

# Article

## The Relation Between the Services Procurement and the Labor Legal System

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### ABSTRACT

*As a rule, government sectors obtain workers by way of services procurement. However, this practice de facto violated the Article 5 & 6 of the Labor Standards Act. Procurement refers to the dispatching of labor. The Labor Standards Act has been implemented in other foreign legal systems, but Taiwan has not enacted the Labor Dispatching Act. Moreover, it is a violation of the law to bypass the Labor Standards Act. A dispatched worker frequently provides service for several years in Taiwan; contrariwise, hiring a dispatched worker for such a long time is forbidden in other foreign legal systems. These problems were initially caused by the incorrect provisions in the Government Procurement Act. Secondly, these problems were caused by the chronic use of day workers. Therefore, our country should posthaste examine whether Taiwan has a faultless legal system that our public servants deserve.*

**Keywords:** *Government Procurement Act, Services Procurement, Labor Legal System, Fixed-term Contract, Labor Dispatching*

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## I. INTRODUCTION

The Government Services Procurement Act was promulgated on May 1, 1988. After being occasionally amended, it has already become the foundational legal framework that our government sectors adhere to when facing construction work, the purchase or lease of property, and the retention or employment of services. This Act is enacted to establish a fair and open system, to promote efficiency and the quality of mandating or employing workers.<sup>1</sup>

However, the Taiwanese government should contemplate on addressing services procurement in the Government Procurement Act. Although the procedure of procurement is provided in the Act, the specific content and its relation with the labor legal system at present must be reexamined since the core values of services procurement may not necessarily be destroyed by its procedures, but the potential offense of the procurement to the labor justice and the labor legal system should not be ignored.

No one has ever pondered over the advantages and disadvantages that the Government Procurement Act may bring from the perspective of services procurement. Furthermore, no papers or books are found so far to compile the impact on services procurement. This study focuses on the relation between services procurement and the labor legal system. Moreover, this article also outlines the clearer principles on the practice of services procurement to offer practitioners some reference when contemplating the Government Procurement Act and the development of public servants.

## II. THE PRINCIPLES AND THE PROBLEMS OF THE GOVERNMENT SERVICES PROCUREMENT

According to Article 7(3) of the Government Procurement Act, the term “service” in this Act refers to professional services, technical services, information services, research and development, business operation management, maintenance and repair, training, labor and other services as determined by the responsible entity.<sup>2</sup> As a meanwhile, according to Article 2 of the same Act, the term “procurement” refers to the employment or mandate of the above-mentioned services. For instance, on June 14, 2006, the Directorate General of Budget, Accounting and Statistics (DGBAS) of Executive Yuan invited bids for the project ‘Investigation of the Workers’

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1. Government Procurement Act, arts. 1, 3 (1998) (amended 2011) (Taiwan) [hereinafter Government Procurement Act of Taiwan] (applying to all government sectors, including government owned business and public schools), *available at* <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030057>.

2. *See id.*, art. 9(1) (indicating the Procurement and Public Construction Commission).

Wage System'. DGBAS obtained and mandated workers who were professionals in certain fields, and declared the expiration date would be on June 27 of the same year.

Based on the foundation of the original government procurement manners in Taiwan, the Government Procurement Act has also been implemented by WTO's GPA system.<sup>3</sup>

Taiwan's Government Procurement Act is also influenced by the system in the U.S. However, the development of the U.S. federal system is different from that in Taiwan. The differences can be observed in the history. In 1947 and 1949, the U.S. promulgated the Armed Services Procurement Act and the Federal Property and Administrative Services Act. In 1984, they announced the Federal Acquisition Regulation (FAR). The U.S. Government keeps advancing in the procurement field and the scope of it also keeps expanding. In 1988, the U.S. promulgated Public Law, paragraphs 100-697. The U.S. also established the Federal Acquisition Regulatory Council. According to the evaluation that the Federal Procurement Policy Office led in 1989, the related information that the government procurement requested has made contractors of government sectors spend over 289 million working hours every year. Moreover, just the tax data records and the documents provided have already become a big burden to the public sectors. With no exception, the situation is similar in Taiwan. In order to make procurements open and fair, social cost is required. In January 1997, the U.S. announced a new simplified procurement procedure—electronic commerce. Taiwan's Government Procurement Act also adopts a similar measure.<sup>4</sup>

The three principles are implied in the U.S. procurement system, namely the openness, the competitiveness and the credibility of government procurement. Of the above principles, the credibility principle is of importance to our country. Taiwan ought to treat suppliers with justice and fairness. To implement the government procurement system, the prerequisite is that the government procurement staff must obey the principles and thus illegal conduct such as corruption, bribery or other immoral behaviors should not be accepted. This is the only way to protect the suppliers and the benefits of the procurement sectors and to obtain the people's credibility, which will lead Taiwan to implement the government procurement without any obstacles.

Government procurement is a behavior that government sectors or

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3. Evelyn Yueh-Tuan Chen, *Chengfu chi Tsaikou tsai Falu Shang Yiyi chih Yenchiu* [A Study of the Legal Meanings of "Government" and "Procurement"], 42 HUAKANG FATSUI [HUAKANG L. REV.] 1, 1-2 (2008).

4. Hsin-Yi Hsieh, *Meikuo Lienpang Tsaikou Kueifan Tihsi yu Taiwan Tichu, Talu Tichu Chengfu Tsaikou Tihsi chih Pichiao Yenchiu (Shang)* [A Comparative Study between the Federal Procurement System of the US and the Government Procurement System of Taiwan and China (Part I)], CHUANKUO LUSHIH [TAIWAN B. J.], Mar. 2009, at 116, 116-18.

organizations adopt to realize government functions and public benefits by way of obtaining goods, works and services with public funds. Public fund derives from the national tax; in other words, the expenditure of procurement is paid by taxpayers. It is a mechanism that aids government procurement by reinforcing expenditure management under the free market, and addressing the macro economy.

Moreover, Government procurement plays an important role in the national economic establishment. The progress of procurement performance is the most effective way to increase the credibility. The government established a “performance index” for evaluating the procurement performance. The Public Construction Commission (PCC) now defines the performance index of government services procurement as the implementation rate of every sector, such as the case amount, the final price, the public processing ratio, public processing ratio without reaching the predicted price, the ratio of electronic bids and so on. However, the author sees it disagreeable to include all the results in those ratios comprehensively. Hence, in order to build up the integrity of administration and procurement sufficiency, Taiwanese government should establish an internal index to meet the different needs of each sector.<sup>5</sup>

The procurement procedures in the U.S. comply with the Anglo-American Legal system. Lawmakers believe that complying with a strict and accurate procedure will be just and will also meet the needs of the public. However, our country should not ignore the practicalities of procurement. There are still a lot of restrictions; even if the procedure is correct, violations of the law may still happen. According to Article 2 and 3 of the Government Procurement Act, the “procurement content” and the “procurement sectors”<sup>6</sup> still need to be examined. In short, if the Taiwanese government only focuses on improving the procedures, Taiwan cannot uphold justice for the procurement.

Pursuant to the related regulations of the Government Procurement Act, the “services procurement” shall either be a contract of mandate or an employment contract. Pursuant to the Civil Law Article 528,<sup>7</sup> a contract of mandate is a contract whereby the parties agree that one of them commissions the other party to deal with his affairs, and the latter agrees to do so. However, whether or not the legitimacy of the contract of mandate is compliant with the labor legal system is questionable. That is to say, if a

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5. Chun-Chieh Liu, Hui-Hua Pan & Gui-Xuan He, *Taitieh Kungcheng Laowu Tsaihou Chihshiao Chihpiao chih Yenchiu [A Study on Performance Measurement of Services Procurement of Taiwan Public Work]*, TAITIEH TZULIAO CHIKAN [TAIWAN RAILWAY J.], Dec. 2006, at 1, 1.

6. Chen, *supra* note 3, at 11.

7. Civil Code, art. 258 (1929) (amended 2010) (Taiwan) [hereinafter Civil Code of Taiwan], available at <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=B0000001>.

government sector breaches an employment contract after the services procurement, this will be acceptable. However, if a government sector procures services by contract of mandate, the procurement will violate the labor legal system because Article 2(6) of the Labor Standard Act stipulates that a “labor contract” only applies to an employer-employee relationship.

Pursuant to Article 2(6) of the Labor Standard Act, a “labor contract” denotes a contract that regulates the employer-employee relationship. In Article 2(6), the so called “worker” means a person who is hired by an employer to do a job for which wages are paid. In Article 2(6), and “employer” means the owner or responsible person of an enterprise or the person who represents the owner in dealing with labor matters. In other words, the labor contract in the Labor Standards Act only applies to an “employment relationship.” Thus, if the government procures services by way of “mandate”, it would violate the Labor Standards Act with a “right” procedure and it even go beyond the third services world which is forbidden in the Labor Standards Act.<sup>8</sup> In terms of “employment contract,” the Labor Standards Act emphasizes 4 elements—the “relationship,” “services providing,” “management” and “wages.” Once a contract of “mandate” occurs, the services providing and management will be altered, which means mandated relationship will not be valid because the Labor Standards Act will not apply to this situation. Therefore, the government sectors need to be vigilant when procuring services in order to evade replacing an “employment” contract with a “mandate” contract so the Labor Standards Act will not be distorted.

The Labor Standards Act is the most important and basic labor-related law in Taiwan. Any labor-related issue needs to be complied with the Labor Standards Act; those issues include general provisions of labor, labor contracts, wages, work hours, time off and leave of absence, child workers and female workers, retirement, compensation for occupational accident, apprentices, work rules, supervision and inspection, penal provisions and supplementary provisions. Hence, both the procedure and the procurement itself should not bypass the Labor Standards Act. Otherwise, the labor legal system will be distorted, and it will create several systems in one country.

Based on the previous statements, according to Article 2 of the Government Procurement Act,<sup>9</sup> procurement by government services will lead to a relationship of “mandate.”<sup>10</sup> However, pursuant to Article 2 of the

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8. Nowadays, there is an internationally “multinational & inter-regional” working type. That is to say, such as India and Sri Lanka gained the job opportunities from the U.S. by the way of call center to provide services to the U.S. The essence of this kind of labor relationship is “contract services”. It is different from the “labor dispatching” in this paper.

