

政府採購法上異議之正當法律程序

王 富 仙*

目 次

壹、案例

貳、政府採購行為之法律性質

參、異議之正當法律程序

肆、本案解析－兼論異議程序存廢

關鍵詞：私法行為、公法行為、雙階理論、異議、行政處分、程序正義、救濟途徑
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administrative sanctions, procedural justice, the promulgated obligations of
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* 國防管理學院法律研究所碩士、臺北榮民總醫院醫務企管部醫務企劃組專員。

摘 要

政府採購法就有關訴訟程序之條文分別規定「異議」、「申訴」、「訴願」、「調解」、「仲裁」、「民事訴訟法」，極易造成理論及實務上之困擾，則政府採購行為究為公法或私法或雙階行為？學者與實務之見解頗為分歧，隨後衍生異議之正當法律程序之爭議，亦即招標機關就招標、審標、決標之決定，法律性質若何？應否教示救濟方法、期間及其受理機關？若未盡到教示救濟義務，致廠商遲誤時，是否發生行政程序法第98條第3項之效果？工程會認定因非行政處分，故無適用或類推適用餘地，然實務見解明確認定其為行政處分，且基於程序正義等理由，機關應負起救濟途徑教示義務毋庸置疑。其未附記教示救濟途徑，廠商於1年內異議時，視為於法定期間內所為。

The Due Process of Filing a Protest in Government Procurement Law

Wang, Fu-Xian

Abstract

The dispute resolved procedures provided in Government Procurement Law are including "protest", "complaint", "administrative petition", "mediation" and "arbitration", "civil procedures", which can easily result to theoretical and practical problems. Thus, whether the government procurement activity is a public or private or a dual-stage behavior has also resulted in different viewpoints between Scholars and practitioners, which also subsequently derive to the controversy with respect to the due process of administrative protest, that is, what's the legal nature of the administrative entity, tender invitation, tender reviewing, or tender awarding? and whether the administrative entity shall promulgate relief procedure, period or competent authority in the tendering document. If the administrative entity does not fulfill its obligations as above mention, and causing supplier's delay in relief procedure, shall the entity take the responsibilities provided in article 98 of the Administrative Procedure Act? Public Construction Commission didn't deem above information as an administrative decision, therefore, there is no application or apply by analogy to article 98 of the Administrative Procedure Act. However, the practitioners have different standpoints in that regard, and think that the administrative entity shall based on the grounds of procedural justice to bear the responsibility to promulgate the relief procedure in the tendering document. If the administrative entity fails to do so, the statutory period shall be curable if supplier elapses the time period within one (1) year from the time the supplier knows the relief right.