


International developments

The Failure Of Administrative Law to Provide Adequate Relief in Bid Challenge Litigation: A Note on *Taiwan Yutong Consulting and Technology Co Ltd v Taiwan Area National Freeway Bureau and Far East Electronic Toll Collection Co*¹

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 Complaints; Interested parties; Public procurement procedures; Stay of proceedings; Taiwan; Time limits

1. Introduction

On August 3, 2006, the High Administrative Court of Taiwan issued a decision on a bid protest related to the public purchase of an electronic toll collection system for Taiwan's highways. In this important case, the Taiwanese courts grappled with issues that every procurement system is bound to confront, but for which the current state of legislation in some jurisdictions, including Taiwan, may prove inadequate.

Taiwan's public procurement regime includes a Government Procurement Act, issued on May 27, 1998 (amended 2001 and 2002) (Government Procurement Law) as well as Act Promoting Private Participation in Public Construction, issued on February 9, 2000 (amended 2003) (PPP Law). Although the *Yutong* case only applies Taiwan's PPP Law, the manner by which the Taipei Municipality High Administrative Court (the trial level court) as well as the Taiwan High Administrative Court handled the issues in the case provides food for thought to the broader public contracting community on the island.

¹ High Administrative Court of Taiwan, Judicial Decision No.1239, Year 95 (August 3, 2006).

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2. Factual Background

In 2003, the Taiwan Area National Freeway Bureau (Freeway Bureau) solicited proposals on the installation and operation of an automated freeway toll collection system. After pre-qualification, three applicants were chosen to compete for contract award: Taiwan Yutong Consulting and Technology Co Ltd (Yutong Consulting), Far East Electronic Toll Collection Co (Far East) and Acer Incorporated.

On February 27, 2004, the Freeway Bureau declared Far East as superior bidder with Yutong Consulting designated number two (Administrative Decision No.0930005550, February 27, Year 93 (2004)). On April 27, 2004, the Freeway Bureau and Far East signed the first of a series of contracts that constituted the project.

Yutong objected to the contract award to Far East and filed a complaint with the Freeway Bureau on March 25, 2004 alleging a number of bases to void the award.³ Because the Freeway Bureau failed to respond in the statutorily required period,⁴ Yutong proceeded to file a complaint with Taiwan's Public Construction Commission (PCC) on April 19, 2004.⁵ While the PCC was reviewing the matter, the Freeway Bureau belatedly rejected Yutong Consulting's objections to the award. The PCC, in contrast, sustained the complaint on a single issue, finding that since Far East failed to provide a notarised certification of the toll system (as required by Arts 43 and 44(1) of the PPP Law and section 2.8.1 of the relevant project solicitation documents) the award to Far East should be cancelled.

Although victorious, Yutong Consulting was dissatisfied with the result. Rather, it wanted a decision compelling the Freeway Bureau to affirmatively award the contract to Yutong Consulting. It therefore filed a lawsuit with the High Administrative Court of Taipei Municipality, arguing that pursuant to the decision of the PCC, Yutong Consulting should be substituted as awardee. The Freeway Bureau was named as defendant in the case. The Court later ordered Far East to be included as a "participant" in the litigation.⁶

The decision of the trial level court in Taipei (the Taipei High Municipal Administrative Court) is composed of at least four separate opinions. Opinion No.752 addresses the defects in the bidding

³ Although not clear from the facts, Yutong Consulting appeared to follow the complaints provisions of Taiwan's Government Procurement Law. According to Art.47 of the PPP Law, when an applicant has a dispute over the evaluation of an application, it should refer to the relevant provisions of Taiwan's Government Procurement Law. In turn, Art.75(1)(3) of Taiwan's Government Procurement Law states that "when an enterprise believes that the agency handling the procurement has violated laws, regulations, orders, treaties, or agreements which damages its rights and interests, it may complain in writing to the tendering agency".

⁴ Per Art.75(2) of Taiwan's Government Procurement Law, the agency should respond to a complaint within 15 days of receipt thereof.