9. Government Procurement Act of Taiwan, *supra* note 1, art. 2.

10. Chen, *supra* note 3, at 11 (discussing the definition of “procurement” in Government Procurement Act).

Labor Standards Act, only an “employment” relationship is allowed; so if the “mandate” services procurement becomes a loophole of the Labor Standards Act, it may violate or bypass the Act. Moreover, in the Labor Standards Act, the object of “employment” refers to a worker who is contracted by employment. In the employment relationship, the government must be one party, and the worker must be the other one. A third party shall not be involved in this relationship; otherwise, it may violate Article 6 of the Labor Standards Act which stipulates that no one may intervene in a labor contract of other persons for illegal interests.

As in practice, I have noticed for years that the government services procurement has obviously violated the provisions of the Government Procurement Act and even bypassed the Labor Standards Act. I hereby take the following two contracts as examples. The first one is “the Research of the Bureau of Labor Insurance Affairs in the Taiwan region and the outsourcing affairs management contract”<sup>11</sup> (hereinafter referred to as ‘Labor Insurance Outsourcing Contract’); and the second one is “the Services Procurement of the Department of Health of Executive Yuan Contract, 2005”<sup>12</sup> (hereinafter referred to as ‘Department of Health Services Contract’). Both contracts have disclosed several problems. Both the Labor Insurance Outsourcing Contract and the Department of Health Services Contract have a third party intervening between the workers and the competent authorities, namely the Bureau of Labor Insurance and the Department of Health. In addition, the workers are not “mandated” or “employed” by the competent authorities. The relationship between the competent authorities and the workers do not adhere to the Labor Standards Act. In other words, the practical services procurement has violated the Government Procurement Act and Labor Standards Act, and exceeded the limits of authority. Despite the two examples here, in fact, all the government sectors use the same aforesaid manner to obtain workers.<sup>13</sup> All the practitioners need to understand that the government sectors are violating

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11. *Laokung Paohsien Chu Yehwu Yenchiu chi Shihwu Chuli Weiwai Tsoyeh* [*The Research of the Bureau of Labor Insurance Affairs in the Taiwan region and the outsourcing affairs management contract*], CHENGFU TSAIKOU WANG [GOV'T E-PROCUREMENT SYS.] (Jan. 28, 2005), [http://web.pcc.gov.tw/tps/tpam/main/tps/tpam/tpam\\_tender\\_detail.do?searchMode=common&scope=F&primaryKey=1163547](http://web.pcc.gov.tw/tps/tpam/main/tps/tpam/tpam_tender_detail.do?searchMode=common&scope=F&primaryKey=1163547).

12. *Hsingcheng Yuan Weisheng Shu 94 Nientu Yehwu Weiwai An* [*The Services Procurement of the Department of Health of Executive Yuan Contract, 2005*], CHENGFU TSAIKOU WANG [GOV'T E-PROCUREMENT SYS.] (Mar. 21, 2005), <http://web.pcc.gov.tw/tps/main/pms/tps/atm/atmAwardAction.do?newEdit=false&searchMode=common&method=inquiryForPublic&pkAtmMain=1166786&tenderCaseNo=9356315>.

13. Readers please go online to search “services procurement”, and then the readers will find out the practical situation. The author participated in the conference of labor dispatching act and policy study which was held by the Council of Labor Affairs on Dec. 7, 2010, and the author found out, unlike Germany, Japan and Korea, Taiwanese government has used a lot of dispatching workers for public affairs.

the labor legal system.

The services procurement contract is usually misconceived as the “labor dispatching contract” that is stipulated in Japan. However, Taiwan has not enacted the Labor Dispatching Act and the form of labor dispatching in Taiwan is in triangular relation because a third party usually intervenes between a worker and the government. The third party often replaces the role of the government and becomes the employer. It leads to a peculiar situation because the worker will work for the government, but the government is not the employer in fact. The workers will be embroiled in this situation and become the “unusual workers” or “the unofficial workers,” which violates Article 5 of the Labor Standards Act, Article 5 which stipulates that no employer may, by force, coercion, detention or other illegal practices, compel a worker to do work. Under the above-mentioned circumstance, the workers may be dismissed arbitrarily by force where the workers’ dignity will be swept away. Furthermore, compelling working is forbidden in the Labor Dispatching Act of Japan.<sup>14</sup> The Labor Standard Act of Japan stipulates that an employer shall not compel his employee to work by force, coercion, detention, or by any other unfair manners which is against the workers’ mental or physical freedom.<sup>15</sup> Moreover, it provides that an employer shall not exploit an apprentice, student, or trainee who are in the process of training.<sup>16</sup> Nevertheless, the related law in Taiwan is inadequate; so the government’s behavior of dispatching and using workers arbitrarily has made the Labor Standards Act become an armchair strategy because it cannot fulfill the labor justice for people. In 1985 the Japanese government enacted the “Labor Dispatching Act” to eliminate the phenomenon of employers “compelling working” (the same as Article 5 of Taiwan’s Labor Standards Act) and “indirect exploiting” (the same as Article 6 of Taiwan’s Labor Standards Act). It has been amended 28 times.<sup>17</sup> The amendments were made mainly to address the problems mentioned above; however, it is not effective in eliminating the phenomenon of *karoshi* and “the new poor” which was caused by “compelling working” and “indirect exploiting.” As to Taiwan, it has not enacted any law or regulations on the dispatching of labor. As many scholars’ opinions regarding this issue remain unresolved, only by referring to the experience of Japan, the author could predict the

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14. See ROUDOU HAKENZIGYOU NO TEKISSETU NA UNEI NO KAKUHO OYOBHI HAKENROUDOUSYA NO SYUUGYOU NO SEIBINADO NI KANSURU HOURITSU [HAKEN GIRI] [Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers] 1985, art. 44 (Japan) [hereinafter Labor Dispatching Act of Japan]; ROUDOU KIJUNHOU [ROUDOU KIJUNHOU] [Labor Standards Act] 2008, arts. 5, 69 (Japan) [hereinafter Labor Standards Act of Japan].

15. Labor Standards Act, art. 5 (1984) (amended 2011) (Taiwan) [hereinafter Labor Standards Act of Taiwan], available at <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0030001>.

16. Labor Standards Act of Japan, *supra* note 14, arts. 5, 69.

17. It was amended again on June 30, 2011, but the amendment hasn’t been enacted.

future trend and challenges that Taiwan will meet.<sup>18</sup> The Labor Standards Act of Taiwan stipulates that a labor contract shall be an “employment” contract which only allows an employer-employee relationship. It is not appropriate to allow such a triangular relationship that is valid in Japan to occur in Taiwan because it will lead to a change of the definition regarding the employer-employee relationship.

Taiwan adopts the Roman civil legal system; thus, all labor affairs are regulated by the codified law for workers and employers to be adhered to. However, Taiwan has not promulgated the Labor Dispatching Act, and even the labor dispatching affairs obviously do not adhere to both the Government Procurement Act and the Labor Standards Act as well. Under these circumstances, the illegitimacy of labor dispatching is potentially hidden behind the Government Procurement Act, which leads to a haphazard labor legal system. It has affected the significance of the existence of labor legal system in Taiwan considerably. Unless the public agrees with a laissez-faire manner of labor obtaining, the practitioners should not ignore the dispatch form adopted by the government. Furthermore, the highest labor administrative competent authority should manage both the misapplication of labor dispatching and the illegitimacy of “indirectly exploiting” and “compelling laborers to do work.”

The Labor Standards Act requires a labor contract to be in either fixed-term or non-fixed-term. A non-fixed-term contract shall not be replaced by a fixed-term contract. The government services procurement shall adhere to this legal principle instead of replacing a fixed-term contract with a non-fixed-term one, or making a “fixed-term dispatching contract” to dispatched workers.

The previous statements imply that violations of services procurement in Taiwan appear frequently. Herein the author would demonstrate the 2004 civil verdict, Chung-Lao-Su, No. 3, passed by the Taichung District Court of Taiwan (a lawsuit involving the chronic use of dispatched workers, which was sentenced on February 24, 2006). The core ideas of the verdict are:<sup>19</sup>

1. A dispatched worker is initially employed and contracted by a labor dispatching agency. With this employment relationship, the dispatching agency will assign the worker to work for another

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18. For example, the Taiwan Telecommunication Network Trade Union sent Gong No. 017 to the Foundation of Chinese Labor-Management Affairs, which represents that a group of dispatched workers formed a union and asked for its own labor right. Taiwan Telecommunication Network Trade Union, Gong No. 017 (Jan. 19, 2011) (answering the request concerning dispatched customer service representatives' labor right raised by the Foundation of Chinese Labor-Management Affairs) (on file with author).

19. Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 93 Chung-Lao-Su No. 3 (Jan. 25, 2006) (Taiwan). The following paragraphs are translated by the author.

company—the so called client company. After being assigned to the client company, the worker will be under the supervision of the client company and be under its command. That is to say, dispatching is an indirect employment system rather than a normal and direct employment which signifies that a dispatching agency will intervene between a service provider and a receiver. The dispatched workers contract with the dispatching agency, so the client company is not the employer under the statute. The dispatched worker provides the same services as the formal employee for the client company; however, the client company is not the legal employer of the dispatched worker, and thus a client company is not obliged to provide any welfare, bonuses, allowances and staff education fee to the dispatched worker. It leads to unequal wages for equivalent job. Aside from bypassing the terminology that the Labor Standards Act applied to the employment contract, this situation also allows a client company to violate the rights of workers, namely, the solidarity right, collective action right and negotiation right. Nonetheless, due to the increasing need of boosting international competitiveness and the transformation of the industrial structure, labor dispatching has gradually become a new strategy that many nations use. Meanwhile, the structure of the labor market in our country also alters rapidly due to the transformation of the international business management environment. In the “small profit era,” the basic objective for the employers is to reduce cost, including the biggest but the most uncontrollable cost of human resources. As a result, labor dispatching has become the most convenient way for many businesses to reduce cost. Since labor dispatching has become an international trend, our country should not act against the norm and deny the necessity of the dispatching system. Moreover, in the international business, protecting workers has also become a necessity to uphold a good employee-employer relationship. In order to improve the standard of workers’ living, Article 153 of the ROC Constitution also stipulates the necessity of protecting workers. The labor dispatching system is thus required to uphold economic competitiveness and to protect the disadvantaged workers at the same time. Hence making the labor dispatching system more obtainable with “conditions” and avoiding employers from exploiting workers’ rights by the principle of free contract should be regulated first.

