

COMPARATIVE DEFENSE PROCUREMENT IN LAW & DEVELOPMENT CONTEXT

Dae-In Kim

Dae-In Kim, Ph. D., is a professor at Ewha Womans University in Seoul, Korea. His teaching and research interest are in administrative law, public procurement law, and law & development (L&D).

Abstract

Professor Joshua Schwartz's theory can be a useful tool for integrating law & development (L&D) and comparative law, despite its limitations. He argues that exceptionalism tendency can be found in contract performance phase in US, which can be explained by the central role of the military procurement in the US public procurement law. He further suggests that developing countries should learn flexibility in contract performance phase. When reflecting on the Korean experience from this theory, we can learn the following lessons.

First, in spite of comprehensive regulation of defense & civil procurement, Korea has limited flexibility in contract performance phase. This is not so much from the fact that defense procurement did not take a pivotal role in public procurement but from its legal nature. The Supreme court of Korea deems procurement contract (including defense procurement contract) as a private law contract, which shows the influence of Germany rather than France. This decision is heavily criticized as it did not consider public law peculiarity of procurement contract.

Second, Korean defense procurement law is making efforts to achieve three main objectives, namely transparency, efficiency, and promoting defense industry. In the developmental perspective, there were shifts of emphasis from promoting defense industry to transparency, and then finally to efficiency (value for money). But we should not understand this flow as a linear process, but dynamic developmental process among these objectives.

Key Words: Defense Procurement, Comparative Law, Law & Development, Congruence & Exceptionalism

I. Introduction

The advancement of defense procurement system is crucial for every country, because it is the foundation for a strong national security capability and its efficient use of public spending. When we see the development of the defense procurement, we should consider the following two points.

First is the similarities and differences between defense procurement and civil procurement. Defense procurement has similar aspects in comparison with civil procurement in that it also pursues transparency and efficiency. However, it has different aspects because it is related with national security, which means enhanced confidentiality and supply stability are necessary. There are many debates on the desirable relationship between these two kinds of procurement, and we should resolve this issue when we deal with the advancement of defense procurement.

Second point is the harmonization of different objectives which guide defense procurement. Transparency, efficiency, competition, best-value, socio-economic objectives, and self-reliant national defense are major objectives of defense procurement. However, some of these objectives often have trade-off relationship with each other. It is very hard to harmonize all these objectives in one hand, but we should make effort to balance these objectives.

In dealing with these two points, I will look into the Korean experience for the following two reasons. First, Korea has achieved remarkable economic growth in recent years and its experience was often referred by the international community as a success story of development. As many laws and regulations in Korea, including the defense procurement regime, laid the foundation for this advancement, it is very meaningful to look into the Korean defense procurement regime in development perspective.

Second, Korea shows a good example of importing both US system & European system and adapting to Korean situation. Since Korea has observed both systems and used them eclectically, Korean experience can be a good research object in that it enables to see both systems in comparative law perspective.

For these reasons, I will deal with Korean defense procurement law in two perspectives. One is law & development, and the other is comparative law. Of course these two perspectives are closely related. In dealing with these two perspectives, I will especially use George Washington Law Professor Joshua Schwartz's theory in detail as he argues 'exceptionalism vs. congruence perspectives' on public procurement and integrates 'law & development' and 'comparative law' (II).

Since the defense procurement law deals with various institutions,

it will be a huge job to study every institutions of defense procurement law. Therefore, I will deal with only two points that I have already mentioned: i) the relationship between defense procurement and civil procurement and ii) the harmonization of various objectives. To this end, I will briefly overview the history of Korean defense procurement (III), study the relationship between defense procurement and civil procurement (IV), and then move on to the harmonization of various objectives (V). Finally, I will draw out some lessons from Korean experience (VI).