⁵ Under Taiwan's Government Procurement Law, oversight of government procurement activities is entrusted to two entities known generically as the "responsibility entity" and the "superior entity". The responsible entity is Taiwan's Procurement and Public Construction Committee, which, in addition to handling supplier complaints is entrusted with the setting of procurement policy, developing procurement regulations, approving standard contract forms, collecting government procurement statistics, training government procurement professionals, and assessing government procurement performance. Taiwan Government Procurement Law, Art.10. (The "Procurement and Public Construction Committee is generally referred to as simply the "Public Construction Committee"). The "superior entity" refers to the next level of government higher than the relevant purchasing agency, which is also entrusted with oversight responsibilities. Art.76 of the Government Procurement Law instructs that the "responsible entity" as well as local and municipal governments should establish a "Complaint Review Board for Government Procurement". (Taiwan Government Procurement Law, Art.9).

⁶ See Taiwan's Administrative Litigation Law, Art.42(1). For more on third-party practice in the Taiwanese Administrative Courts, see section 3.3, below.

process. Opinion No.122 rules on Yutong Consulting's application to freeze execution of the administrative order awarding Far East the contract, pending resolution of the dispute. Opinion No.3123 cancels the relevant decision of the PCC and Opinion No.301 resolves any claims that Far East had against the PCC.⁷

The case eventually made its way up to the High Administrative Court of Taiwan, which issued a lengthy opinion (No.1239) addressing the substance of Yutong Consulting's objections to the contract award to Far East, as well as issues pertaining to the standing of Yutong Consulting and Far East as participants in the litigation.⁸

3. Analysis

This note evaluates the *Yutong* case from the perspective of four issues common in public procurement disputes: 1) the timeliness of complaints; 2) the stay of contract execution pending procurement disputes; 3) the question of who qualifies as interested parties to bidding disputes; and 4) defects in the procurement contract award process.

3.1 An unanswered question of timing

The sequence of events in the *Yutong* litigation raises a question as to which complaint procedure Yutong Consulting actually followed in this case. The underlying facts suggest that Yutong Consulting was relying on the Government Procurement Law (as instructed per the PPP law) because it followed a path that began with the filing of an objection to the purchasing agency (the Freeway Bureau) and then proceeded to administrative level review at the PCC, before going to Court. However, the relevant judicial opinions never discuss the dispute resolution mechanisms under government procurement law, nor for that matter any provisions of Taiwan's Government Procurement Law. If the Courts had engaged in such an analysis, they would have discovered that Yutong Consulting's complaints to the procuring agency and PCC were untimely under the Government Procurement Law (neither the Freeway Bureau nor Far East ever raised the issue). On what procedural basis then was the Court adjudicating the bid protest?

Like other procurement regimes, Taiwan's procurement complaints procedure sets time deadlines within which a dissatisfied bidder should submit its complaints to the subject purchaser and/or to the relevant administrative review body (i.e. the Public Construction Committee). According to Art.75(3) of the Taiwan Government Procurement Law, a supplier *may* file a protest in writing with a procuring entity within 10 days following the date of notice [of award] from the purchaser

⁷ *Yutong Consulting and Technology Ltd v Taiwan Area Freeway Bureau of the Ministry of Transportation*, Taipei High Administrative Court, Opinion No.752, Year 94, February 24 (2005); *Yutong Consulting and Technology Ltd. Coy v Taiwan Area Freeway Bureau of the Ministry of Transportation*, Taipei High Administrative Court, Opinion No.122, Year 94, February 24 (2005); *Far East Electronic Toll Collection Co v Taiwan's Public Construction Commission*, Taipei High Administrative Court, Opinion No.3123, Year 94, May 25 (2006); *Far East Electronic Toll Collection Co v Taiwan's Public Construction Commission*, Taipei High Administrative Court, Opinion No.301, Year 94, February 24 (2006). Note that judicial opinions in Taiwan are cited from the year of the establishment of the Republic of China, 1911. Therefore, a case opinion issued in 2006 is treated as an opinion issued in Year 95.

⁸ *Yutong Consulting and Technology Company Ltd v Taiwan Area National Freeway Bureau v Far East Electronic Toll Collection Co*, High Administrative Court of Taiwan, Judicial Decision No.1239, Year 95, August, 3 (2006).

(emphasis added). Similarly, under Art.76, the Government Procurement Law sets a 15-day period within which a supplier *may* protest to the PCC.

