system, two business process platforms, four basic databases, and eight subsystems. Successful implementation of this project will increase the speed of information construction on government procurement, enabling it to integrate the departmental budget and state treasury's centralized payment information, as well as establishing a standardized system for government procurement management and implementing management refinement of government procurement, providing comprehensive technical support and guaranteed perfection of government procurement's supervision mechanism.⁵¹

As identified by the Working Group, e-GP initiative at the national level does not have to start from scratch. The government procurement gateway (www.ccgp.gov.cn), established by MOF since 2002, has the potential to contribute significantly to the development of e-GP. At present, its front page contains a section named “E-GP Platform” which consists of the following sub-systems/databases:

- self-access centre for contract notice publication;
- government procurement statistics and planning management system;
- registry of evaluation experts for central government procurement;
- system for central government department to apply for approval regarding changing procuring methods;
- certification system for procurement agencies (while the application form can be filled online supported by scanned copies of original documents, a printed version needs to be filed and the certification is not issued electronically);
- trading system for framework agreement procurement by central government departments (just a link to the Central Government Procurement Centre though, see further section IV.B below)
- the up-to-date list of energy-saving and environment-friendly products that subject to preferential treatment under GPL and relevant ministerial measures.

It is apparent that the abovementioned platform remains limited in scope and function with procurement at sub-central level largely excluded (except publication of contract notices) and the trading system (such as electronic reverse auction) missing. The most

⁵⁰See the news report available at <http://www.prnewswire.com/news-releases/chinasoft-international-won-the-bid-for-government-procurement-management-and-trading-system-project-by-ministry-of-finance-prc-124997989.html>, in English, and the report in Chinese at <http://product.zfcg.com/home/bid/view/id/207469>, visited on 25 Sep. 2011.

⁵¹ *Ibid.* The system will be tested and its construction supervised by two other companies chosen through open tendering. See the calls for tender in Chinese at http://www.ccgp.gov.cn/cggg/zybx/zbgg/201107/t20110707_1682859.shtml, and http://www.ccgp.gov.cn/cggg/zybx/zbgg/201107/t20110707_1682825.shtml, visited on 25 Sep. 2011.

advanced aspect is arguably the publication of contract notices. According to the official statistics, in 2010 alone, 243,618 contract notices, 521,340 award decisions and 1,557 dispute resolution decisions were published.⁵²

The key for the success of a Nation-wide Integrated E-GP System lies in its ability to achieve integration, standardization, data-sharing and inter-operability among existing e-GP platforms. As the discussion in section IV.B and C will show, the size of that task should not be underestimated given the number of such platforms, the length of their operation and the lacking of coordination among them. On the one hand, it is encouraging to see that the recognition of the benefits of e-procurement has led to the flourishing of e-GP initiatives at the local level. On the other hand, there is a concern that the more developed and entrenched the local e-GP initiatives are, the more difficult for a national e-GP platform to be constructed.

The “competition” from e-Tendering initiatives especially those backed by NDRC as further explained in section IV.D also needs to be addressed. It is interesting to note that NDRC’s <http://www.chinabidding.com.cn> claims on its front page that it is “the **only** website designated by the Chinese government for the publication of calls for tender”.

B. E-GP by Central Government Centralized Purchasing Agency

Government Offices Administration of the State Council⁵³ is in charge of centralized procurement on behalf of central government ministries, commissions and agencies. It established the Central Government Procurement Centre (CGPC) to perform this task.

According to one of its officials, the CGPC e-GP platform— www.zycg.gov.cn – has become operational since 2004. The platform enables procurement information publication, framework agreement procurement, e-ordering from catalogue, electronic reverse auction (price competition) and low value procurement. E-tendering is currently on trial. 70% of central government centralized procurement projects are conducted completely or partially through the platform.⁵⁴

As of 31 Oct. 2011, the platform (www.zycg.gov.cn) has 51,655 registered suppliers(34,308 goods suppliers, 4,730 service providers, and 6,369 construction service providers), Contains 343,178 catalogued supplies, as well as 13,598 registered procuring entities.