II. Methodology

1. Law & Development

'Law and Development' (L&D) is a term usually used to describe legal assistance programs for developing countries and related academic work. Although it was initiated by developed countries, followed by Japan, this movement experienced up and downs since its launching in 1960s. Originally scholars sought to develop theory on the role of law in state and market development that can be integrated into a general modernization theory. Furthermore they thought this modernization theory could be applied to developing countries as well. (Trubek, 2001: 8443)

However, this theory did not fit squarely with the developing countries' cultural, political situation. L&D movement was criticized as ethnocentric and naïve. (Trubek & Galanter, 1974:1062-1102) The critique was taken by many to be a denunciation of the movement. As a result, the movement revived at the end of the Cold War and the collapse of communism in Eastern Europe and the former Soviet Union. (Trubek, 2001: 8443-8444)

UNCITRAL Model Law on Public Procurement was originally enacted to significantly assist all States (both developing countries and developed countries). However, in practice, it has been overwhelmingly developing or transition countries that have used the Model Law. (Arrowsmith, 2009: 13) We can understand this phenomenon in the context of revival of L&D movement in 1990s.

2. Comparative Law

Comparative law may be seen as a special legal subject within the broader field of the comparative disciplines which explore the similarities and dissimilarities of different cultural or social phenomena. (Jansen, 2006: 306). The two most frequently referred legal traditions are civil law tradition and common law tradition. (Glenn, 2006)

In public procurement law field, comparative law research is actively conducted nowadays. EU public procurement directives, WTO Government Procurement Agreement (GPA), and UNCITRAL Model Law on Procurement laid the foundation for this comparative research. For example, in reform of UNCITRAL Model Law on Procurement, each country's institutions, such as framework agreement and reverse auction, is compared and evaluated. (Arrowsmith, 2009) This shows that globalization and harmonization gives motive to comparative law research.

The typical example of comparative law research in defense procurement is the work of Professor Martin Trybus, in which he compared France, Germany, and UK's defense procurement law. In his work, he evaluated that France's defense procurement is established on a 'regulated basis', while Germany's is established on a 'semi-regulated basis' and UK's is established on a 'non-regulated basis'. In this comparative research, he emphasized the type of rules upon which defense procurement is regulated. (Trybus, 1999) This research was conducted when EU directive on defense procurement was not yet enacted. After ten years of this publication, EU directive on defense procurement was finally enacted. This shows how the comparative research can contribute to the harmonization of defense procurement.

3. Integrating L&D and Comparative Law

(1) The Usefulness of Professor Joshua Schwartz's Theory

Two legal research methodologies that I mentioned above, L&D and Comparative Law, are closely related with each other. In reforming public procurement in their own countries, developing countries have to consult developed countries' or international institutions' best practices. Especially, OECD and World Bank have managed public procurement reform projects in many developing countries. There can be many debates on the efficiency of this legal technical assistance. However, comparative law analysis capability of host country is crucial for the success of legal technical assistance.

To enhance comparative law analysis capability of host country, it is important to establish sound methodology. In this context, George Washington University Law Professor Joshua Schwartz's theory is noteworthy. There are four reasons for dealing with his theory in detail.

First, his theory integrates L&D and comparative law research. Therefore, this theory can be a good starting point to conduct comparative law research by developing countries. Especially, his theory shows the difference between US and EU system. Because these two systems lead the innovation in public procurement

worldwide, his theory can be a good foundation for understanding both systems.

Second, his theory deals with the relationship between defense procurement and civil procurement. As we see above, the advancement of defense procurement can be made with the right relationship with civil procurement. Therefore, his theory shows crucial point in dealing with defense procurement.

Third, his theory touches the similarity and difference between public procurement contract and private contract. This comparison between two types of contracts shows strong relevance especially in civil law tradition countries, in which public law/private law dichotomy is well known.

Fourth, his theory shows the relationship among various objectives. As harmonization among these objectives is critical for the advancement of public procurement, his theory has also relevance in L&D context.