2. The labor dispatching system can bring certain economic profits. Although labor dispatching may bring difficulties in

implementing the law on protecting workers, in order to safeguard job opportunity and economic benefits for workers, the only approach is to adopt labor dispatching appropriately to reduce the impact after the system was implemented in Taiwan. The labor dispatching is a triangular relationship involving a dispatching agency, a client company and a dispatched worker. A labor contract establishes the relationship between a dispatching agency and a dispatched worker; and the one between a dispatching agency and a client company is a services providing contract, which is very different from the employer-employee relationship in the current labor legal system. In the event that some employers might dismiss long-term employees and replace them with dispatched workers, or hire the original long-term contracted employees by way of dispatching instead, countries which enacted the Labor Dispatching Act have stipulated provisions to prevent the misapplication of the labor dispatching system. For instance, Article 6(1) of the Labor Dispatching Act of Korea pursuant to the provisions of Article 5(1), stipulates that the service term of a worker shall not exceed one year. If the dispatching employer, the client employer and the dispatched worker reach an agreement, they can extend the term, but not more than one year. Article 6(3) stipulates that if an employer hires a dispatched worker for more than two years, the dispatched worker shall be deemed a formal employee the day following the expiration date. This provision does not apply to certain workers who refuse to be a formal employee. Another example is Article 40(2)(2) of the Labor Dispatching Act of Japan which stipulates that the service term of a dispatched worker must not exceed one year except in specific circumstances as set out in the provisions. Article 40(5) stipulates that if a worker provides the same service for a client company or a dispatching agency in excess of 3 years and the client company receives the services from the same dispatched worker for more than 3 years; the client company must propose an employment contract if the client company wishes to continue to hire the same dispatched worker for the same service. Practice in Taiwan shows, according to Article 6 of the draft of the Labor Dispatching Act on the 6th proposal discussion of the 5th meeting 2nd session of Legislative Yuan, before the expiration date, if a dispatched worker wishes to continue providing the same service for a client company and the client company does not reject this, a labor contract will be deemed to be established

between the worker and the client company. A dispatched worker shall not provide service for the same client company for more than two years. Hence, the dispatching system only applies to non-long-term work. Moreover, pursuant to Article 9 of the Labor Standards Act, a contract for temporary, short-term, seasonal or special work shall be considered a fixed term contract. The above-mentioned types of work should be moderately obtainable for employers. Due to the close relation between the workload and the considerable demand of workers, obtaining workers by way of dispatching will be more convenient for employers.

3. The Labor Dispatching Act has not been enacted in Taiwan; however, in order to reduce the personnel cost for enhancing business competitiveness, all other countries have gradually approved the dispatching system. Although the dispatching system cannot safeguard the right of workers, it is still not a wise decision to terminate the system before Taiwan reaches a balance between protecting the workers' rights and executing the free contract principles. In any event, the relationship between a worker and an employer is interdependent. If Taiwan forbids the employer to reduce personnel cost by dispatching, Taiwan will not be able to increase its international competitiveness in the market. If there's no employer in the market, our workers will not have any job opportunities; and the Labor Act will become useless and unable to fulfill its purpose of safeguarding the workers.
4. According to the previous statements, the labor dispatching system is restricted to the service term and the scale of dispatching work. Under these circumstances, employers can mandate a dispatching agency to provide temporary, short-term, seasonal or specified work to dispatched workers. It neither misapply the free contract principles, nor conflict with public morality and the spirit of protecting workers.

The previous verdicts contained the following two statements: "a non-fixed-term contract shall not be replaced with a fixed-term contract;" and "a dispatching contract only applies to a short-term worker." According to the verdict, a monopoly business cannot run under the reliance of a short-term system. It shall hire more and more long-term workers due to the increasing social requirement. Otherwise, it will be regarded as bypassing the non-fixed-term contract in the Labor Standards Act. This kind of misapplication on dispatched workers should be invalid. In short, the verdict

presented that the misapplication of the dispatching system would damage the labor standards legal system. I believe that if this verdict is set as a precedent for the government sectors to examine the “dispatching” services procurement and contemplate on amending the Government Procurement Act of Taiwan in the future.

In my opinion, the practice of the Government Procurement Act is mostly via “dispatching.” However, the dispatching system has eliminated the justice of the Labor Standards Act; under this circumstance, Taiwan has to reexamine the situation. Furthermore, Taiwan also has to examine whether the government endangers the public system by way of mandating the services to dispatching agency and dispatched workers.

To be more specific, according to Article 7(3) of the Government Procurement Act the term “service” means professional services, technical services, information services, research and development, business operation management, maintenance and repair, training, labor and other services as determined by the responsible entity. The above-mentioned services are, pursuant to the current provisions, public affairs that should be managed by public servants because at least a public servant has to satisfy all the qualifications to be a public servant and is authorized to handle legal public affairs. I highlight that, although the Government Procurement Act addresses services procurement, procuring services by way of “dispatching” will not adhere to the provisions. Moreover, this situation has violated the related labor contract provisions of the Labor Standards Act. Therefore, in my opinion, administrating “government services procurement” by way of “dispatching” is seriously damaging the national public human resources system.

### III. THE EXAMINATIONS OF THE PROBLEMS OF THE GOVERNMENT SERVICES PROCUREMENT

The system and practice problems of the government services procurement shall be examined with as follows.

#### A. *The transformation of the recruitment process of temporary workers by the government*

For a long time, without violating the law, the public workforce in Taiwan consisted of public servants, contracted workers and temporary workers. However, from a labor legal perspective, it can be observed that a non-public-servant who is a short-term worker usually becomes a long-term worker. The government contemplated this; however, after the government enacted the Government Procurement Act, they effectively complicated the

manner of obtaining non-public-servant workers. For instance, the Government of Tainan County obtains its temporary workers by way of “services procurement.”<sup>20</sup> However, according to the current provisions, the obtainment of temporary workers has its own selection procedures and content. These include the “public selecting regulations of Changhua County Government and subordinate schools’ contracted workers and temporary workers.”<sup>21</sup> Even though they obtained workers by services procurements, the aforementioned guarding function of the selecting regulations would be useless. In short, due to the services procurement provisions in the Government Procurement Act, the circumstance of a non public servant worker providing public services is going through a new transition.

B. *Can “regular services” be obtained by services procurement? And what is the relation between “the services procurement of regular services” and a labor contract?*

According to Article 5 of the “Executive Yuan and Subordinate Agencies Contracted-Employment Regulations,” the employment term of contract personnel is limited to one year.<sup>22</sup> However for those jobs that can be completed within one year, the employment term should be based on the actual required period of time. When the employment term needs to be more than one year, based on the original time scheduled for the plan, the contract of employment can be continued for another year at a time until the completion of the plan; if the employment term is over five years, the plan should be re-examined periodically for its cancellation. In short, for a contracted employed worker a fixed-term job is the limit, and a non fixed-term job only applies to public servants. However, if a non-public-servant who is a fixed-term worker can be obtained by way of services procurement, the non-public-servant who is a fixed-term worker will be regarded as a dispatched worker. Moreover, the government procures the regular services by way of inviting bids from human resources provision activities, so a successful bidding or a failed one will influence the regular service, which means that the regular services will naturally become the

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20. *Tsaikou Fanpen Piaotan [The List of Modeled Contract of Service Procurement]*, TAINAN HSIENCHENGFU [TAINAN COUNTY GOV’T], <http://prc.tainan.gov.tw/u-form.asp> (last visited Jan. 15, 2012).

21. *Changhua-sien Chengfu chi Soshu Chikung Hsuehsiao Yuehpinku Jenyuan chi Linshih Yuehpinku Jenyuan Kung-kai Chenhsuan Yaotien [The Public selecting regulations of Changhua County Government and subordinate schools’ contracted workers and temporary workers]*, DEP’T OF PERS., CHANGHUA CNTY. GOV’T., [http://www.chcg.gov.tw/personnel/02law/law01\\_con.asp?law\\_id=36](http://www.chcg.gov.tw/personnel/02law/law01_con.asp?law_id=36) (last updated Jul. 12, 2006).

22. Executive Yuan and Subordinate Agencies Contracted-Employment Regulations, art. 5 (1972) (amended 1982) (Taiwan), available at <http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?PCode=S0110014>.

“irregular” services. The Services Procurement Act allows the mandating or employment of services to be obtained by way of services procurement. A worker who is not public servant will be mandated by human resources provision activities through bidding. Therefore, it will remove the focus from temporary workers and even make the “regular services” become a “fix-termed” type. Article 59(2) of the Labor Contract Act of China stipulates that an entity shall not divide a continuous term of labor use into a couple of short-term dispatch agreements; however, Taiwan has not enacted the Labor Dispatching Act, and our government sectors ignored the misapplication of labor dispatching. And the so called “services procurement of regular services” means the government need not sign a “labor contract” and can even take the freedom of using workers. Essentially, obtaining public regular service workers by way of services procurement has completely changed the contractual relation in public services.

C. *The relationship between a “services procurement contract” and a “labor contract”*

According to Article 2 of the Government Procurement Act services procurement can be obtained by way of mandate or employment, so the services procurement shall be mandated services or employed ones.<sup>23</sup> However, regardless of the kind of services procurement contract, the first thing to be confirmed should be the identity of the opposite party of the government services procurement; and whether the party is the worker, or just a supplier who provides the worker. In terms of a labor contract, the party should be the worker himself. If the worker is not the services provider, it will violate the relation between a labor contract and a worker as stipulated by the Labor Standards Act and the provisions of the specificity of a worker in Article 484 of the Civil Code.<sup>24</sup> The aforementioned services procurement contract includes mandating and employing. Pursuant to Article 529<sup>25</sup> of the Civil Code, provisions of mandate shall apply to any contract concerning the performance of services which does not belong to any kind of other contracts provided for by the act. If the aforesaid services have its own specificity, then the contract of mandate should adhere to the regulations, and the counterparty of the contract should be the services provider himself instead of the worker provider. I believe that the Labor Dispatching Act of

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23. Government Procurement Act of Taiwan, *supra* note 1, art. 2.