The platform is advanced in electronic framework procurement from multiple suppliers. Supplies subject to framework purchasing include IT products such as computers, general-purpose software, server and other network equipments, copy machines, printers, projectors, audio/video equipments, vehicles, air conditioners. Mini-tenders and electronic reverse auctions may be used in the process of framework procurement.⁵⁵

⁵² See reports at <http://gks.mof.gov.cn/>, visited on 20 Sep. 2011.

⁵³ See www.ggj.gov.cn.

⁵⁴ See new report at <http://soft6.com/html/tech/17/179147.shtml>, visited 20 Sep 2011.

⁵⁵ See CGPC, “Notice on Framework Procurement Related Issues”, [2010] No. 3, 30 May 2010, in Chinese, available at <http://www.zycg.gov.cn/article/show/11531>, retrieved on 29 Sep 2011.

A number of guides have been issued by CGPC to facilitate its operation. Regarding supplier registration, for example, CGPC requires that suppliers applying for admission to the supplier registry must fulfill the following criteria:⁵⁶

- having Chinese juristic/legal personality and the capacity to independently undertake civil liability;
- complying with state laws/regulations and having good business reputation and account management system;
- having necessary technical capacity and good record of contract performance;
- good record of tax and social security payment;
- supplying goods that comply with national technical, security and environmental standards;
- good capacity for after-sale services and adequate technical expertise;
- no major criminal records in the past 3 years;
- other conditions stipulated by laws or regulations.

Although the application form can be downloaded from the platform, it needs to be printed out and submitted in paper with official seal and signature and accompanied by documentary evidences such as bank credit certificate, tax and social security certificates, audit reports etc.

Furthermore, registered suppliers that wish to engage in electronic reverse auction (or “online price competition” as used by CGPC) need to apply to be registered with a special sub-registry for auctions. Suppliers will be sorted into 5 grades by CGPC in accordance with their turnover, contract performance record and goodwill. When other conditions are equal, suppliers with higher grades will win; when all conditions are equal, the first offer will win. CGPC also provides for debarment measures against suppliers that deliberately obstruct the auction process by refusing to fulfill the order after winning the auction.⁵⁷

Although the legality and legal basis of CGPC measures is debatable and the practice is limited primarily to framework purchase of office equipments, such measures may nonetheless pave the way and provide useful insight for MOF to draft national e-GP measures.

C. E-GP at Provincial/Municipal Level

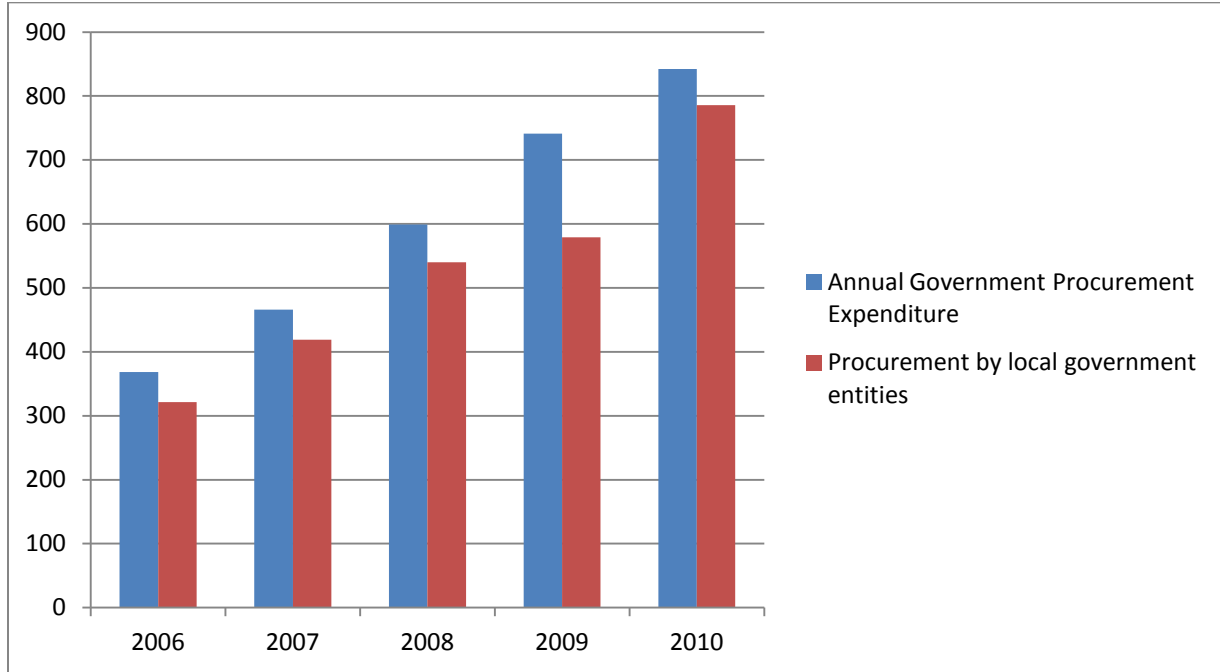
At the outset, it is noteworthy that sub-central government procurement accounts for the majority of China’s annual government expenditure (see Figure 4 below). Among provincial/municipal governments, the following’s procurement size exceeds 40 billion RMB: Guangdong Province 91.75 billion RMB, Jiangsu Province 90.23 billion RMB, Shandong Province 67.39 billion RMB, Zhejiang Province 42.46 billion RMB, Anhui Province 41.21 billion RMB, Shanghai Municipality 40.83 billion RMB, Henan Province