(2) The Core of Professor Joshua Schwartz's Theory

Professor Joshua Schwartz's theory starts with 'exceptionalism' and 'congruence'. 'Exceptionalism' is related to the idea that "because of its sovereign status, unique functions, and special responsibilities, the United States Government as a contracting party is not subject to all of the legal obligations and liabilities of private contracting parties." The opposing norm of 'congruence' embodies "the tendency to construe the obligations and liabilities of the United States Government under its contracts to conform to those of private parties under purely private agreements." He also uses term 'reverse exceptionalism'. This term is used for "positive departures from the norms of private contract law that impose extra obligations on the United States in contracting." (Schwartz 2004: 2, 6)

He indicates that exceptionalist tendency is manifested in contract 'performance' phase, while reverse exceptionalism is found in contract 'formation' phase. He presents competitive bidding obligations of government as an example of reverse exceptionalism, and 'termination for convenience' or 'equitable adjustment' as an example of exceptionalism. (Schwartz 2004: 4-18)

In addition, he links this observation with comparative public procurement law. He argues that defense procurement and civil procurement are regulated separately in European Union, while they are regulated comprehensively in the US. He observes that other countries outside US have exempted military procurement from the coverage of their requirements precisely to respond to these important policy considerations. However, when the procurement law system is built around the needs and exigencies of military procurement, as was the case in the United States, the procurement

law doctrine that results is far more likely to build in the substantial flexibility and significant latitude for adjustment of government obligations. He indicates that this difference leads to more 'exceptionalist' characteristics of US procurement contract law. (Schwartz 2004: 42-52)

He integrates this comparative law theory with L&D. He argues as follows.

“Indeed, the United States’ experience provides evidence that suggests that such inclusion [of military procurement within the coverage of a nascent scheme of procurement law in a developing nation] may be very helpful to the development of key flexibility devices within the corpus of government procurement law- both to the recognition of the policy needs that such devices serve and the legitimacy they can possess.”(Schwartz 2002: 117)

In the same context, he deals with exceptionalism and congruence as follows.

“A...device for balancing the norms of exceptionalism and congruence that the author thinks has been quite successful in the United States’ law governing public contract performance, and that is worthy of study and emulated by developing countries, is the set of flexible devices that have been evolved to share the risk of certain unforeseen occurrences in the performance phase of government.” (Schwartz 2002: 124-125)

And he also deals with competing objectives which govern public procurement as follows.

“The primary lesson drawn here...is simply that it is literally impossible to devise a perfect system of public procurement. One of the reasons that this is an unattainable goal is that the objectives of a system of public procurement are almost invariably multi-faceted...Over the long haul, some kind of compromise will emerge among these competing desiderata. But the approach to this kind of compromise is far from linear process. Rather it is a process of dynamic evolution in which policy excesses and errors.. crop up from time to time, and lead to course corrections in policy.” (Schwartz 2002: 124-125)

(3) The Evaluation of Professor Joshua Schwartz’s Theory

Although Professor Joshua Schwartz’s argument is valuable, his theory also has some limitations. First, exceptionalist characteristics

of procurement law can be found in individual European State as well. For example, France has 'administrative contract' (*contrat administratif*) law system and majority of public procurement contracts are regulated according to this regime. France has 'termination for public interest reason' (*résiliation pour motif d'intérêt general*) which is very similar to 'termination for convenience' in the US. (Licher, 1999: 212-213)

Without doubt, Professor Schwarz knows the 'administrative contract' concept in France. And he also admits that exceptionalism regarding the rules of contract performance is not a complete stranger to public procurement law in Europe and other civil law countries. (Schwartz 2004: 7-8) However, in spite of this knowledge, he does not pay due attention to the real differences in contract performance phase between two jurisdictions.

Second, he pays relatively little attention to contract 'formation' phase in L&D context. Although he mentioned the reverse exceptionalism in contract formation phase, lessons which developing countries can learn from US experience are focusing only on exceptionalism in contract 'performance' phase.

