

Study on Legal Risk Prevention and Countermeasures of PPP Model

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Abstract: The essence of PPP model is to establish a new type of cooperation between government and social capital that shares benefits, shares risks, and balances responsibilities. In practice, the lack of institutional supply and the lack of rules framework together lead to the failure to form an effective PPP regulatory system. Although PPP contracts have provided a clear basis for the distribution of legal risks between the two sides, the legal risks caused by insufficient legislative supply, abuse of administrative power, and lack of judicial relief have become important factors that hinder the healthy development of the PPP model in China. In this way, it is necessary to promote the healthy development of PPP model in China by promoting top-level legislative work, improving the regulatory mechanism, and improving the supporting facilities to control the possible legal risks of the current PPP model.

1. Introduction

On May 9, 2015, the General Office of the State Council officially issued the Guiding Opinions on Promoting the Cooperation Model between the Government and Social Capital in the Public Service. It clearly points out: "The PPP model is of strategic significance for coordinating efforts to achieve steady growth, promote reform, adjust structure, benefit people's livelihood, and prevent risks. Since then, in response to the call of the State Council, provincial and municipal governments have set up PPP project libraries to promote the construction of basic services such as transportation, water Conservancy, energy, environmental protection, and municipal engineering, and promote the innovation of national governance. In practice, PPP projects generally achieve cooperation between the government and social capital through the establishment of "project companies", and determine the form of project structure based on the clarity of project boundaries, income accounts, and risk structures. Then participate in the development and design of the project together, share profits and share risks. In this process, other subjects may also be involved, including insurance companies, financial institutions, product buyers or service recipients. The legal relations between these subjects are very complex and the interests are intertwined. In particular, the "glass door" and "spring door" and the lack of exit machine system in the field of private capital investment in public services have led to many legal risks in the PPP model in China, and the effectiveness of promotion and application is far lower than expected. In view of this problem, it is necessary to discuss the risk of PPP model from the legal perspective and put forward effective countermeasures.

2. Type Identification of Legal Risk in PPP Model

Legal risk is a relatively broad concept. Although there is no unified definition in the theory field at present, there is consensus on the nature and consequences of legal risk, that is, legal risk implies possibility and uncertainty. And it is this possibility and uncertainty that will have some negative legal consequences, causing losses to private interests or public interests, In the end, civil liability, criminal liability, and administrative liability are the manifestations. The legal relations between the multiple subjects of the PPP model are complex, and the legal text system involved is also extremely large. This leads to many risk factors in the PPP project. The risks that arise during the operation of PPP projects, such as political risks, market risks, and management risks and returns risks, will eventually be transformed into legal risks through specific vectors and manifestations.

2.1 External legal risks

2.1.1 Legal risk arising from legislative factors

Because of its stability, authority and predictability, the law can regulate people's behavior because of its characteristics. The PPP model is inevitable because of the lack of legislative supply. At present, China has not yet issued special legislation on PPP model, mostly in the form of government regulations or departmental regulations to control, the legal rank is less effective. At the same time, there is a lack of consensus on the connotation and extension of PPP concept, the relationship between PPP and franchising, the selection of social capital for PPP projects, and the dispute resolution mechanism. Therefore, it is urgent to build a special legal system on PPP model. Without the support of high-order laws, PPP projects can only rely on contracts and policies, which will undoubtedly exacerbate the risk and complexity of project operations.

2.1.2 Legal risks arising from administrative factors

The legal risks caused by administrative factors mainly include power rent-seeking, administrative corruption, and government inaction. In practice, many PPP projects have failed due to factors such as insufficient government arguments, improper selection of collaborators, and non-fulfillment of promises. As one of the project subjects, the government often involves public policies, public power, public funds and government supervision, which have a very significant impact on the establishment and operation of PPP projects. In practice, the legal risks caused by administrative factors are particularly prominent in PPP projects, such as the Tianjin Shuanggang Garbage Incineration Power Plant Project and the "Shenyang Waterworks Black Curtain".

2.1.3 Legal risk arising from judicial factors

Once the government and social capital dispute over the PPP project and can not be resolved through non-litigation, they often choose the way of litigation. The lack of clear legal guidelines for PPP project disputes increases the uncertainty in judicial practice. In judicial practice, the most important problems in dealing with PPP project disputes are the qualification of PPP project agreement and the application of litigation procedures. If the plaintiff initiates a civil action, it may be subject to the consequences of the defendant's defense on the grounds of "administrative contract"; If the plaintiff brings an administrative lawsuit, the defendant can regard it as a civil contract and challenge the legality of the case before the court. The end result is that either the litigation relief is "bankrupt" or the judge conducts "legal renewal"[3]. In addition, the PPP model itself is a system engineering, involving land, taxation, price, environmental protection and franchise, etc.. The handling of PPP disputes requires the comprehensive use of legal, financial,

economic and other methods, and the trial is more difficult.