⁵⁶ See CGPC, Interim Measures on Suppliers Qualification Registration and Management, 28 Nov. 2003, in Chinese, available at www.zycg.gov.cn

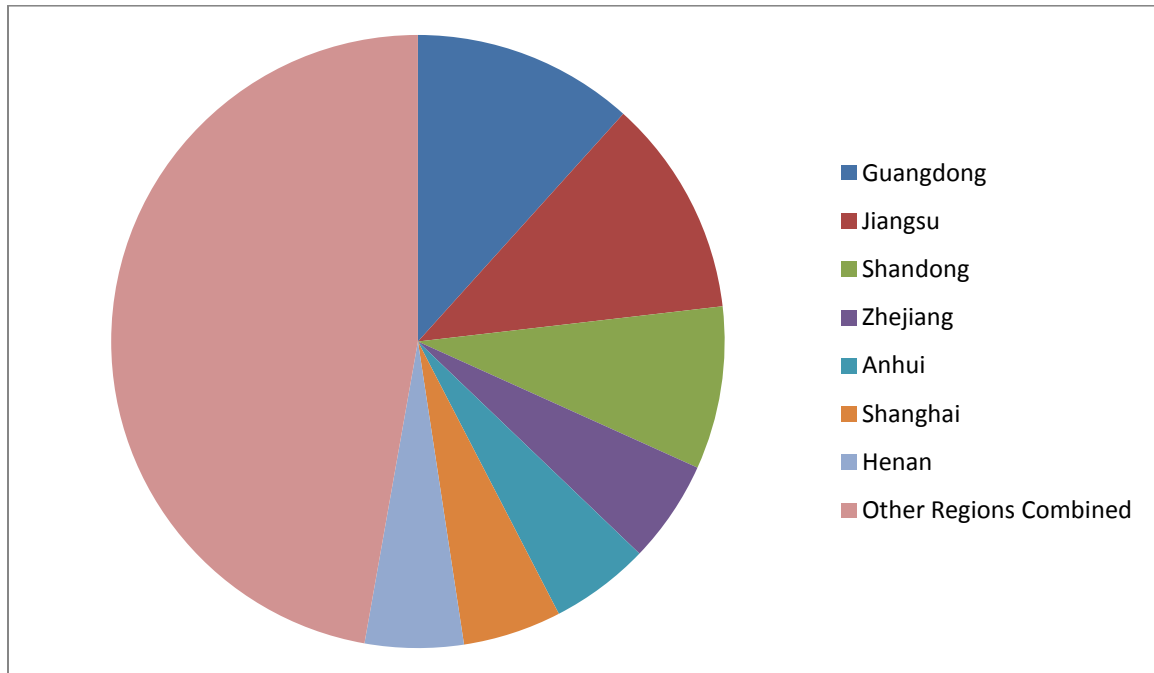
⁵⁷ See CGPC, Operational Manual on Online Price Competition (trial version), 20 Jan. 2011, in Chinese, available at www.zycg.gov.cn.