Remarkably, while setting time deadlines, Taiwan's Government Procurement Law renders its own complaint procedures optional by using the term "may" rather than "shall" in the text of the relevant provisions. That the aggrieved supplier can opt out of law's dispute resolution provisions seems folly, especially since the law contains an evolved set of dispute resolution rules, substantively covering: 1) the content of complaints (Art.77); 2) response to complaints (Art.78); 3) rejection of and corrections to complaints (Art.79); 4) review of complaints (Art.80); 5) withdrawal of complaints (Art.81); 6) decisions on complaints and options to stay the underlying contract (Art.82); 7) treating a decision on a complaint as a decision on an administrative petition (Art.83); 8) remedies on valid complaints (Art.84); and 9) failure of agency to follow recommendations, and damages available to successful complainants (Art.85).

In the instant case, the Taiwan Freeway Bureau determined Far East to be the superior applicant on February 27, 2004, but Yutong Consulting did not initiate the complaints process until March 25, 2004 well beyond the 10-day optional period specified in Art.75(3) of the Government Procurement Law. In turn, Yutong Consulting did not further complain to the PCC until April 19, 2004. If, considering the time deadlines, Yutong Consulting was outside the operation of Taiwan's Government Procurement Law, on what legal basis was it pursuing its case against the Freeway Bureau?

The answer lies in Taiwan's administrative legislation, which in practice allows Yutong Consulting to pursue its case against the Taiwan government independent of the application of Taiwan's public procurement legislation. This explains why the relevant Court opinions did not have to address the procedures in the Government Procurement Law. According to Taiwan's Administrative Procedure Law, any unilateral decision by an agency that has an effect on outsiders constitutes an "administrative act"⁹ subject to review.¹⁰ Under this clause both the rejection of Yutong Consulting protest by the Freeway Bureau as well as the decision of the PCC arguably constitute administrative acts reviewable by the Taiwanese administrative courts. In turn, under Taiwan's "Administrative Appeals Law" (*Su Yuan Fa*) a plaintiff can contest any such unilateral decision of a government agency within 30 days of that decision.¹¹ Taiwan's administrative law, combined with the optional nature of Arts 74 and 75 of the Government Procurement Law renders the complaints procedure under the latter irrelevant.

The above conclusion is confirmed by an opinion expressed by a judge speaking at a year-end Taiwanese Judicial Conference on December 13, 2006, which noted that after the last amendment of the Taiwan's Government Procurement Law (which took contract performance and contract inspection out of the Art.74 complaints procedure, leaving only matters pertaining to tendering and bidding), decisions in the public bidding process were all now "unilateral acts of the government . . . with an effect on society", and thus acts of administrative sanction challengeable in accord with the Taiwan's Administrative Procedure Law.¹² Accordingly, under current conditions in Taiwan, it is the

⁹ Art.92(1), Taiwan Administrative Procedure Law (February 3, 1999)(amended twice in 2000, and once in 2001).

¹⁰ Art.14 of the Taiwan Administrative Appeals Law (October 28, 1998) (amended twice in 2000).

¹¹ Note that Taiwan's Administrative Procedure Law and Taiwan's Administrative Appeals Law are distinct pieces of legislation, apart from Taiwan's Administrative Litigation Law.

¹² Proceedings of the Civil Law Summary No.14, High Level Courts of Taiwan and Subsidiary Court, Year 95 Legal Conference (December 13, 2006). Interestingly, the opinion went further to note that issues of government procurement contract performance and inspection and acceptance (which through amendment, were taken out of the Government Procurement Law Art.74 complaints procedure) were questions in the nature of the private law of contract and better resolved through mediation or arbitration. See also Taiwan Government Procurement Law Arts 85-1, 85-2, 85-3 and 85-4.

30-day appeal rule in Taiwan's administrative jurisprudence that is key for government procurement suppliers seeking to protect rights and interests in the Taiwanese procurement process. The complaints procedure and time deadlines in the Government Procurement Law are, for all practical purposes, of little consequence.

3.2 Yutong Consulting's application for a stay

In pursuing its administrative litigation at the trial level in the Taipei Municipal High Administrative Court, Yutong Consulting sought a court order staying prosecution of the underlying contract awarded to Far East. In support of its application, Yutong Consulting argued, among other things, that allowing Far East to proceed would create damages that would be hard to reverse later. Unfortunately, the trial court could not find an appropriate legal basis to grant Yutong Consulting the equitable relief it requested. It is also clear from the trial level opinion that the Court was quite aware of, and troubled by, its impotency under the circumstances.