24. Labor Standards Act of Taiwan, *supra* note 15, arts. 2(6), 2(9); Civil Code of Taiwan, *supra* note 7, art. 484.

25. Civil Code of Taiwan, *supra* note 7, art. 529 (“With regarding to the provisions of Mandate shall apply to any contract concerning the performance of services which does not belong to any kind of other contracts provided for by the act.”).

Japan aims to prevent the use of “human resources provision activities: (namely the worker provider.)”<sup>26</sup> But, our country legalizes the “human resources provision activities” in the Standard Industrial Classification of ROC, and allows “human resources provision activities” to replace workers’ specific positions in a “labor contract.” Taiwan has not enacted the Labor Dispatching Act, thus the government should examine a labor contract and the employer-employee relationship according to the “Labor Standards Act.” Bypassing the Labor Standards Act should not occur and the government services procurement contract should adhere to it. In short, government services procurement contracts should comply with the current provisions in relation to the labor contract.

D. *The impact of the “services procurement” on the Labor Standards Act*

As mentioned earlier, a services procurement contract might not impact on the Labor Standards Act and a labor contract. However, the government allows the “human resources provision activities” to participate in bidding. The government ignored Article 8<sup>27</sup> of the Government Procurement Act which stipulates that that the term “supplier” referred to any natural person. Instead, the services procurement that the government obtains is used to supply routine works or regular services. When the number of workers is not few, it is more convenient for government sectors to obtain workers from juristic person (suppliers) because the workers will become the liability to the juristic person instead of to the government. Therefore, obtaining workers from juristic person (suppliers) by way of services procurement becomes the government’s habitual dependence. I believe that procuring the non-public-servant worker from juristic person (suppliers) for public services definitely bypasses the Labor Standards Act and completely interferes with a labor contract. However, the public and even legal practitioners see this impact. In addition, due to its convenience, they even allow the government to transfer the responsibility assigned to them by the Government Procurement Act to the supplier who wins the bid; thus, the liability stipulated by the Labor Standards Act will be disrupted. For the sake of convenience, the provisions in the Labor Standards Act regarding “indirectly exploiting” and “compelling workers to do work” have been bypassed. In short, obtaining workers from worker suppliers has a huge implication on the effectiveness of the Labor Standards Act.

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26. See SHUAI-LIANG DENG, LAOTUNG HSINGCHENGFA LUN [A STUDY ON LABOR ADMINISTRATIVE LAW] 85-87 (2005).

27. Government Procurement Act of Taiwan, *supra* note 1, art. 8.

E. *The relation between a “services procurement contract” and a “services undertaking contract”*

As mentioned above, according to Article 2 of the Government Procurement Act the type of “services procurement contract” is either mandating or employing. A “services undertaking contract” means that one party agrees to provide services for the other party and once the services are completed the other party should give a wage. Comparing an “employing type of services procurement contract” to a “services undertaking contract,” the “employing” and “undertaking” differs from one another. However, a “mandated services procurement contract” resembles a “services undertaking contract.” In a mandated services procurement contract, one party mandates the counterparty to provide the services and the other party agrees to do it. That is to say, the only function of a “mandated services procurement contract” is providing services. In short, a services procurement contract is only for obtaining workers to assist in providing services. However, the purpose of a “services undertaking contract” is to finish a specific work. Hence, our public should not consider a “services undertaking contract” as a “services procurement contract.” That is to say, if the government wants to obtain an undertaking services contract, it should obtain it by the “services procurement” in the Government Procurement Act. From another perspective, why does the Government Procurement Act clearly exclude services undertaking out of services procurement? The reason is that the dividing of services undertaking might lead to the outsourcing of public services. When the government administration is unable to manage or command, it might lead to a phenomenon of dividing public power or abandoning public power. To sum up, the government services procurement does not allow a services undertaking contract.

Hence, if the government sectors delegate the job of filing data or cleaning to personnel companies by way of services undertaking contracts, this will violate the Government Procurement Act which stipulates that if “the amount of data filing” or “the workload of cleaning” reaches a certain level, in order to provide a fair opportunity to suppliers and to make the government sectors obtain the best labor force, the government can only choose certain companies or individuals to do the services undertaking.<sup>28</sup> That is because it will deprive the government’s opportunity and forcing the government to become the lowest bidder. Moreover, the Government Procurement Act stipulates that the type of services procurement is either employing or mandating.<sup>29</sup> Therefore, adopting an “undertaking contract”

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28. *Id.* art. 67.

29. *Id.* art. 2.

will be forbidden by the law. In other words, the Government Procurement Act is expecting that under the circumstance of self-responsibility and self-management, government sectors will still not use the supplementary workers; thus preventing the “indirect exploitation” and “compelling labors to do work” from occurring in public services.

F. *The relation between a “services procurement contract” and a “labor dispatching services contract”*

A “labor dispatching services contract” refers to the workers that are provided by the “human resources provision activities.” However, the legitimacy of a “labor dispatching services contract” on mandating or employing services still needs to be examined. As a matter of fact, according to Article 484 of the Civil Code,<sup>30</sup> the employer shall not transfer his right of the services to a third party without the consent of the employee. Pursuant to the Article, a dispatching agency and a worker should initially establish an employment contract that excludes undertaking and mandated relationship. Thus, the relationship of a “labor dispatching services contract” between a worker and an employer should be an employment contract. However, the problem is the content of the “labor dispatching services contract.” Through this, practitioners can find that a labor dispatching contract assists workers to enter the labor force and gain job opportunities. That is to say, the content of a “labor dispatching contract” is to provide workers and sell workers as merchandise or products; so the relationship will be a “merchandise relationship” instead of an “employer-employee relationship.” The Labor Dispatching Act in Japan was enacted in 1985 to resolve the problems in relation to human resources provision activities. Taiwan should not overlook the above-mentioned problems that the “labor dispatching services contract” brings. In short, if a “services procurement contract” adopts the manner of “labor dispatching contract,” provisions preventing the potential problems of indirectly exploiting and compelling workers to do work in the services procurement contract will be necessary in the services procurement contract.<sup>31</sup>

G. *The different services procurement bidding winners procure the same workers. Under the circumstance, what will the impact be on the labor legal system?*

The government invites bidding regularly for services procurement,

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30. Civil Code of Taiwan, *supra* note 7, art. 484.

31. DENG, *supra* note 26, at 85.

thus, the winners are not necessarily always the same. In practice, the bid winner differs; however, the government still wants certain procured workers. Under these circumstances, the new bid winner will successively hire the same workers, which amounts to continuity of a fixed-term contract. Those procured workers are essentially being “chronically faithful” to the public services. Does the long-term faithfulness have no meaning to the labor legal system? In Japan, Germany and China, they stipulate that any chronic worker has the right to change position.<sup>32</sup> That is to say, a dispatched worker has a chance to become a “formal employee.” Although Taiwan has yet not enacted the Labor Dispatching Act, a worker who is not a public servant may still have a “contracted employment” type of contract. Although the employment type is not an ideal one in the system protecting labor, it is still better than relying on a services procurement contract. Therefore, the government sectors should consider giving opportunities for procured workers to be “contracted” under certain conditions. In short, a dispatched worker who is successively and chronically hired under the name of services procurement should be offered a new position from “non-fixed-term” to “formal employee.”

#### H. *Can “services procurement” include “turn-key”?*

Article 24 of the Government Procurement Act<sup>33</sup> stipulates that an entity may, according to the needs of efficiency and quality, conduct the procurement on a turn-key basis. The term “turn-key” refers to the procurement of construction work or property by consolidating the procurement of the design and work, supply, installation, or maintenance within a certain timeframe, and others into a contract for tendering. The aforesaid provision about “turn-key” only applies to construction or property procurement; “services procurement” is not included. There are two probable reasons for this; one is that services cannot be divided, and the other may be that the turn-key will not be authorized by the government. In my opinion, taking into the above considerations, if services procurement includes “turn-key,” it should be regarded as invalid, and which means if the primary execution, examination, management and evaluation are all managed by a dispatched worker from the beginning to the end, it will be deemed as “turn-key.” This type of services procurement should be terminated.

On the balance of evidence, “services procurement” still has its own

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32. See Labor Dispatching Act of Japan, *supra* note 14, art. 33; Chunghua Jenmin Kunghekuo Laotung Hetung Fa [Labor Contract Act of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), art. 65 (China) [hereinafter Labor Contract Act of China].

33. Government Procurement Act of Taiwan, *supra* note 1, art. 24.

restrictions. The main point of the restrictions is to prevent the forfeiture of the right of public services, indirectly exploiting and compelling workers to do work and so on. However, in light of the above analysis, the current “services procurement” is completely uncontrolled; and our government recognizes the legitimacy of “human resources provision activities.” The practice is different from that of other developed industrial countries;<sup>34</sup> and there is an immediate need for the termination of public services procurement in our country.

#### IV. THE “FIXED-TERM CONTRACT” SYSTEM RESTRICTION THAT THE GOVERNMENT SHOULD ADHERE TO FOR SERVICES PROCUREMENT

The regulation of services procurement in the Government Procurement Act in Taiwan only focuses on the procedures’ strict procedural requirements and examination; there is no consideration of the legitimacy, the range or the level of the procurement, or the relations and restrictions between services procurement and other labor legal provisions. The Council of Labor Affairs only ignores the practical misapplications of the services procurement that violates the labor legal system.

I believe that government sectors need to consider aborting the ongoing “services procurement” to adopt the “fixed-term contract” in order to make services procurement consistent with the Labor Standards Act. In addition, the procuring of workers who are “continually” and “chronically” hired by the Bureau of Labor Insurance, Bureau of National Health Insurance, the visa section of the Ministry of Foreign Affairs, Household Registration Office and the government-owned enterprise should be strictly examined. To put it more specific, the administration should have certain standards including for safety. If the workers who are required by administration are all or mostly obtained by way of services procurement, when a dispatching agency does not want to provide or slothfully provides workers to the government, it will affect the national administration and inevitably lead to a crisis.

As a matter of fact, a “fixed-term contract” should be sufficient to be applied to services procurement. The term “temporary work” shall refer to work of an unexpected and non-continuous nature, not exceeding six months.<sup>35</sup> “Short-term” work shall indicate work expected to be

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34. The references of the conference of labor dispatching act and policy study was held by the Council of Labor Affairs on Dec. 7, 2010.