40.81 billion RMB. Government procurement of these 7 regions totals 414.68 billion RMB accounting for 52.8% of all sub-central procurement (see Figure 5 below).

Figure 4 Proportion of Sub-central Procurement in Government Procurement Expenditure 2006-2010 (Unit: Billion Yuan)



Source: compiled from data available at www.ccgp.gov.cn, and <http://gks.mof.gov.cn/>
Figure 5 Proportion of Procurement of Certain Regions in China's Sub-central Procurement in 2010 (Unit: Billion Yuan)



Source: compiled from data available at www.ccgp.gov.cn, and <http://gks.mof.gov.cn/>

In light of the data above, special attention will be paid to those regions where government procurement is more advanced. As the survey below will show, e-GP initiatives are more developed in these regions as well.

1. Guangdong Province

Guangdong Province is one of the leaders of e-GP development at the sub-central level in China. Its e-GP platform-- www.gdgpo.com – offers “one stop shop” for the whole government procurement process.

The platform has been constructed since 2004 starting with the information bulletin board, procurement planning system and evaluation experts management system. It current consists of a number of subsystems including a trading system enabling framework procurement, electronic reverse auction and e-tendering; the supplier registry; the evaluation experts database; the procurement planning system; statistics gathering system.

It is reported that until 13 August 2009, provincial agencies had conducted 1,722 framework purchases via the e-GP platform with contracts valued around 45 million RMB and savings achieved at average 30.53%; the platform had incorporated 1,274 suppliers, 337 brands for framework agreements, 27,444 items for e-catalogue.⁵⁸

The platform puts special emphasis on electronic reverse auction. Procuring entities are required to use the electronic platform to award contracts valued more than 10,000 RMB. Only if the procuring entity is not satisfied with the offer made by framework suppliers, electronic reverse auction may be used and the price achieved at the end must be lower than the original offer under the framework agreement. The auction is seen as an effective tool to counter the dominant position and possible abuse of framework suppliers. It is reported that until 13 Aug. 2009, provincial agencies had conducted 69 electronic reverse auctions with a total value of 6,804,343 RMB, which is 16.95% cheaper than the corresponding framework offer and 26.47% cheaper than the prices quoted by manufacturers.⁵⁹

Guangdong Province adopted the *Interim Measures for E-GP by Provincial Agencies* in 2009.⁶⁰ This is an advanced piece of e-GP legislation in comparison with the brief provisions found in IRGPL discussed above in section III.D.1. From the technical perspective, it provides for the role of the system administrators embedded in procuring entities and suppliers, the role of certification authority and digital key, as well as the consequence of system failure (Articles 9-11, 27-28). It also provides for an innovative method of e-procurement: e-shopping-mall/e-supermarket which contains products/services negotiated under framework agreement and maintains its competitive price level by using electronic reverse auction periodically (Articles 19-20). It is clear, as pointed out above in section III.D, that electronic reverse auction is used in practice in a

⁵⁸ See report on 3 Sep 2009, in Chinese, available at http://www.ccg.gov.cn/gysh/itch/cgxw/201009/t20100929_1319872.shtml, visited on 25 Sep. 2011.

⁵⁹ *Ibid.*

⁶⁰ The Chinese version is available at <http://www.ccg.gov.cn/guangdong.gov.cn/gdgpmsPortal/jsp/policyRuleArticle.jsp>, visited on 25 Sep. 2011.

way not anticipated by IRGPL which confine its use to request for quotation procedure. It also provides the procedure for e-tendering (Article 18).

The *Interim Measures* sets high standards for e-GP requiring that an e-GP project shall be void and reinitiated when all offers exceed the budget or average market price under same conditions (Article 25). While the intention of this provision is arguably noble, its legality and compatibility with GPL is questionable.

While this document does not cover e-GP by regions and municipalities below the provincial level, it encourages such sub-provincial governments to engage in the construction of compatible and interoperable e-GP platforms on a voluntary basis (Article 33).