The inability of the Taipei municipal court to grant the requested stay derives from Art.116 of Taiwan's Administrative Litigation Law (October 28, 1998) (amended 2001) (hereinafter the ALL). While the court found that Yutong Consulting had standing to request the relief, the Court could not in turn grant the relief, because the damages Yutong Consulting claimed it would suffer were, in nature, prospective damages, not the kind preventable with a stay. Damages in the form of foreseeable profits or the denial of a future opportunity were not sufficient grounds for granting the stay requested. The Court emphasised that Yutong Consulting could not affirmatively show that if successful in the litigation it would ultimately win the contract or be automatically substituted as awardee. While the Court admitted that under Art.116 it could consider the public welfare in determining whether to grant the stay, it determined it could only do so after Yutong Consulting first met the relevant damage standard.¹³

In denying the stay, the lower court in Taipei Court was clearly uncomfortable with its inability to fashion a remedy under the circumstances. In the closing words of Opinion No.122, the Court expressly encouraged the Freeway Bureau to consider the public interest in determining whether to proceed with contract award, highlighting the risks associated with proceeding when administrative organs and/or the courts might ultimately invalidate the Freeway Bureau decision. In addressing the Freeway Bureau, the Court specifically cited Arts 146 and 147 of Taiwan's Administrative Procedure Law, which authorised the agency to unilaterally adjust the content of contracts if necessary, and use other appropriate means, such as delaying prosecution of the project, when such would serve the public interest.

The Court's admonitions to the Freeway Bureau are the last statements regarding the requested stay found in the record of the *Yutong* case. The subject is not a part of the appellate ruling. Instead, the Taiwan High Administrative Court opinion only adjudicates issues relating to defects in the award process and the standing of both Yutong Consulting as well as Far East to assert claims in the litigation.

¹³ Interestingly, Taiwan's Government Procurement Law Art.82, authorises the "Government Procurement Complaints Review Board" to stay the underlying procurement proceedings when the board feels this is necessary.

3.3 Interested parties in Taiwanese bid protest litigation

Far East contended that Yutong Consulting was not the subject of the administrative decision to award the subject contract and therefore was not a proper plaintiff. In turn, Yutong Consulting insisted that Far East could only participate in the litigation for the purpose of assisting the court in ascertaining facts and had no standing to independently litigate issues. Smartly, the Court rejected both arguments.

Taiwan's ALL subscribes to three categories of third-party "participants" in administrative lawsuits. First, Art.41 of the ALL speaks to "independent participants that must be made part of the lawsuit", Art.42 refers to "independent parties with an interest in the litigation" that may be joined as participants and Art.44 pertains to independent third parties that can be joined in the lawsuit in order to assist the court in gathering facts and rendering its decisions.¹⁴ As to Art.41 and Art.42 participants, the decision of the court is binding on such third parties. At the trial level, the Taipei court joined Far East as an Art.42 participant.

At the appellate level, Yutong Consulting argued that Far East should only be joined as an Art.44 participant to help the Court gather evidence, which in effect would prohibit Far East from making independent legal arguments in the case. The High Court rejected Yutong's position rightly finding that since Yutong Consulting was asking for the award to Far East to be cancelled and, moreover, that Yutong Consulting be substituted as awardee, that such prayed for remedies would have a direct legal effect on the existing legal (i.e. contractual) rights of Far East and thus the latter was entitled to protect these rights in the litigation.

Affirming Yutong Consulting's right to sue was a more tricky proposition for the Court, given that the underlying administrative decision was not expressly directed at the plaintiff. However, the Appellate Court reasoned that by virtue of the Freeway Bureau decision to award the contract to Far East, the decision also effected other applicants as a form of harm in denying them the contract. To the Court, the fact that the relevant administrative decision was not targeted at the other applicants did not obviate the resulting harm, nor the ability of the Yutong Consulting to challenge the decision.¹⁵

3.4 The substantive decisions on Yutong Consulting's complaints

As noted in section 2 above, the PCC (the administrative department entrusted to hear public procurement complaints) ruled in favour of Yutong Consulting on a single issue; finding that Far East failed to provide a notarised certification on the operation of its electronic toll system in violation of both the PPP Law and the relevant provisions of the solicitation documents. On appeal to the Taipei High Administrative Court, the case was treated more deeply. The trial court found that although Far East was a qualified bidder, the Freeway Bureau failed to provide complete information to the relevant evaluation committee conducting the negotiations, which rendered the award to Far East illegal. This violated the principle of equality and fairness under the PPP law, which entitles each applicant an opportunity to compete on a level playing field (PPP Law, Art.44(1)). However, the trial level rejected Yutong Consulting's additional contention that it, as number 2, should be declared a substitute awardee.