This may be due to the fact that contract formation phase shows many similarities between US and Europe. He may further feel that if developing countries wish to learn from US typical experience, it will be found in contract performance phase. However, US and EU have some differences also in contract formation phase (ex: competitive negotiation vs. competitive dialogue). And for developing countries, the reform of contract formation phase is even more important than that of contract performance. Therefore, implications from contract 'formation' phase in US should be given to developing countries.

Third, the situation in Europe is somewhat changing now. EU adopted recently new directives on defense procurement to enhance competition and liberalize defense procurement in the region. It has many similar provisions in comparison with civil procurement. This shows the convergence tendency of these two areas in EU.

Of course, this new directive's adoption did not happen when Professor Schwartz presented his argument. Since this new directive provides only contract formation phase, it is not directly related with Professor Schwarz's theory which focuses on contract performance phase. However, this convergence tendency in contract formation phase can also lessen the overall gap between defense procurement and civil procurement, which lead to rapprochement of US and EU system.

In spite of these limitations, Professor Schwartz's theory has sound grounds and many usefulnesses which were mentioned above. In the following sections, I will deal with Korean experience based upon his theory. Through this process, I will complement his theory and make his theory more relevant and convincing in L&D and

comparative law perspective.

III. History of Korean Defense Procurement Law

Currently, the Korean defense procurement is mainly regulated by two statutes: 'Act on the defense acquisition program' (enacted in 2006) and 'Act on contracts in which the state is a party' (enacted in 1995). 'Act on contracts in which the state is a party' deals with the process of procuring goods, services and works for central government agency, while 'Act on the defense acquisition program' contains special provisions which apply only to defense procurement. However, since this Act do not provide exhaustively about defense procurement, 'Act on contracts in which the state is a party' is also applied to defense procurement which is mainly conducted by the central government agency, namely the 'Defense Acquisition Program Administration' (DAPA). To look into the development of Korean defense procurement law, we need to see the history of both acts.

1. History of 'Act on contracts in which the state is a party'

As controlling budget is crucial in government procurement, this area was traditionally dealt by public finance law. This is the reason why government procurement was provided in 'Public Budget and Accounting Act' and 'Local Government Finance Act'. However, nowadays government procurement is provided in individual statutes, separated from 'Government Budget and Accounting Act' and 'Local Government Finance Act'. 'Act on contracts in which the state is a party' [hereinafter, Central Government Procurement Act (CGPA)] was enacted in 1995, and 'Act on contracts in which the local government is a party' [hereinafter, Local Government Procurement Act (LGPA)] was enacted in 2005. (Kim 2006: 79-80)

The influence of WTO Government Procurement Agreement (GPA) was absolute in enacting these statutes. Korea tried to join GPA three times during the Tokyo Round, but failed due to developed nations' discontent with Korean government's annexes. Korea managed to enter GPA in 1994 during the Uruguay Round. After joining this agreement, CGPA was enacted in 1995 separately from 'Public Budget and Accounting Act'. (Kim 2006: 80)

CGPA provides two cases: procurement from national contractor & procurement through international tender (competition). Presidential Decree (hereinafter 'Decree') and Ministerial Ordinance (hereinafter 'Ordinance') were enacted by delegation of CGPA. Especially in regard to international tender, International Contract

Dispute Resolution Council was established (CGPA § 29). Furthermore, by delegation of this statute, international tendering process is regulated by 'Presidential Decree on Government Procurement through International Tender' (hereinafter 'Special Decree') or 'Ministerial Ordinance on Government Procurement through International Tender' (hereinafter 'Special Ordinance'). Special Decree provides non-discrimination as a principle of international tender, and bans the discriminatory distribution of information. (§4)

A typical example of transparency is information disclosure clause. In international tendering, procuring agencies should comply with the request from bidder for information disclosure, and information concerning practice or procedure of procurement should be included in the list of disclosure. (Special Decree §17②; Special Ordinance §4①) If this disclosure gives rise to the discouragement of legal execution or infringement of public interest, information disclosure can be denied. (Special Ordinance §4③)