2.2 Internal legal risks

In addition to the external legal risks caused by legislative, administrative, judicial and other factors, there are also internal legal risks arising from the behavior of other legal subjects such as government, social capital, and PPP project agreements themselves. The behavior of legal subject runs through the whole process of PPP project construction, and it is possible for legal subject to violate the spirit of contract in any link. Due to the large number of legal subjects of PPP projects, only the legal risks that the behavior of government and social capital may bring to PPP projects are discussed here.

2.2.1 Legal risk arising from a breach by the Government

The legal risk caused by government default is the most common and most harmful risk of PPP projects. It mainly means that the government can not fully perform or refuse to perform the obligations and responsibilities stipulated in the PPP project agreement. The general term for the various legal risks caused by the damage caused to the operation of the project. In practice, it is mainly manifested in the risk of default caused by the failure of the government's promises and guarantees, the early termination of the government, or the modification of the project contract. Compensation risk caused by unclear or improper agreement and dispute settlement risk caused by unclear agreement. In particular, government defaults are often caused by poor decision-making or delays in approval. In particular, there are problems such as the prevailing bureaucracy in the implementation of PPP projects, irregularities in decision-making procedures, mistakes in previous evaluations, lack of experience in the actual operation of PPP projects, lack of operational capacity, and cumbersome and time-consuming approval procedures for projects. This together causes the consequences of the failure of the government to perform.

2.2.2 Legal risk arising from default of social capital

In the PPP model, the government and social capital cooperate, the government has the risk of default, and social capital as a party has the possibility of default. Social capital has an unparalleled advantage in terms of the power, means, and experience of project operations, but they can also default due to the pursuit of private interests. For example, the risk of completion due to delays, poor management, and insufficient franchise capacity; Supply risk due to the delay in supply of raw materials, equipment and energy. These risks will cause the construction of the project to be inconsistent with the PPP project agreement. It will not only harm the interests of local governments, but also make the public products or public services they provide unable to meet public needs and thus harm social interests.

2.2.3 Legal risk of PPP project agreement itself

In general, PPP projects have a longer period, more stakeholders, and more complex legal relationships. Therefore, PPP projects are a contract system composed of many contracts. Among them, PPP project agreement is the core and key of this contract system, and it is the basis of the contractual legal relations between the parties. In practice, PPP project agreements themselves also have a high risk point: First, the contract term is longer risk. Unlike ordinary projects, PPP projects are based on cooperation between government and social capital. The general cooperation period is 20 to 30 years. During this period, the parties' variables are too large to make accurate estimates. It is particularly obvious that the change of government leadership has even crossed several

government classes. The signing of long-term cooperation agreements under the condition that there are many unknown factors, if the regulations are too detailed, they can not adapt to changes in the environment. If the provisions are too general, they can not solve the problem; Second, the risk of force majeure. Force majeure mainly refers to things or situations that can not be predicted by the two parties before the signing of the cooperation agreement, but can not be avoided after the situation occurs. For example, a sewage treatment plant project in Jiangsu Province was forced to interrupt negotiations with the government due to the occurrence of SARS during the renegotiation of the return on investment; Third, project uniqueness risk. In order to realize the market returns of the project, social capital often requires the government to commit itself to ensuring that it has a monopoly on the operation for a certain period of time, and the government will generally make such a commitment in order to attract investment. However, PPP projects are politically sensitive and of public interest, which greatly increases the legal risk of government commitments being honoured.

3. The present situation of regulation of legal risk in PPP model

At present, the special method of China's PPP model has not yet been formed. In practice, The laws on which the legal relationship of PPP projects can be established and adjusted are mainly the General Civil Law, Contract Law, Government Procurement Law, Land Administration Law, Bidding and Bidding Law, Budget Law, Civil Procedure Law, Administrative Procedure Law, Arbitration Law, Environmental Protection Law Wait. These laws can regulate the formulation of PPP project agreements, the establishment of project companies, government procurement, project tendering and dispute resolution. However, due to the "public-private synergy" nature of the PPP model itself and the different content of the above-mentioned legal norms, there are some inconsistencies between the various laws, resulting in them can not completely cope with the legal problems faced by the PPP model.

One is that the hierarchy is not high enough. At present, most of the normative documents that have been issued in China are guiding and principled opinions. Some of them are less stable, are not operable and predictable, and are difficult to lead the overall situation. They lack systems, complete top-level design, and long-term planning. In other words, the regulation of PPP model in China has not formed a complete legal system, that is, the "law + policy + contract guide" system.