35. See Enforcement Rules of the Labor Standards Act, art. 6(1) (1985) (amended 2009) (Taiwan) [hereinafter Enforcement Rules of the Labor Standards Act of Taiwan] (referring to the Article 14 of the Labor Standards Act of Japan, this regulation does not need to be defined with classifying. Moreover, the Article 9 of Labor Standards Act of Taiwan does not stipulate any authorization of administrative legislation), *available at*

accomplished within a short period of time, which is of a non-continuous nature and is not to exceed six months.<sup>36</sup> “Seasonal work” shall mean work for which the raw materials, source of materials or market is influenced by seasonal factors, and is of a non-continuous nature, and is not to exceed nine months,<sup>37</sup> and the “specified work” shall mean work which can be completed within a specified term and is of non-continuous nature, and is not to exceed one year without approval by the competent authority.<sup>38</sup> If services procurement only applies to the above-mentioned types of works, then the current bypassing the Labor Standards Act by dispatching can be avoided. I believe that services procurement as provided by the Government Procurement Act should not be misapplied to bypass the Labor Standards Act, but for obtaining the aforesaid fixed-term workers. Perhaps for this reason, the Labor Dispatching Act of Japan and China only deem a short-term worker as a dispatched worker.<sup>39</sup> To be more specific, the provisions of the Labor Dispatching Act of Japan stipulate that if a certain dispatched worker is continually hired for more than 3 year and is still needed to be hired after 3 years, the client company shall establish an employment contract with the worker. The provisions of China also provide that the dispatching service only applies to the temporary, assistant or substitute services.

As a matter of fact, there are differences between the “fixed-term contracted worker” and the “dispatched worker.” The dispatched worker in Taiwan can be replaced at anytime, but a fixed-term contracted worker can only be replaced for certain legal problems. However, I have to highlight that any processes dealing with issues between employer and employee should be adhered to the Labor Standards Act. The dismissal of a worker based on an employer’s own discretion is illegal. For instance, the Labor Dispatching Act in Japan and China both stipulate that this kind of situation are forbidden, otherwise the reason for replacing the employee must be stated in order to safeguard workers.<sup>40</sup> To be more specific, the Labor Contract Act in China stipulates that only if the worker’s circumstance is complied with Article 39 and Article 40(1) & (2), the client company may be sent back to the labor dispatching agency by the worker, and then the dispatching agency shall terminate the contract with the dispatched worker in accordance with

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<http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0030002>.

36. *Id.* art. 6(2).

37. *See id.* art. 6(3).

38. This regulation does not provide any power to competent authority. It should be refuted and it might violate the parent law. *See id.* art. 6(4).

39. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 40(5); Labor Contract Act of China, *supra* note 32, art. 66.

40. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 27; Labor Contract Act of China, *supra* note 32, art. 66-2.

the related provisions of this Act. In addition, the Labor Dispatching Act in Japan also stipulates that a client company shall not dismiss a worker due to the worker's nationality, religion, gender and union involvement.<sup>41</sup> Though replacing workers arbitrarily is not allowed internationally, the government in Taiwan should not process or procure services by "dispatched workers."

Article 18<sup>42</sup> of the Government Procurement Act stipulates three types of tender procedures including open tendering procedures, selective tendering procedures, and limited tendering procedures. In addition, Article 20<sup>43</sup> of the same act also provides that under the circumstance that the supplier's cost for preparation of a tender is high and where there is a recurring demand which an entity may apply for selective tendering procedures. Article 21<sup>44</sup> stipulates that the permanent list of qualified suppliers used for the procurement in connection with recurring demands shall contain at least six suppliers. Article 22(1)<sup>45</sup> also stipulates that under the circumstance where there is no tender in response to an open tender. A selective tender, an entity may apply limited tendering procedures. However, on the balance of evidence, I have found that the above-mentioned situations are consistent with the aforementioned verdict. For the recent 10 years, the government sectors have received services procurement from almost the same suppliers. The minority suppliers have monopolized certain labor markets of government sectors. Under these circumstances, have the government sectors violated the criminal law? Let's not discuss the question at present, but observe the aforementioned case about Taiwan Power Company. How could the TPC draw up the budget for replacing original employees with the recurring procurement with a low expense? Article 31(1) of the Government Procurement Act stipulates that an entity shall refund or return, without interest, the bid bond or guarantee money for the services procurement. The purpose of this provision is confusing and in vain. In practice, combining the stipulations in the Government Procurement Act with this provision actually results in a strange situation. If the suppliers are able to assemble a group of people whose expertise is qualified for a certain government sector, the suppliers can gain the benefits through the services procurement contract without paying the bid bond or guarantee money. As a matter of fact, anyone could establish a shell company or any one-person company in Taiwan if the person in charge can win the bid of services procurement. To be more specific, if the supplier asks the workers to pay their own labor and health insurance and pension, the suppliers can still

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41. Labor Dispatching Act in Japan, *supra* note 14, art. 27.

42. Government Procurement Act of Taiwan, *supra* note 1, art. 18.

43. *Id.* art. 20.

44. *Id.* art. 21.

45. *Id.* art. 22, para. 1.

obtain job applicants and be qualified for the government's legal requirements, which means the suppliers can obtain a good business transaction without any cost.

#### V. THE PROBLEMS OF THE GOVERNMENT SERVICES PROCUREMENT

Although many serious violations have been made by the government services procurement, the most common violation is to procure supportive public workers by "dispatching" where the process of "employment" can gain supportive public workers too. Nevertheless, both actions of "employment" and "dispatching" are forbidden by law. The following paragraphs are the statements that the government sectors provide for explaining the violations.

1. In the end of Article 2 of Government Procurement Act, the sentence is finished with "etc," which shows that the government regarding "labor dispatching" as a short-term plan with the law.<sup>46</sup> I believe that the government has misunderstood that they can procure all kinds of services only if they follow the procedures that are stipulated in the Government Procurement Act. However, the services procurement only adopts the manner of either "mandating" or "employing." Moreover, the afore-mentioned "mandating" is forbidden in the Labor Standards Act because it only allows an employer-employee relationship. Therefore, labor dispatching is not a short-term plan enumerated by the law. According to the previous analysis, a "short-term plan" is just a malicious method of dividing "long-term" work. Pursuant to Article 21(3)<sup>47</sup> of the Government Procurement Act, deeming the recurring demand of services as "short-term" services is not consistent with the law. The relationship of services procurement is neither "mandating" nor "employing," but by a way of "dispatching." Therefore, the statement by the government does not adhere to the law. Even Article 59(2) of the Labor Contract Act in China (promulgated on Jan. 1, 2008) also expressly forbids this kind of dividing successive term into several short-term services dispatching agreements.

2. The government sectors claimed that "dispatched" workers stay in an illegal relationship on their own accord to gain "improper benefits" from dispatching agency. Even though the dispatching agency can replace or dismiss the dispatched worker, it is invalid because a dispatching agency is only a hypothetical employer. That is to say, the real problem is not between a "dispatched" worker and a dispatching agency; it should be the

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46. *Id.* art. 2 ("The term 'procurement' as used in this Act shall refer to the contracting of construction work, the purchase or lease of property, the retention or employment of services, etc.") (emphasis added by author).

47. *Id.* art. 21(3).

government that bears the legal responsibility. In short, the government should not hire the “regular” public worker by a “legal” procurement procedure to cover the fact that they use certain specific suppliers.

3. The government claimed that the “dispatched” worker should be interviewed by the dispatching agency first, and the government will interview them again. However, in practice, the dispatching agency plays no roles here. Even if it does, it is still a formal interview that the government intends to make a third party intervene in the “services procurement.” Therefore, as the preceding statement, such a conduct will violate Article 6 of the Labor Standards Act because there is another party that intervenes in a labor contract. The dispatching agency gains illegal interests, which means it also violates the Article 76 of the same act. An employer who violates Article 76 shall be imprisoned for a term not exceeding three years, detained or fined NT\$ 30,000 or both. Therefore, the statement made by the government has only uncovered its violations and has no influence on the relationship between the “dispatched” worker and the government.

4. Furthermore, the government claimed that in compliance with the contract, the promotion request for the dispatched worker is proposed by the dispatching agency, and the proposal will later be reexamined by the government. However, on inquiry, the dispatched labor contract does not comply with the government services procurement. Besides the aforesaid statements, the government controls all the administrative details of the “dispatched” worker. That is to say, the promotion request might be applied for by the “dispatched” worker under the name of the dispatching agency. In short, the promotion that the dispatching agency proposes for the “dispatched” worker is a superfluous strategy of the government.

5. The government claimed that “dispatched” workers can be substituted by others or be transferred at any time. However, in the practice of the countries which have enacted the Labor Dispatching Act, such as Japan and China, employers will have to clearly state the circumstances under which the worker is substituted or transferred. Moreover, if the dispatched worker receives or encounters any improper treatment from the dispatching agency, they will be safeguarded under the protection of the law. Both China and Japan have adopted this approach. In other words, the arbitrary substituting and transferring that our government proclaimed are only reckless behavior without legal control. However, for their own profits, government sectors are accustomed to hire the same “dispatched” workers that they are accustomed to and familiar with; so substituting or transferring does not occur often. It is an abnormal situation because if the worker in those countries which have enacted the Labor Dispatching Act encounters this, the “dispatched” worker will be made a formal employee.

6. The government even quoted the Labor Dispatching Act in Japan to

argue that there is no “employment” relationship between the “dispatched” worker and the dispatching agency, and to contend that the right of the dispatching agency to command “dispatched” worker is given by the contract. According to those countries which have enacted the Labor Dispatching Act, the dispatched worker shall be supervised and receive the instructions of the dispatching agency. However, as mentioned previously, Taiwan has not enacted the Labor Dispatching Act and the misapplications of services procurement are definitely forbidden in the Labor Standards Act. The government’s claim only allows prosecutors in Taiwan to investigate and determine which party should bear the responsibilities because Article 5 of the Labor Standards Act stipulates that no employer may, by force, coercion, detention or other illegal practices, and compel working. Pursuant to Article 75 of the Labor Standards Act an employer who violates the provisions of Article 5 shall be imprisoned for a term not exceeding five years, detained or fined NT\$ 50,000 or both. Therefore, the government has just poised for the prosecutors in Taiwan to investigate; it has no effect on the relationship with “dispatched” workers.