With regard to domestic tendering, procuring agencies or contracting officer should disclose the following information through 'designated information processing tool'(on-line): The purpose of contract, bidding time, calculated or anticipated price, method of contract, name of contractor, size of contract, overall price of contract, among others. (Decree §92-2, Ordinance §4③)

With regard to method of contract through international tendering, there are three types: Open competition, selective competition, and single-source contract. (Special Decree §7) This was stipulated according to the WTO GPA. With regard to domestic tendering, there are four types: Open competition, limited competition, selective competition, and single-source contract. (CGPA §7, LGPA §9) Open competition is the principal method. Though this was not influenced directly by UNCITRAL Model Law, it is a similar enactment to that of UNCITRAL Model law. It can be evaluated positively because there are high chances of strengthening transparency in Korean situation.

These decree and Ordinance partly applies to defense procurement, because Korea did not open Ministry of National Defense (MND) fully in WTO GPA. Notes to Annex 1 provides as follows: "The Defense Logistics Agency shall be considered as part of the Ministry of National Defense. Subject to the decision of the Korean Government under the provisions of paragraph 1, Article XXIII, for MND purchases, this Agreement will generally apply to the following FSC categories only, and for services and construction services listed in Annex 4 and Annex 5, it will apply only to those areas which are not related to national security and defense."

2. History of the 'Act on the defense acquisition program'

Traditionally, promoting the defense industry was regulated by 'Special Act on defense industry' and the defense acquisition and the administration of munitions were regulated by 'Act on the administration of munitions'. On the other hand, the conceptual research, exploratory development, systems development, production & operation were regulated by 'Ordinance on defense acquisition administration'. This somewhat fragmented legal system was criticized for lack of consistent regulation of defense procurement, and the Ministry of National Defense (MND) and its affiliated Defense Logistics Agency, which mainly dealt with defense procurement, were also criticized for lack of transparency, efficiency and expertise.

In this context, 'Act on the defense acquisition program' was enacted in 2006. By this act, Defense Acquisition Program Administration (DAPA) was established and separated from MND. Many commentators evaluate that the establishment of DAPA enhanced transparency in defense procurement. However, some commentators argue that the separation of defense planning (MND) and defense acquisition (DAPA) resulted in inefficiency.

This new Act also has transparency related provisions. With regard to the conclusion or execution of major policies on defense acquisition programs, the Minister of National Defense and the Administrator of DAPA need to implement the real-name policy system that records and preserves the matters, such as the post, rank, name and opinion of the participants in the determination or implementation of major policies, as well as all types of plans and reports, the details of discussions and conclusions of the meetings, public hearings, among others. (§5①)

In promoting defense acquisition programs, the Minister of National Defense and the Administrator of DAPA need to disclose information on procedures and details of decision making. In this case, the Official Information Disclosure Act will apply to the information disclosure. (§5②)

The administrator of DAPA will formulate a procurement plan for munitions in accordance with the guidance of the Minister of National Defense, and formulate a procurement plan for munitions accordingly. In order to efficiently implement the defense budget, the DAPA needs to procure munitions en bloc. Each service may procure directly, or request the Public Procurement Service to make purchases as prescribed by the Presidential Decree. (§25①, ②)

3. Evaluation

In the Korean public procurement law history, defense procurement did not take a central role in the field. Rather, civil procurement, especially construction procurement, gained most attention in public procurement, which contrasts with the US experience. This can be explained by the difference of industry structure. With Korea's rapid industrialization, the construction industry took a major portion of economy, while US is typified by 'military-industry complex'.

In contract formation phase, there are also reverse exceptionalism tendency in Korea. However, it is not clear whether exceptionalism tendency can be found in contract performance phase. For example, CGPA provides adjustment of contract amount. (§19) Although this provision is applied to both defense and civil procurement, this adjustment is strictly restricted. It is only allowed when price fluctuations or design modifications occurs. There is not so much flexibility as it is found in US system.