It is reported that Guangdong is aiming at expanding the coverage of the e-GP platform from procurement by provincial agencies to that of all municipalities in 2011.⁶¹

Within Guangdong, the e-GP developments in two Special Economic Zones (i.e. Zhuhai and Shenzhen) are noteworthy. Special Economic Zones in China are notorious for their pioneer role in economic reform. This is also true in the context of e-GP development.

Shenzhen Special Economic Zone is regarded as the first region to conduct the whole procurement process online in China in Sep. 2003 ahead of the Guangdong provincial government. It developed an e-GP management and trading system covering the whole procurement process including procurement planning and approval, publication of contract notices, solicitation for tender, tender submission, tender evaluation, request for quotation, competitive negotiation, complaint filing and supervision. All participants of the procurement process, including the procuring entity, financial authority, procurement center, supplier and evaluation panel experts, work in the electronic environment. Since July 2007, Shenzhen's e-GP platform has further incorporated supplier ranking system and electronic reverse auction system.⁶² At present, Shenzhen e-GP platform (www.szzfcq.cn) has 19,016 registered suppliers (11,630 goods suppliers, 5,997 construction service providers, 7,167 other service providers), 5,472 registered evaluation experts and 734 register procuring entities. The supporting regulatory measure—*Shenzhen Interim Measures on Online Government Procurement*—was adopted on 25 Sep. 2003 and entered into force on 15 Oct. 2003.⁶³

Zhuhai Special Economic Zone adopted *Zhuhai Interim Provisions on E-GP Administration* on 11 July 2008 which entered into force on 1 Oct. 2008.⁶⁴ Zhuhai's e-GP platform (www.cngpc.com) has 4,289 registered supplier, 1,355 registered procuring entities and covered procurement worth 318 million RMB as of 20 Sep. 2011.

⁶¹ See news report at http://www.ccgp.gov.cn/jrcj/zfcgdt/201103/t20110329_1544650.shtml, 29 Mar. 2011, visited on 25 Sep. 2011.

⁶² See news report at <http://www.nbc.gov.cn/article/jsyf/200803/20080300001076.shtml>, 6 Mar. 2008, visited on 25 Sep. 2011.

⁶³ Chinese version available at http://cgzx.baoan.gov.cn/xxgk/ywxx/zwgk/ljg/zcfg/201104/t20110413_410088.htm, visited on 23 Sep. 2011.

⁶⁴ Chinese version available at www.cngpc.com, visited on 23 Sep. 2011.

Suppliers applying for access to e-GP platforms in Guangdong Province have to obtain digital key from Guangdong Certificate Authority (<http://www.gdca.com.cn/info/197018>). However, it is not even clear whether the provincial e-GP platform is interoperable with that of Shenzhen and Zhuhai. The different numbers of registered suppliers of these platforms suggest the answer is negative.

2. *Jiangsu Province*

It adopted the Operation Guide for Online Government Procurement in Oct. 2003 which supports the operation of the provincial e-GP platform (<http://www.ccgp-jiangsu.gov.cn/>).

The guide only contains 17 Articles and is fairly brief.

3. *Shandong Province*

Shandong Province established its e-GP platform on 1 June 2007 (www.ccgp-shandong.gov.cn). At present, the platform includes a framework procurement subsystem and the information bulletin. It does not enable the whole procurement process to be conducted electronically.

The construction of the provincial Tendering Centre was claimed as an achievement since all procurement procedure, including bid evaluation, can be conducted in one location with full video surveillance.⁶⁵ However, this is arguably against the very idea of e-GP which does not necessarily involve physical presence.

On the other hand, it is reported in April 2011 that Jining Municipal Government of Shandong Province has used remote tender evaluation through online video conference instead which enabled a 11 strong procurement team to acquire 2.4 billion RMB worth of goods and services in 2010.⁶⁶

4. *Zhejiang Province*

According to a report on 10 Oct. 2011⁶⁷, as part of Zhejiang GFMS construction (金财工程), phase I of Zhejiang Provincial Procurement Information Management System was completed and phase II will start before the end of the year. The aim of the system, consisting of 3 phases, is to establish a "Province-wide Online Government Procurement Market". Phase I of the project focused on online supervision, phase II will develop online trading system, and phase III will work on the data sharing with neighbouring provinces' e-GP platforms. The supporting software will be developed which enable unified interface and diversified choice of subsystems.