7. The government also claimed that the legal verification for using dispatched workers came from “technical services regulations for technical consultancy to process mandated services from various organizations” (hereinafter referred to as “technical services regulations”).<sup>48</sup> The latest amendment of the “technical services regulations” was in 1997.<sup>49</sup> As a matter of fact, according to Article 7 of the Central Regulation Standard Act,<sup>50</sup> the aforementioned “technical services regulations” has remained valid despite the fact of the downsizing of the provincial government. However, since January 1, 2004, pursuant to Article 174-1<sup>51</sup> of the Administrative Procedure Act, all legal orders shall become inoperative. From the legal source of “technical services regulations,” it can be observed that the “technical services regulations” should be inoperative; therefore, the statement that government proclaimed only uncovers this violation. Furthermore, the “technical services regulations” was aborted on August 16, 1999 by Executive Order No. 00631. Moreover, the “technical services regulations” applies to the “technical consultancy.” The “worker” provides “professional skill” instead of “routine procedure,” and thus, it is a contract

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48. Ke Chikuan Weito Chishu Kuwen Chikou Chengpan Chishu Fuwu Chuli Yaotien [Regulations Governing the Entrustment to the Technological Consulting Organization Concerning Technological Service by Executive Yuan and Subordinated Agencies] (1999) (repealed 2004) (Taiwan), available at <http://gisapsrv01.cpami.gov.tw/cpis/cpclass/appendix/bureaulaw.htm>.

49. Taiwan Provincial Government, Fu-Chien 4 No. 118570 (Dec. 24, 1997).

50. Taiwansheng Chengfu Kungneng Yehwu yu Tsuchih Tiaocheng Chanhsing Tiaoli [Temporary Act on Function and Structure Adjustment of Taiwan Provincial Government] (1998) (repealed 2005) (Taiwan), available at <http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=A0040012>.

51. Administrative Procedure Act, art. 174-1 (1999) (amended 2005) (Taiwan), available at <http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?PCode=A0030055>.

of “mandate” instead of a “dispatched” one; and it is a strange type of contract which is totally different from the “labor dispatching” in other countries.

8. The government claimed that after the “dispatched labor contract” expires, the worker shall leave; only a minority of workers will stay. If anyone wants to waive the right to leave and stay, it will not matter much; if one who wants to exercise their rights, it will be appropriate for sure. However, the “dispatching” dispute is in regards to a personal labor right; it is irrelevant to the “dispatched” workers’ option of staying or leaving.

9. The government also stated that transferring a formal employee is in accordance with the “government sectors transferring regulations,” and this does not apply to the “dispatched” workers. However, the government sectors usually transfer their staff according to their own regulations to avoid discord and having to follow more specific regulations. Nevertheless, the government sectors have been accustomed to arbitrarily transferring or changing the “dispatched” workers; thus, transferring dispatched workers with another manner is necessary for government sectors. However, this necessity does not consequently give the government sectors the right to deny the real position of the “dispatched” workers.

10. The government even required the “dispatched” workers to do the following work: (1) To prove that “no other person can substitute specific dispatched workers.” On inquiry, this is stipulated in the labor dispatching contract. (2) To prove that they were “unable to refuse the command of government sectors.” The common characteristic of an “employment contract” and a “labor dispatching contract” is that a worker should receive the instructions of the person who is in charge in practice, which means that the worker need not prove this. (3) To prove that the “dispatched” worker receives a certain transaction price for their service. However, in practice, after being exploited indirectly by the dispatching agency, the “dispatched” worker will get a wage which is usually unequal to that of a “same level” staff in the government sectors. Observing the verdict example,<sup>52</sup> the situation of unequal pay for equal jobs under the labor dispatching contract does not change the economic subordinate status of the accuser. As the preceding statement, the government should bear the criminal responsibility of violating the Article 79 of the Labor Standards Act. The “dispatched” worker should be compensated under criminal and civil law.

11. Finally, the government claimed that the labor dispatching contract is not related to the Labor Dispatching Act but to an anonymity contract which is regulated in the Civil Code; thus, among the dispatching agency, the client company and the “dispatched” worker, there is the freedom of

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52. Zuigao Fayuan [Sup. Ct.], Civil Division, 81 Tai-Shang No. 347 (Feb. 27, 1992) (Taiwan).

contracts. However, Taiwan has not enacted the Labor Dispatching Act. Although the labor dispatching contract can be understood as an anonymity contract, there should be a legal regulation to stipulate that any contract should not violate the law. I believe that the anonymity contract is “intervening in a labor contract of other persons for illegal interests.” This situation has distorted the Civil Code and the Labor Standards Act and bypassed the Labor Standards Act. In addition, before Taiwan promulgated employment services law, the government did not allow a business entity to employ foreign workers in order to safeguard the job opportunities for the domestics. Hence, before enacting the Labor Dispatching Act, we still need to question whether or not using dispatched workers will deprive the right of the workers in Taiwan.

In summary, the government’s proclamations are meaningless. In my opinion, the government sectors should examine and discuss how to normalize the human resources system. Perhaps because of these troublesome cases that the government encountered in practice, since 2006 some of the sectors have started to conduct recruitment tests and have received passionate responses from society.<sup>53</sup> It is foreseeable that once the government sectors accumulate the recruit workers to a certain number, the “labor dispatching” problem will gradually disappear.

The Council of Labor Affairs explained that the legitimacy of the “human resources provision activities;”<sup>54</sup> according to the Standard Industrial Classification of ROC (6th revised edition, December 31, 1996), is edited in class 7901. The so called “human resources provision activities” refers to a person who engages in introducing occupations, any services involved in labor interposition, labor dispatching or recruitment of workers by mandate. Moreover, the letter from the Council of Labor Affairs<sup>55</sup> explains that since April 1, 1998 a supplier which obtains a tender of government services procurement, such as “human resources provision activities,” should fulfill the employer obligation. In other words, even though Taiwan has not enacted the Labor Dispatching Act, the industrial classification allows “human resources provision activities” and “labor dispatching services.” Moreover, in “human resources provision activities,” the rights of the workers was studied and amended by the Council of Labor

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53. See Chingchipu Panli Taitien Kungssu chi Chungyu Kungssu 95 Nien Hsinchin Chihyuan Chenshih Weiyuanhui [2006 Recruit Committee of Taiwan Power Company and CPC Corporation Organized by Ministry of Economic Affairs], *Chingchipu Panli Taitien Kungssu chi Chungyu Kungssu 95 Nien Hsinchin Chihyuan Chenshih Chienchang* [2006 Recruit Announcement of Taiwan Power Company and CPC Corporation Organized by Ministry of Economic Affairs] (June 9, 2006), [http://www.taipower.com.tw/TaipowerWeb/upload/files/27/main\\_6\\_12\\_63.pdf](http://www.taipower.com.tw/TaipowerWeb/upload/files/27/main_6_12_63.pdf).

54. Council of Lab. Aff., Executive Yuan, Lao-tung 1 No. 0970005320 (Mar. 3, 2008).

55. Council of Lab. Aff., Executive Yuan, Lao-tung 1 No. 047494 (Oct. 30, 1997).

Affairs and the Public Construction Commission of Executive Yuan.<sup>56</sup> That is to say, the right of the dispatched workers has been safeguarded. The industrial classification categorized the “dispatching” as a part of the “human resources provision activities;” however, I believe that although the dispatching services have the potential to survive in the future, Taiwan cannot adopt it at present without the Labor Dispatching Act. Though the introduction of foreign workers belongs to “human resources provision activities,” the supply of the foreign workers still adheres to the Employment Services Act. Through the legal procedure of private employment services organization, it is allowed to supply; in the contrary, through a non private employment services organization, it will be illegal. Therefore, regulation of the labor dispatching in Taiwan is still waiting to be promulgated in order to implement the employments requirements and the legal administration.

Furthermore, the Council of Labor Affairs indicated that procurement services done by “labor dispatching” shall adhere to the Regulations of the Employment and Management of Temporary Workers of the Subordinate School Organizations of Executive Yuan (hereinafter Temporary Workers Regulations), Article 4.<sup>57</sup> This Article stipulates that if the sectors encounter the shortage of employees, they shall hire temporary workers by way of “outsourcing.” The so called “outsourcing,” according “the Plan of Outsourcing Public Affairs to the Civil,”<sup>58</sup> refers to the shift of the position of the government from a rower to a helmsman. Being trimmed and streamlined, the government will outsource the services to the public and utilize the civil resources effectively. However, outsourcing the public affairs effectively divides the relationship. The civil servants will follow the government’s instructions, manage the services by themselves, administer the management of the workers and pay the wages also. The government will not play the role of an executor, which signifies that “outsourcing” is different from “labor dispatching” herein. The government services procurement and the administration of labor dispatching have still been managed by the government but the dispatching agency does not bear the responsibility to manage efficiency. Article 3 of the Temporary Workers Regulations stipulates that the temporary worker shall not receive any public affairs services, and also includes: (1) The temporary and fixed-term

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56. See Enforcement Rules of the Labor Standards Act of Taiwan, *supra* note 35, art. 6(3).

57. Hsingchengyuan chi Soshu Ke Chikuan Hsuehsiao Linshih Jenyuan Chinyung chi Yunyung Yaotien [The Regulations of the Employment and Management of Temporary Workers of the Subordinate School Organizations of Executive Yuan], art. 7 (2008) (amended 2009) (Taiwan), available at [www.cpa.gov.tw/public/Attachment/911259381518.doc](http://www.cpa.gov.tw/public/Attachment/911259381518.doc).

58. See Shu-Fang Shieh, *Tsung Williamson te Chiaoyi Chengpen Kuantien Lun Chengfu Shihwu Weiwai Kuanli* [Reconsiderations about Government Service Contracting Out: Oliver E. Williamson’s Transaction Cost Approach], 2008 TASPAA HUOPAN KUANHSI YU YUNGHSU FACHAN KUOCHI HSUEHSHU YENTAO HUI [2008 COLLABORATIVE PARTNERSHIP AND SUSTAINABLE DEVELOPMENT] (May, 2008), available at <http://web.thu.edu.tw/g96540022/www/taspaa/essay/pdf/018.pdf>.

services; (2) Due to the quality of an organization or any specific requirement of the services, hire the temporary worker before this regulation takes effect by the ratification of the Executive Yuan.<sup>59</sup> As a matter of fact, other countries usually deem the dispatched worker as temporary worker; but our country often regards the relationship as an “informal” labor contract of which the term can be flexible. From this, it can be observed that those are two different concepts.

