



On the Role of State-Owned Enterprises and the Buy-Chinese-Policy
in the Prospective
New Chinese Government Procurement Law

On July 16, 2022, the Ministry of Finance of the People's Republic of China ("MOF") issued a second draft for the solicitation of public comments ("*Draft*") on the proposed amendments to the PRC Government Procurement Law ("*GPL*"). The Draft was preceded by a comparable first draft at the end of 2020 ("*Previous Draft*" or "*PD*"), which has been widely criticized by foreign commentators for its lack of compatibility with the requirements of the so-called Government Procurement Agreement of the World Trade Organization ("*WTO-GPA*").

The Draft presents itself as a fairly consistent and solid piece of legislation which regulates the "*mechanics*" of public procurement. International expectations placed onto the Draft in terms of adjusting the GPL further to the requirements of the WTO-GPA remained, however, widely unfulfilled.

1. Contracting authority

This applies, first of all, to the definition of the term "*contracting authority*". For many years, there was hope that China would subject its state-owned industry to the application of the GPL. This would not only have meant a quantum leap forward for the public procurement activities of Chinese SOEs which, by doing so, would have become more legalized and transparent. The inclusion of SOEs into the scope of application of the GPL would have also been in line with the requirements of the WTO-GPA, which China was supposed to join ever since its admission to the WTO in 2001 which event it cleverly delayed, however, for two decades by continuously presenting more or less insignificant offers of accession. According to Art. 12 of the Draft, the new GPL shall apply to state organs (such as administrations and agencies), institutions (such as hospitals and universities), social organizations (such as the communist youth organization and chambers of commerce) and other "*procuring entities*". According to the Draft, the latter term refers to state-owned enterprises which manage public infrastructure or provide public network services in pursuit of public tasks for the common good. At present, it is still hard to predict the implications of the said definition. On a general note, it would, however, appear fair to assume that it refers to the operation of water, energy, transport, telecommunication and internet networks in the form of state-owned enterprises.

In comparison to the PD, such understanding would mean remarkable progress; since especially in the railway and air(port)sector, there are first signs of a trend emerging which apparently consists in outsourcing the pursuit of public tasks to SOEs which, on their part, are not obliged to apply the GPL. Whether such trend can effectively be disrupted by the new Art. 12 will depend on the future implementing legislation which is expected to be issued in connection with such provision. In practice, it is, however, fair to assume that the range of procurement units will be narrowly defined and will thus probably hardly differ from the definition under Art. 12.

2. Buy-Chinese Policy

According to Art. 23 of the Draft, the performance of public bidding procedures should principally result in the procurement of Chinese goods, projects and services. An exception to such rule shall only apply if and insofar goods, services and projects are not available in China or can only be procured at commercially unreasonable terms. This has already been the law up-to-date and was also enshrined so in the PD. In detail, the Draft goes, however, even further by stipulating that upon achievement of the relevant proportions for added value and fulfillment of all other stated requirements, goods produced within China have to be given priority. A conclusive definition of the term "*Chinese*" or "*goods produced within China*" is still missing in the Draft. It thus remains unclear whether goods and services of foreign-invested enterprises may enjoy full equality in Chinese tender procedures. In practice, one must be afraid that such ambiguity is interpreted to the disadvantage of foreign and foreign-invested enterprises. On the other hand, one cannot fail to deliberate that the existence of the Buy-Chinese Policy may in practice be prone to reduce the desire of foreign governments and lobbying groups to demand the inclusion of Chinese SOEs into the scope of application of the GPL; for it is fair to assume that outside the scope of the GPL SOEs may be free to procure and import foreign goods and services upon their own free discretion. Such speculation is certainly correct in terms of logic. In our view, it neglects, however, the fact that Chinese SOEs are often just too willing to adopt the requirements of Buy-Chinese on a voluntary basis or are otherwise bound by similar requirements under specific laws or local regulations. The mere non-inclusion of SOEs into the scope of application of the GPL, would thus appear to be insufficient to break-up the phalanx of the current Buy-Chinese Policy.

3. Non-applicability of the GPL for reasons of state security and the protection of state secrets

A corresponding exception was contained in Art. 142 PD but has been deleted from the present Draft. Instead, Art. 24 of the Draft simply states that in case of confidentiality concerns, preference should be given to non-public procedures. Strangely enough, the latter provision still requires the performance of a security audit without providing, however, any guidance of how to proceed in case such audit leads to the assumption of security concerns. In the absence of clear regulations, it is, thus, realistic to assume that in such case the performance of public bidding procedures could still be forfeited.

4. Overall assessment

Overall, the Draft contains only minor improvements for foreign and foreign-invested enterprises in comparison to the law in force. That being the case, the said enterprises may be well advised to reconsider their current public sales activities in China by taking into account all obstacles and limitations which they currently face and assume that those are likely to be cast in stone once the new GPL is out. In doing so, we would, of course, be glad to assist you.

Please do not hesitate to contact us if you have any questions in relation to the topics discussed herein above: snb@snblaw.com