Second, tenure is not clear enough. While the State has made it clear that the National Council for Reform and Development is responsible for leading PPP projects in the area of traditional infrastructure, the Ministry of Finance is responsible for leading PPP projects in the area of public services, each with its own responsibilities. In practice, however, the areas of infrastructure and public services often intersect and can not be clearly defined. The result is that both ministries are struggling to compete for the legislative and decision-making leadership of PPP. Because there is a large gap between the two departments in the characterization of PPP projects and the understanding of the subject of supervision, the starting point and destination of policy formulation are also different. This has led to a lack of conformity of social capital with policy procedures when it comes to participating in PPP projects and a lack of clear legal rules that can be applied by courts in PPP cases.

Third, risk regulation is not sufficient. Since 2013, central ministries such as the Ministry of Finance and the National Reform and Development Commission have successively issued a large number of PPP normative documents, set up PPP demonstration centers, and launched a number of PPP demonstration projects. However, there are few specific provisions on risk management in these normative documents. Even if there is a reference to risk prevention when government and social capital cooperate, it is mostly only superficial, and there is no hard indicator and quantitative

standard to constrain risk. At the same time, risk management does not cover the entire cycle of PPP projects. Whether it is from the perspective of the content of the normative documents or the degree of emphasis on risk prevention, it is mostly focused on project identification and project preparation. In the project procurement, project construction, project operation and project transfer stage, the risk control is not enough, and it is difficult to form a risk prevention system covering the entire life cycle.

Fourth, the mechanism for safeguarding interests is not sound enough. In general, social capital participation in PPP projects is most concerned with the return of benefits, and the current normative documents on the income security of the project are not clear. According to the PPP Law(Consultation Draft), the income of the project must be avoided too high or too low, but there is no clear quantitative standard for "too high" and "too low". This increases the uncertainty about the risks to which social capital is exposed. In addition, when social capital participates in PPP projects, The lack of system guarantee of fair competition with large state-owned enterprises, the lack of legal guarantee of diversified financing in financing and the lack of system guarantee of dispute resolution in dispute are the main reasons for the existence and aggravation of legal risk in PPP model.

4. Improving the Legal Risk Regulation of PPP Model

The PPP model has developed into the fastest pace of institutional choice for the reform of the supply mode of infrastructure and public services in China. Although it is still in the promotion stage, it has been promoted by the decision-making level of the government and its development situation is in full swing. However, it can not be ignored that if the legal and institutional barriers and barriers of the PPP model can not be solved, it will eventually become a "road Tiger" that will constrain the benign growth and scale development of the PPP model. Therefore, it is necessary to improve the top-level design, formulate a unified high-level legal norm in this field, clarify the main responsibilities of various stakeholders, and improve supporting facilities to minimize the legal risks of the PPP model.

4.1 Promote PPP model legislation and build a PPP legal system

Accelerating the PPP legislative process, formulating PPP legal norms, and removing institutional obstacles to PPP development have become the consensus of Chinese academic circles. Internationally, the United Kingdom, France, Germany, Japan and other developed countries all have specific legislative provisions on PPP, and some specialized international agencies or organizations have basically formulated special regulations to regulate PPP. Examples include the Legislative Guide on Privately Financed Infrastructure Projects developed by UNCITRAL, the PPP Reference Guide developed by the World Bank and the Handbook on Public-Private Cooperation developed by the Asian Development Bank. The drafting of the PPP special law in China should be based on combing out the existing laws and regulations and normative documents to ensure that the PPP special law can be integrated with them. In turn, the division of labor, coordination, approval, supervision and the rights and obligations of relevant stakeholders in each stage of the project are better defined.

4.2 Improve PPP model supervision mechanism and clarify stakeholder's principal responsibility

The best way to solve the legal risk caused by administrative factors in PPP operation is to establish an effective supervision mechanism. Due to the lack of special PPP departments in China,

the PPP model management system is very chaotic, and long supervision is prone to problems such as inconsistent government decrees and low regulatory efficiency. In view of this, it will be necessary to identify the lead department for PPP work in the future.

4.3 Improve PPP model supporting facilities and promote the sound development of PPP model

First, we need to create diversified forms of financing. In view of the difficulty of social capital financing, on the one hand, the Ministry of Finance should speed up the improvement of relevant policies for PPP financing support, and make it clear from the legislation that financial institutions provide long-term, low-interest, and high capital protection functions for PPP projects to ease the financing pressure of social capital; On the other hand, financial institutions should strive to explore diversified financing channels, actively innovate financial products according to the specific content of PPP projects, and use financial instruments such as trusts, equity, funds, and project income bonds and commercial bank loans to improve the efficiency of capital operations; In addition, consideration could be given to preferential policies such as interest-free, low-interest loans and tax breaks. In the early stages of the PPP project, there is a large investment and a long period of time. It is generally necessary to wait until the operation stage before there will be a cash inflow. Therefore, in the early stages of the project, the financial pressure of the company is greater and the government is required to give preferential treatment in terms of loans and taxation.

Second, strengthen the spirit of government contract. To solve the problem of government default in PPP project construction, it is necessary to strengthen the government's credit construction and establish a perfect contract system.

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