⁶⁵ See report at http://www.caigou2003.com/news/ep/news/20080123/news_111179.html, in Chinese, visited on 24 Sep. 2011.

⁶⁶ See report at http://www.sdbidding.org.cn/info_show.asp?articleid=67788, in Chinese, visited on 24 Sep. 2011.

⁶⁷ See report at www.chinawuliu.com.cn/information/201110/10/169252.shtml, in Chinese, visited on 11 Oct. 2011.

5. Shanghai Municipality

As one of the pilot regions for government procurement regulation, Shanghai started government procurement practices as early as in 1995, which gathered valuable experiences for the enactment of GPL. Shanghai's e-GP platform (www.zfcg.sh.gov.cn) entered into operation in Nov. 2008 which covered procurement of common commodities through e-marketplace. On 1 July 2009, the procurement information management subsystem became operational. The next stage is to construct e-tendering subsystem. The procurement through e-marketplace may be facilitated by calling for framework price competition and electronic reverse auction.

According to a report dated 11 Feb. 2011, the e-marketplace has achieved significant savings and expanded its goods coverage; the construction of e-tendering system was nearly finished and trials have started.⁶⁸

Shanghai Municipal Government adopted the *Interim Measures on Online Framework Agreement Procurement* on 30 April 2009 which entered into force on 1 July 2009.⁶⁹

6. Henan Province

Henan's e-GP gateway (www.hngp.gov.cn) entered into operation in Aug. 2007. The construction of Henan's e-GP platform was selected by relevant State Council authorities as a pilot program to test internet security issues. The design for the platform is quite ambitious consisting of supervision subsystem and trading platform. At present, the construction of the platform is at its second stage—the building of the function block for e-tendering, framework procurement and electronic reverse auction. The project is to be completed by 2012.⁷⁰

D. E-Tendering Initiatives

E-tendering in China was first introduced in 1999 with regard to tendering for textile quota and widely used by MOC in international bidding for imported electronic and mechanical equipments.

www.chinabidding.com is one of the first website which started e-tendering with regard to international and domestic bidding of electronic and mechanical equipments in 2001. It established a comprehensive e-tendering platform in 2007.

It is reported that China Tendering and Bidding Association (CTBA) was entrusted by the Legal Department of NDRC to draft the technical standards for e-tendering.⁷¹ A draft of *E-Tendering System Technical Regulation* has been examined by experts in a number

⁶⁸ Available at http://www.caigou2003.com/news/ep/news/20110211/news_169897.html, visited on 2 Oct 2011.

⁶⁹ Chinese version available at www.ccg.gov.cn/gysh/itch/cgxw/default_15.shtml, visited on 2 Oct. 2011.

⁷⁰ See reports at http://www.ahzbtb.gov.cn/include/web_content.php?id=622, visited on 4 Oct. 2011.

⁷¹ See reports at http://www.ctba.org.cn/list_show.jsp?record_id=122125, visited 30 Sep. 2011.

of conferences held in 2010. It will act as a supplement to the *Measures on E-Tendering* being drafted by the NDRC.

At the sub-central level, local authorities in charge of construction, such as Nanjing Construction Commission, have established e-tendering platforms which enable the whole tendering process to be conducted online.⁷²

These developments, while encouraging and having the potential to create synergy with e-GP initiatives, inevitably also give rise to the concern of conflicting rules and technical standards.

V. Challenges for the Development of E-GP in China and the Way Forward

A. The Challenge to Establish a Coherent Institutional Framework for E-GP

As suggested by the analysis above, the most significant challenge for the success and sustainable development of e-GP in China is the incoherent and conflicting institutional framework.

The co-existence of GPL and TL and the lack of coordination between their “guardians” (ministries entrusted with their draft, amendment, implementation and enforcement) namely MOF and NDRC, has resulted in a two dimensional legislative and institutional framework for government procurement in China.