It is not clear whether this lack of flexibility comes from the marginal role played by the defense procurement in public procurement. In author's view, this phenomenon comes from considering public procurement contract as private contract.

Disputes regarding government procurement (defense procurement & civil procurement) in Korea are dealt by judiciary, and the Supreme Court rules that these disputes should be settled by civil procedure. With the influence of civil law tradition, there are strong division between public law and private law, which means private contract goes to civil court, while public contract goes to administrative court. Therefore, the Supreme Court deems government procurement contract as a private contract. [Decision of 11 of December, 2001, 2001 da 33604 (Korean Supreme Court)]

One of the reasons for this attitude is because Government Procurement Act provides that "(government procurement) contract should be concluded by consent of coordinate parties, each party should fulfill this contract in good faith." (CGPA §5) 'Lawsuit for confirmation of awarding contractor' is the most frequently used remedy in civil procedure.

Private contract is characterized by *pact sunt servanda*. Escape from this principle is only rarely acknowledged. To see public procurement contract as private contract is influenced by German Law Tradition. In German public law, public procurement contract is evaluated as a private contract, because of Finance Theory (*Fiskustheorie*). This theory deems financial relationship between the State and person as a private law. Public procurement is typical example of this relation. (Grau, 2004: 186-189)

There are some government procurement disputes which are dealt

in administrative lawsuit. A conspicuous example for this is a dispute regarding debarment. The Supreme Court deems debarment as administrative disposition, and permits administrative litigation. [Decision of 27 of February, 1996, 95 nu 4360 (Korean Supreme Court)]

IV. The Relationship Between Defense Procurement and Civil Procurement

1. Overview

The relationship of defense procurement and civil procurement in Korea can be explained as follows. In principle, since defense procurement & civil procurement is regulated by CGPA, defense procurement law & civil procurement law has many similarities. However, defense procurement is also regulated by 'Act on the defense acquisition program' and this Act stipulates special provisions which apply only to defense procurement.

For example, fostering of defense industry is provided in this Act. The Administrator of DAPA may, after consultation with the Minister of Knowledge Economy, designate materials classified as weapons systems as defense materials, which are necessary for the securing of stable source of procurement, strict quality assurance, etc. Those materials that are not classified as weapons systems but prescribed by Presidential Decree may be designated as defense materials. (§34①)

Those who intend to manufacture defense materials must obtain designation as defense contractors from the Minister of Knowledge Economy after meeting the standards for facilities, and meet the requirements of security that are prescribed by Presidential Decree. In this case, the Minister of Knowledge Economy need to consult in advance with the Administrator of the DAPA regarding the designation of defense contractors. (§35①)

With respect to the cases where a large enterprise related with the defense industry, merges and takes over a small or medium enterprise, or duplicates investment among defense contractors, the Administrator of the DAPA, after consultation with the Minister of Knowledge Economy, coordinate the business between large enterprise and the small or medium enterprise or the business the defense contractors. (§36①)

Where the Government procures the repair parts that are essential to the management of defense materials and weapons systems, or entrusts research or manufacture of prototypes, the Government may

conclude a short-term, long-term, fixed or approximation contract. In this case, CGPA does not apply. (§46①)

There are also other differences between these two contracts. For examples, multiple award schedule (MAS), which is regulated by 'Act on the procurement program', is only used in civil procurement. This differs from US in which MAS is actively used in defense procurement also (DFAR 208.404-70).

2. Evaluation

Defense & civil procurement is regulated comprehensively by CGPA. Although weapon system is also regulated by CGPA in principle, there are some provisions which apply only to weapon systems in 'Act on the defense acquisition program.' This regulation system is very similar to that of US. But when we look deeper, we can find many differences. Once again, Korea does not have such flexibility as can be seen in US. This shows that even if the defense & civil procurement is regulated comprehensively, flexibility does not necessarily apply.