¹⁴ Art.43 of the Taiwan ALL speaks to the procedures for joining independent third parties in a case before the administrative court.

¹⁵ Query whether the Court would have taken a similar position if the protestor had not been named number 2 best bidder by the purchasing agency.

The lower Court affirmed that the PCC decision was correct in refraining from declaring which applicant offered the best bid or otherwise declaring that Yutong Consulting should be substituted as awardee. In reaching its conclusions, the lower court relied on Art.45(2) of the PPP Law (and section 12.1.2 (Item 10) of the relevant solicitation documents) which hold that when the best bidder fails to sign the contract, the relevant government department may either declare the next best bidder awardee or re-solicit proposals. Given this choice of options (re-solicit or choose the next best bidder), there was no basis to insist that the PCC or the Court compel an award to Yutong Consulting.

The Taiwan High Administrative Court affirmed the decision of the Taipei Court, but on different legal grounds. The High Court noted that the legal reasoning of the Taipei trial level court was flawed in that the lower court relied on a provision relating to the situation where the original awardee fails to sign the contract. However, in the *Yutong* case, Far East had, in fact, signed the initial contract. Hence use of PPP Law Art.45(2), was in error.

The High Court confirmed that the negotiating process carried out by the Freeway Bureau was flawed in that the Freeway Bureau only negotiated with Far East, not the other applicants, in violation of the equality principle contained in Taiwan's PPP law. On this finding, and applying Art.44(1) of the PPP Law, the Court affirmed that the award to Far East was illegal and should be cancelled.¹⁶ But like the lower court, the Taiwan High Administrative Court found no basis to declare Yutong Consulting the awardee, ordering the Freeway Bureau to restart the negotiations process instead.

4. Conclusion

On April 14, 2007, after renegotiation, the Freeway Bureau again announced that Far East was the superior bidder and that Yutong Consulting ranked the second best bidder. Yutong Consulting inexplicably failed to take an active part in the post-litigation, second round of negotiations.¹⁷

What accounts for Yutong Consulting's reticence after so aggressively litigating its case before the Taipei Municipal and Taiwan High Administrative Courts? The answer appears to lie in the fact that during the course of the entire litigation, the Far East proprietary electronic toll collection system was already being placed on certain Taiwan highway lanes on an experimental basis. Moreover, the Taiwanese public was already being encouraged to try out the Far East system. Without the Court affirmatively staying prosecution of the Far East contract, practical use of the Far East product by the island's populace was a creeping fait accompli. The trial court in Taipei realised this, but was powerless to help, left simply to egg on the Freeway Bureau to stop the process unilaterally in its final words of Opinion No.122.

Public procurement law, while related to administrative law, is distinct from the latter. The concept of "third-party participants" in administrative litigation is better known as the "rights of interested suppliers" in bid challenge litigation. The concept of "stopping execution of an administrative order" in administrative law is known more appropriately as "staying execution of the underlying procurement process pending result of the bid protest" in government procurement law. These distinctions matter and the fact that the court in *Yutong* had to expend judicial resources

¹⁶ Art.44(1) of the PPP Law states that in order to determine the quality of applications, the procuring entity should set evaluation standards in accordance with the goals of the public construction. As to the materials provided by the applicants, evaluations should be determined on the principles of justness and fairness.

¹⁷ A news report on the second round award can be found at <http://www.bcc.com.tw/news/newsHistoryview.asp?cde=191158>.

fitting the procurement concept of “interested suppliers” into the ALL’s provision for third-party participants, reveals a shortcoming in Taiwan’s Government Procurement Law. Similarly, the fact that the lower court had to encourage the Freeway Bureau to deliver justice that the court was not otherwise empowered to grant (namely freezing the contract process) shows that well drafted public procurement laws can offer needed relief that conventional administrative law may not be able to afford.

The *Yutong* saga provides a lesson to avoid over-reliance on general administrative law for resolving procurement disputes. Rather, efforts are needed to develop more detailed government procurement legislation to supplement, if not overrule, general administrative law, and efforts also need to be made to train judges on the fine, but real, distinctions between general administrative law and government procurement law. Only such a strategy will truly serve to protect the rights of all suppliers to the bidding process, through ensuring a fair competitive environment and that the most suitable bidder ultimately gets the procurement contract.