When it comes to e-GP regulation and development, the situation is arguably more challenging since more stakeholders are involved. These include:

- MOF as the guardian of GPL and IRGPL, drafter of specific national measures on e-GP, the leader on the construction of the Nation-wide Integrated E-GP Platform;
- NDRC as the guardian of TL and IRTL, drafter of specific national measures on e-Tendering, the developer of e-Tendering technical standards;
- MOC as the leader for e-commerce;
- MIIT as the leader for e-government, information industry regulator/developer, jointly responsible with State Code Administration for digital certificate authority approval;
- State Code Administration as the leader for internet security regulation, jointly responsible with MIIT for digital certificate authority approval;
- Sub-central governments’ financial authorities/government procurement centers with vested interests in their operational e-GP platforms;
- Sub-central governments’ construction/planning authorities and affiliated tendering centers with vested interests in their operational e-tendering platforms;
- IT companies providing software solutions or ISP services for e-GP and e-Tendering initiatives;

⁷²See the Chinese report on the Nanjing E-sunshine project in Sep. 2011. http://njrb.njnews.cn/html/2011-09/08/content_1002320.htm, visited on 1 Oct. 2011.

It is quite clear that no central government department, be it MOF or NDRC, will be able to resolve the issue on its own, neither will the inter-ministerial coordination mechanism.

E-GP demands unification and interoperability. Domestic and foreign suppliers, especially SMEs, would sincerely want to gain access to electronic government procurement market without the pain to register hundreds of times.

However, unified legal rules, technical standards and integrated electronic platforms will not be possible without a unified and coordinated institutional framework. In order to address the institutional challenge, objectives, priorities and interests of various stakeholders must be assessed as a whole and accommodated in a coherent framework.

It is submitted that a supra-ministerial institution, such as a Government Procurement Commission under the State Council, may be necessary to establish such an institutional framework.

B. The Challenge of Building Adequate Legal Foundation and Technical Support for E-GP

Only when the institutional challenge is properly addressed, the legal foundation and supporting technical legislation for e-GP can be established in a satisfactory and consistent manner.

As discussed above in section III and IV, e-GP legislation is well behind the practice. A number of administrative measures in this regard are in place but with little coordination and their compatibility with primary procurement laws in doubt.

The drafts of IRGPL and IRTL do not provide clear guidance for e-GP and unified specific national legislation is needed. Separate measures on e-GP and e-Tendering should be avoided at all cost. The saga of GPL v. TL should not be continued in the context of e-procurement which by nature promotes unification.

Technical legislation supporting e-GP initiatives shall be sufficiently incorporated into the legal framework for e-GP. At present, the link between provincial e-GP platforms to local Certificate Authorities threatens the integrity of national procurement market. The technical solutions currently developed should take into consideration future interoperability with other e-GP initiatives.

Internet security is another major concern of Chinese authorities in developing e-GP. This issue shall be taken seriously by formulating adequate technical solutions, establishing reliable firewall and secured link between intranet handling sensitive information and internet enabling trading activities.

C. The Challenge to Comply with revised GPA

China has, in its Protocol of WTO accession, undertaken to table a GPA offer "as soon as possible". On December 28th, 2007, China tabled its initial offer with MOF in charge

of the accession negotiations. China also tabled an improved offer in July 2010 and will table the second revised offer by the end of 2011 which is expected to offer some provincial authorities for coverage.⁷³

The GPA is currently being revised. The revised text of the GPA, likely to be adopted in Dec. 2011 (GPA/W/313, 16 December 2010), has been updated to take account of the widespread and increasing use of electronic tools in the procurement process. For example, the term “in writing or written” is defined as including electronically transmitted and stored information. Electronic auction, defined as “an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re ranking of tenders”, was introduced. In addition, shorter minimum time periods have been permitted for responding to tenders in a variety of circumstances. Shorter time-periods have also been allowed for the procurement of goods and services of types that are available on the commercial marketplace.

Any future e-GP regulatory measure in China will have to comply with the GPA requirements. The first and arguably the most challenging task for Chinese authorities is to make all procurement information (relating to procurement subject to GPA coverage) available in one of the WTO official language.

The requirements of supplier registration also need to be scrutinized as GPA only allows Annex II and III entities (namely local governments and state enterprises) to use supplier list to publicize procurement opportunities.