How can this lack of flexibility be evaluated? Flexibility is related with the discretionary power of contract officer, and this power should not be misused. Korea's strict rule on flexibility in contract formation phase can be explained as an effort to prevent this misuse. Although it has its meaning in Korean context, limitation on discretionary power of contract officer should be balanced with efficiency or best value. In the following section, I will elaborate more on this issue.

V. Relationship Between Various Basic Objectives

1. Overview

When we see the history of defense procurement, we can find three main objectives in defense procurement law: transparency, efficiency (value for money), and strengthening of defense industry (and self-reliant national defense). 'Act on the defense acquisition program' also provides these three as the main principles (§ 2).

Among these three objectives, we can trace that the emphasis was shifted according to the developmental stage of defense procurement. In the early period of defense procurement (1960-1970), promoting defense industry and self-reliant national defense were the most important goals of defense procurement. But in coping with corruption issues in defense procurement, more emphasis was laid upon the transparency.

For example, with the adoption of 'Act on the defense acquisition program' in 2005, 'specialization program', which was regulated by 'Special Act on defense industry', was repealed. 'Specialization program' was originally intended to promote national defense industry, and allocated each sector of defense to each designated enterprise. However, this program was criticized for lack of transparency and competition. Other than repealing specialization Program, many provisions which enhance transparency (information disclosure, ombudsman, etc.) were included in this Act.

Nowadays efficiency and value for money are more emphasized. The Public Procurement Service (PPS), which is the central procurement agency in Korea, adopted MAS system in supplies. Before choosing this system, PPS researched MAS in US, and framework contract in European Union. The reason for adopting this system was to enhance efficiency (time-saving and meeting the various needs of ordering agencies) in procurement. However, after embracing this system, this system was criticized for discouraging competition, since ordering agencies could directly choose any schedule-enrolled enterprise. In response to this critic, PPS embraced second-stage competition after schedule enrollment. Although this system is not yet adopted in defense procurement, this system is expected to take over in the near future.

The reason for this expectation is that DAPA cooperates more and more with PPS. In 2007, DAPA made an agreement with PPS for collaboration. The essence of this agreement is to use PPS procuring system in 'commercial items' which is used in military. As commercial items are the primary area that uses MAS, there are high expectations of using MAS in defense procurement.

2. Evaluation

In general, the harmonization of various basic principles is the most important and difficult task in public procurement. In the developmental perspective, there were shifts of emphasis from strengthening defense industry, to transparency, and then to efficiency (value for money) in Korea. But this is only an overall picture of shifts of emphasis. There are ongoing efforts to balance these objectives. For example, introducing second-stage competition in MAS shows the tendency to achieve efficiency in due attention to transparency. This balancing of two objectives in MAS is also expected to be adopted in defense procurement. The Korean experience shows a good example of 'process of dynamic evolution' among these competing objectives.

VI. Conclusion

In spite of some weaknesses, Professor Joshua Schwartz's theory can be a useful tool for integrating L&D and comparative law. He indicates that exceptionalism tendency can be found in contract performance phase in US. He argues that this can be explained by the fact that the military procurement took a central role in public procurement law in US, and he suggests that developing countries should learn flexibility in contract performance phase. When we reflect the Korean experience from this theory, we can learn the following lessons.

First, in spite of comprehensive regulation of defense & civil procurement, Korea has limited flexibility in contract performance phase. This is not so much from the fact that defense procurement did not take a central role in public procurement but from its legal nature. The Supreme court of Korea deems procurement contract (including defense procurement contract) as a private law contract, manifesting the influence of Germany rather than France. This decision is heavily criticized as it did not consider public law peculiarity of procurement contract.

Second, Korean the defense procurement law is making efforts to achieve three main principles: transparency, efficiency, and promotion of defense industry. In the developmental perspective, there were shifts of emphasis from strengthening of defense industry, to transparency, and then to efficiency (value for money). But we should not understand this tendency as a linear process, but a dynamic developmental process.

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