In short, considering the labor dispatching contract consistent with the Temporary Workers Regulations is a terrible misunderstanding.

Moreover, the Temporary Workers Regulations might violate Article 174-1 of the Administrative Procedure Act because the Temporary Workers Regulations only applies to the administration of temporary workers within money saving and normalizing services which should conform to the J.Y. Interpretation Nos. 443 and 526.<sup>60</sup> On inquiry, the Temporary Workers Regulations stipulates that if the services that the temporary worker receives do not belong to a part of the core services of its organization and the services are planned and time-phased, then the organization should hire other substitute workers; and if the services that the temporary worker receives is a long-term core services or is involved with public affairs, then the organization should delegate the service to a formal public servant, contracted employee or other substitute workers. However, in practice, the utilizing of long-term temporary workers and the formalizing of them has revealed many problems. The government has misapplied the Temporary Workers Regulations to hire temporary workers for public affairs instead of utilizing the employment system or the formal public servant system.

Compared with the civil verdict Chung-Lao-Su No. 3, 2006, Taichung District Court and the previous reviews, the civil verdict of Chung-Lao-Su No. 5, 2007, Kaohsiung District Court, (sentenced on June, 9, 2008)<sup>61</sup> had given a different explanation. This verdict focused on another perspective on labor dispatching. It contended that after the employer of the dispatching agency establishing a labor contract with the worker, under the agreement of the worker to maintain the contract relationship, the worker should provide services under the supervision of the client company. Thus, there will be no employer-employee relationship between the worker and the business entity

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59. Hsingchengyuan chi Soshu Ke Chikuan Hsuehhsiao Linshih Jenyuan Chinyung chi Yunyung Yaotien [The Regulations of the Employment and Management of Temporary Workers of the Subordinate School Organizations of Executive Yuan], art. 3 (2008) (amended 2009) (Taiwan), available at [www.cpa.gov.tw/public/Attachment/911259381518.doc](http://www.cpa.gov.tw/public/Attachment/911259381518.doc).

60. J.Y. Interpretation No. 443 (1997) (Taiwan), available at [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=443](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=443); J.Y. Interpretation No. 526 (2001) (Taiwan), available at [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=526](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=526).

61. Kaohsiung Difan Fayuan [Kaohsiung Dist. Ct.], Civil Division, 96 Chung-Lao-Su No. 5 (June 9, 2008) (Taiwan).

but a services providing and supervision relationship instead. The obligation of an employer that comes after a contract will lay on the dispatching agency and the client company should pay the dispatching wage to the dispatching agency. However, when it comes to a labor contract, dismissal, wage or working regulations, the responsibility will lay on the dispatching agency. The dispatching agency thus transfers the right of claiming and the right of commanding to the client company which create the aforesaid strange relationship. Pursuant to Article 484 of the Civil Code the employer shall not transfer his right of the services to a third party without the consent of the employee.<sup>62</sup> Only if the dispatched employee agrees with the type of services based on the contract between the worker and the dispatching company, the labor dispatching be legal.

Along with economic development, social transition, international competitiveness and the industrial transitions, the labor dispatching system has been changing. Due to the advancing development of manufacturing techniques and the varieties of products, the employers need to hire a huge amount of professional workers. Thus, to reduce human costs and the size of enterprises, employers adopt one of the non-typical services contract systems. This non-typical labor contract is mediated by the client company to instruct workers; however, the non-typical contract relationship between the dispatching agency and the dispatched workers is very different from the traditional structure of the employer-employee relationship. Nevertheless, society has utilized this system and regarded it as normal. This kind of dispatching system may be the loopholes for the dispatching agency to gain illegal interest and result in unstable employment levels due to the great quantity of labor dispatching. The situation may blur the responsibilities that should lie on the employers; however, it still has advantages in saving human resources costs and has been flexible to transfer or deploy the high quality worker. Moreover, in many countries such as Germany, Japan, and even Taiwan all have utilized the labor dispatching system. The Taiwanese government cannot deny the necessity of labor dispatching when the industries structure has been changing under global competitions. Even though Taiwan has not promulgated the related labor dispatching law, the Taiwanese government still cannot still assume that the labor dispatching relationship does not exist and intentionally establish an employment relationship between the dispatched worker and the client company.

Based on the above paragraphs, the verdict of Kaohsiung District Court obviously did not consider “the service term” and “the scale of dispatching work” which were mentioned in the Taichung District Court verdict.<sup>63</sup> It

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62. Civil Code of Taiwan, *supra* note 7, art. 484.

63. Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 93 Chung-Lao-Su No. 3 (Jan. 25, 2006) (Taiwan).

seemed to explain why regulating labor affairs via civil contract could replace the appropriate formalities of the legal labor system.

#### VI. THE LABOR DISPATCHING ADJUSTMENTS THAT THE GOVERNMENT SHALL ADHERE TO WHEN PROCURING SERVICES

The government procures services by labor dispatching; however, our country has neglected to address the situation and even deemed it an appropriate option. I believe that Taiwan still needs to clarify the misunderstanding and misapplication of labor dispatching system and to encourage our government to modify the system.

1. Firstly, if the practitioners encounter any problem with labor dispatching, they will usually directly go into the discussion of the contract's validity of its detail without discussing the legitimacy of the practice. It is because our country adopts the civil legal system. All administrations should adhere to the national provisions, autonomous legislation included. The labor administration is a part of the national administration; thus, it should certainly adhere to the national provisions. However, Taiwan has not enacted the Labor Dispatching Act; so, the labor dispatching system should be inoperative in Taiwan. Likewise, without the Employment Services Act, foreigners in Taiwan would not be able to work; and hiring foreigners would be unlawful. The Employment Services Act is for safeguarding the job opportunities for native workers. Nevertheless, the Labor Standards Act and all the other labor regulations do not apply to the labor dispatching system. The system is different from the current and the typical labor contract; thus, Taiwan must enact a law to legalize it and to conform with the civil legal system without disrupting the social order. Presently, legal practitioners cannot solve the problems where the labor dispatching brings, but they can also neglect the fact that the labor dispatching system does not adhere with the Labor Standards Act. Due to the shortage of related provisions about labor dispatching, I believe that it should be illegal; otherwise, our country shall adhere to the Labor Standards Act, or to replace our system with the Anglo-American legal system to give all the authorities to employers and employees.

2. Secondly, although Taiwan has already created a labor legal system, the practitioners and the legal practitioners usually disregard the misapplication of replacing the concept by the Civil Code. People think that the labor dispatching contract refers to the "anonymous contract" which is prescribed by the Civil Code or the "transferring the right of the services contract" which is stipulated in Article 484 of the Civil Code.<sup>64</sup> However,

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64. See Gaodeng Fayuan [High Ct.], Civil Division, 94 Lao-Shang No. 7 (Sept. 22, 2005)

our country has promulgated the Labor Standards Act and other labor legal regulations; so what exactly should the relation between the Civil Code and labor legal regulations be? For instance, the Labor Standards Act stipulates the type of labor contract is either with “fixed-term” or with “non-fixed-term.” But, could it be legal to establish a third type adhering to the Civil Code? Should the Civil Code provisions related to the employment contract be a supplement to the Labor Standards Act? Or should the “employment relationship of the Civil Code” and other types of contracts as per the Civil Code be deemed accurate? Since our country adopts the civil legal system, and the Civil Code was enacted before the Labor Standards Act and other legal regulations; thus, I believe that the labor legal system has a certain purpose, and this purpose should not be interpreted with the original concept from the Civil Code. Pursuant to Article 1 of the Labor Standards Act, matters not herein provided shall be governed by other applicable laws. The Labor Standards Act has divided the labor contract into two types, which means that the Act intends to exclude any possibility of a third type. Take Japan and China as an example, the Labor Standards Act and other labor legal regulations are applying to all sorts of jobs.<sup>65</sup> The practitioners in Taiwan claim that the third type of the contracts could be interpreted from the Civil Code; however, it would be deemed invalid in Japan and China. These two countries have respectively enacted the Labor Dispatching Act and the Labor Dispatching Regulations to regulate labor dispatching affairs.<sup>66</sup> Hence, Taiwan should not construct the order of labor dispatching with the conception of the Civil Code.

3. The practitioners often explain the labor dispatching contract using the concepts of a “typical labor contract” and a “non-typical labor contract”<sup>67</sup> The common English antonyms for of the word “typical” are “untypical” and “atypical.” The term “untypical” simply means something that is not representative or characteristic of a particular type. The term “atypical” means something that is not conforming to a particular type, or something that is abnormal or irregular. If the labor dispatching contract is categorized

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(Taiwan); Taoyuan Difang Fayuan [Taoyuan Dist. Ct.], Civil Division, 94 Lao-Su No. 5 (Oct. 13, 2005) (Taiwan); Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 92 Chung-Su No. 776 (June 7, 2004) (Taiwan).

65. See Labor Standards Act of Japan, *supra* note 14, art. 9; Labor Contract Act of China, *supra* note 32, art. 2.

66. See Labor Dispatching Act in Japan, *supra* note 14 (containing 75 articles in total, legislated on July 5, 1985, and last amended on July 6, 2007); Labor Contract Act of China, *supra* note 32, arts. 57-67, 92.