⁷³ See further, Wang, Ping “Coverage of the WTO’s Agreement on Government Procurement: Challenges of Integrating China and other Countries with a Large State Sector into the Global Trading System” (2007)10(4) *Journal of International Economic Law* 887–920; Wang, Ping “China’s accession to the WTO Government Procurement Agreement - challenges and the way forward” (2009)12(3) *Journal of International Economic Law* 663–706

VI. Concluding Remarks

The development of electronic government procurement (e-GP) in China is now at a crossroad. On the one hand, alongside the development of e-government, e-commerce and the government procurement reform in China in the last decade, e-GP in China has gained wide recognition and increased momentum. On the other hand, e-GP development is facing significant challenges.

It is encouraging to see that the benefits to the transparency and efficiency of the procurement process offered by electronic means, especially internet, have been universally recognized by both policy makers at the top level and procuring officers in public and private sectors. E-GP has become one of the priority tasks for China's e-governance development and government procurement reform as shown by the national policy instruments discussed above in section III.

It is also encouraging to see that in recent years, a number of pilot e-GP systems/platforms have been established at the central government level by the centralized purchasing body of the State Council as well as at the sub-central level by a number of provincial/municipal procurement regulators. These initiatives have far-reaching goals that are not limited to electronic communication of procurement documents (contract notices, contract award decisions and results of bid challenges), but to achieve "paperless procurement" from the beginning (budget planning) to the end (contract administration).

In practice, these e-GP platforms normally consist of two main subsystems: i) an administrative system enabling the government procurement budgets to be submitted and approved, the process supervised by relevant authorities, and the statistics to be gathered; ii) a operational system enabling framework procurement, competitive negotiation, electronic reverse auction and competitive tendering to be conducted. These sub-systems in turn consist of components such as a supplier registry, databases for evaluation experts and certified procuring agencies, sometimes e-catalogue and e-supermarket, and facilities for tendering and bid evaluation online as well as electronic reverse auction.

However, these initiatives vary in their coverage and function. The majority are limited to framework agreement procurement which normally involves low value repetitive goods procurement such as office equipments. The sub-central e-GP platforms generally require suppliers to register with their database by obtaining digital certificate issued by local certificate authorities. The lacking of interoperability of these platforms and their databases arguably gives rise to the concern of local protectionism and information isolation.

Nevertheless, a number of innovative procurement methods have been developed through these e-GP initiatives such as e-supermarket/e-marketplace using framework agreement to construct e-catalogue and using electronic reverse auction to maintain low price level.

The assessment on the legal foundation for e-GP is less optimistic. The regulation of e-GP has fallen far behind its practice. In the absence of any explicit reference to e-GP in national government procurement legislation, legal uncertainty is inevitable. While the draft of IRGPL contains certain relevant provisions, it is argued that they are too brief and to a certain extent misleading especially with regard to the use of electronic reverse auction.

The efforts to establish a unified legal and institutional framework for e-GP are unlikely to be fruitful when the regime for government procurement regulation is fragmented. The co-existence of, and sometimes conflicts between, Government Procurement Law and Tendering Law is the "bottleneck" of Chinese government procurement reform. E-GP, instead of offering a cure, became another victim, which is evident in the parallel drafting of

technical standards for e-GP and e-Tendering by rival authorities. The institutional challenge is submitted as the most significant one for the success of e-GP in China taking into consideration the multiple stakeholders involved as explained above in section V.A.

In the absence of adequate legal foundation and coherent institutional framework, the long term unity and interoperability of pilot programs at sub-central level is questionable. The burden for suppliers to register with increasing numbers of e-GP platforms should not be underestimated. Without a nation-wide platform or the interoperability of local platforms, the national procurement market may suffer from local protectionism caused partitioning.

The prospects of the Nation-wide Integrated E-GP Platform which is mandated by the State Council and being constructed by the MOF remain uncertain given the institutional challenge and the workload to accommodate existing local initiatives.

At last, but not least, China needs to consider whether these practices are complying with the provisions of the WTO Agreement on Government Procurement on the use of supplier list and electronic procurement.