67. See Tung-Hsuan Yang, *Taiwan Laotung Paichienfa Lifa chih Chuyi: Chihui yu Fenghsien te Pingheng* [Suggestions on the Legislation of Taiwan Dispatched Employment Laws: A Balance of Opportunities and Risks], 138 WANKUO FALU [FORMOSA TRANSNAT'L L. REV.] 32, 32-33 (2004); Chin-Chin Cheng, *Meikuo Paichien Laotung Fachih chih Yenchiu* [A Study on the Labor Dispatching System of the U.S.], TAIWAN LAOTUNGFA HSUEHHUI HSUEHPAO [LAB. L.J.], Nov. 2000, at 123-24.

as the latter, what will the true definition of the contract be? That is to say, the practitioners have not explained whether the labor dispatching contract is legal or not. Moreover, the original wording of non-typical labor contract can be seen in the verdict or group negotiations in the Anglo-American legal system countries while the one can also be found in the civil legal system and its provisions. Nevertheless, the practitioners in Taiwan have disregarded the civil legal system and categorized the labor dispatching contract into a “non-typical” labor contract in light of the provisions in the Civil Code. Even though the Council of Labor Affairs has drafted the Labor Dispatching Act,<sup>68</sup> it is usually stonewalled by the current situation and there are no further advances or the courage to implement it. In my opinion, our country should not neglect the non-typical labor contract, especially when our country considers the Taiwan Railway as the employer of porters and foreman.<sup>69</sup> The practitioners and legal practitioners should insist on justice and call for the enactment of a new law instead of neglecting the third contract type that appears beyond the Labor Standards Act and the current labor legal regulations. As mentioned above, a non-typical type of labor contract is excluded from the legal system of all other countries because they have all regulated the labor dispatching system; and our government should not disregard this fact. As a matter of fact, workers in Japan who are involved in labor dispatching are regulated by the Labor Dispatching Act. The Labor Contract Act of China also provides that the labor dispatching function should adhere to the company law. The registered capital should not be less than five hundred thousand RMB, and they even stipulated that the client company should not establish a labor dispatching function or require dispatched workers from affiliated unit.<sup>70</sup> Moreover, although Article 2 of the Labor Dispatching Act of Japan divided the labor dispatching services into “general labor dispatching services” (Article 4) and “specific labor dispatching services” (Article 5), only the latter will provide long-term dispatching services. The aforesaid “general labor dispatching services,” namely the registration type of labor dispatching services, is usually in an unstable (shaky) employer-employee relationship. Therefore, Japan adopts a “permit system” of administrative management.<sup>71</sup> Article 58(1) of the Labor Contract Act of China stipulates that the labor dispatching agency is an “employing organization” instead of the Japanese-typed “general labor dispatching services.”

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68. See DENG, *supra* note 26, 150-60.

69. See SHUAI-LIANG DENG, LAOTZU SHIHWU YENCHIU [A STUDY ON EMPLOYER-EMPLOYEE AFFAIRS] 115-18 (1993).

70. See Labor Dispatching Act of Japan, *supra* note 14, art. 5; Labor Contract Act of China, *supra* note 32, art. 57.

71. See KAZUO SUGENO, ROUDOUHOU [LABOR ACT] 196 (2d ed. 1988).

4. The practitioners claim that the labor dispatching contract is divided into the “continuously employing type” and “registration type,”<sup>72</sup> and claimed that these are legal. The practitioners even allow the “continuously employment type” before considering the labor dispatching legal system in China and Japan.<sup>73</sup> The Labor Dispatching Act of Japan not only adopts different approaches to manage the “general labor dispatching services” and “specific labor dispatching services,” but also clearly stipulates that the dispatched worker refers to the worker employed by an employer to provide specific services. The relationship between the dispatched worker and the dispatching services is “employment,”<sup>74</sup> and the “employment” should be the basic premise of the “general labor dispatching services” and “specific labor dispatching services.” Moreover, the Labor Contract Act of China also stipulates that the labor dispatching organization should establish a fixed-term contract for at least 2 years with the dispatched worker and pay wages each month.<sup>75</sup> That is to say, the dispatched worker should be the worker of the dispatching organization and an employer-employee relationship consistent with the labor legal system should exist between the worker and labor dispatching organization. Japan also regards the “registration type” as a misapplication of the labor dispatching regulations.<sup>76</sup> China has even halted this type of service relationship when they started to stipulate the Labor Contract Act.<sup>77</sup> On the other hand, the practitioners in Taiwan ignored the problem that the “registration type” of labor dispatching may bring. The dispatching organization usually searches for workers again after they get the services by “services undertaking.” As a matter of fact, “services undertaking” and “turn-key” are not illegal; however, utilizing “services undertaking” (“turn-key”) as the core of labor dispatching is not the original purpose of labor dispatching because the system of labor dispatching means to dispatch workers for the client company to utilize and manage, which is different from undertaking. Moreover, the “registration type” is almost like a “labor servant market.” If the worker is not covered by

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72. See Labor Dispatching Act of Japan, *supra* note 14, art. 5(1); Labor Contract Act of China, *supra* note 32, arts. 57, 67.

73. See Chin-Chin Cheng, *Tsung Meikuo Laotung Paichien Fachih Kan Wokuo Laotung Paichien Fa Tsaoan [A Comparative Study on the Laws Governing Dispatched Employment in the U.S. and the Dispatched Employment Bill in Taiwan]*, 10 KUOLI CHUNGCHENG TAHSUEH FAHSUEH CHIKAN [NAT'L CHUNG CHENG U. L.J.] 37, 40-41 (2003).

74. See Labor Dispatching Act of Japan, *supra* note 14, art. 2(2).

75. Labor Contract Act of China, *supra* note 32, art. 58(2).

76. In 1985, the Labor Act was legislated on the purpose of averting the shortcoming of “labor supply services.” There’s one thing should be noticed—the appearance of “labor dispatching” comes from “labor supplying”. However, the market characteristic of “labor supplying” is very different from the sacred insistence of “labor dispatching” act. See KENICHIROU NISHIMURA, HATARAKUHIITO NO HOURITSU NYUMON [LEGAL INTRODUCTION OF LABOR] 228 (2006); ROUDOUSYA HOGOHO [PROTECTING LABOR ACT] 35, 38, 56, 203, 209 (Takezi Tsunetou ed., 1989).

77. See Labor Contract Act of China, *supra* note 32, arts. 57-58.

health insurance while working, it would be difficult for the client companies to acquire certain number of workers regularly. The practitioners deemed the “registration type” contract as the fixed-term contract; and deemed the “continuously employing type” contract as the non-fixed-term contract.<sup>78</sup> I believe that the practitioners should reexamine the practical fact which is that our country has not enacted the Labor Dispatching Act, and nearly all the practices of labor dispatching are categorized as the “registration type.” Even the dispatched workers who should not be obtained due to the registration in the Government Procurement Act and the workers who work for the public services are all “registration type” workers. Therefore, how can the Taiwanese government keep neglecting the “registration type” labor contract while the legal system is different from Japan and China? Specifically, our country should not disregard the “registration type” labor contract which is a loophole to the current legal system. Furthermore, the “registration type” labor contract has become a tool to exploit dispatched workers with low wages.<sup>79</sup> However, if the “registration type” of labor dispatching is necessary in the future, our country could consider adopting the approach of Japan to provide strict provisions and adequate protection for dispatched workers.

5. Many of the practitioners regard the followings as dispatched workers: “the saleswoman in department store is the dispatched worker of the department store,”<sup>80</sup> “transferring among business”, “working abroad” and the aforesaid “services undertaking.”<sup>81</sup> as explained by practitioners. I believe that, in order to create a new legal management standard, people who care about labor dispatching should establish a concept to distinguish the terms “broker,” “agent,” “representative,” “undertaking” and “employing” from “labor dispatching.” Please see the illustration below.

The above illustration presents a simple and clear relationship between the three parties. Even the aforesaid provision “transferring the right of the services contract” of the Article 484 of Civil Code<sup>82</sup> cannot explain the triangular relationship. The triangular relationship of the illustration above is

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78. Chun-Yen Chiu, *Laokung Paichien Fachih chih Yenchiu: Yi Jihpen Laokung Paichien Fa Weili* [The Study of Labor Dispatching Act: From the Point of View of Labor Dispatching Act of Japan], 1 TAIWAN LAOTUNGFA HSUEHHUI HSUEHPAO [LAB. L.J.] 1, 1, 33 (2000).

79. See Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 93 Chung-Lao-Su No. 3 (Jan. 25, 2006) (Taiwan).

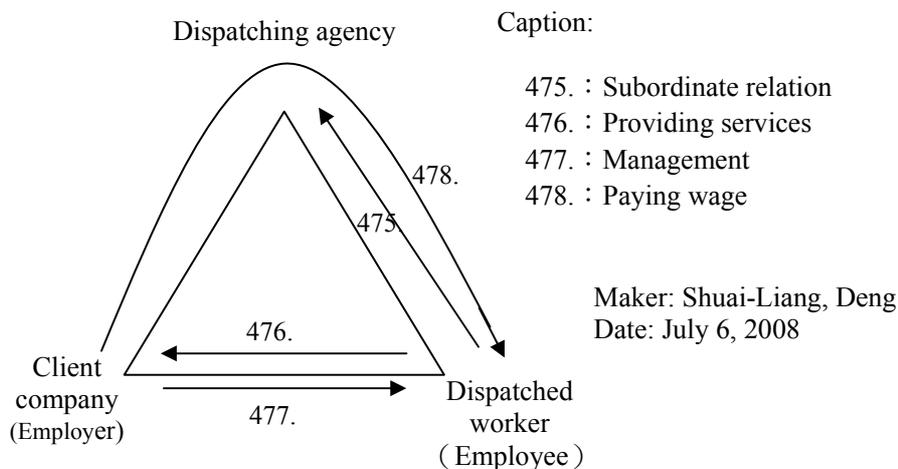
80. Chiu, *supra* note 78, at 36-37.

81. See Hsin-san Chen, *Woguo Laotung Paichien Hsiangkuan Falu Wenti chih Yenchiu* [A Study on the Regulations Related to Labor Dispatching] (June, 2006) (unpublished LL.M. thesis, National Chung Cheng University) 18-20, available at <http://ndltd.ncl.edu.tw/cgi-bin/gs32/gswweb.cgi?o=dncldr&s=id=%22094CCU05227026%22.&searchmode=basic>.

82. Civil Code of Taiwan, *supra* note 7, art. 484.

stipulated in the labor dispatching legal system of Japan and China.<sup>83</sup> Taiwan has not enacted the Labor Dispatching Act. Our country should not use other explanations to confuse the practice and hinder the enactment of the Labor Dispatching Act.

The Illustration of the triangular relationships of dispatched labor contract



6. The practitioners have various explanations about the employer of the labor dispatching contract. Some claim it is a “double labor relationship.”<sup>84</sup> Some doubt the identification of the employer of the dispatched labor contract and the possibility of “compelling workers to do work” and “indirectly exploiting;”<sup>85</sup> others, even the legal practitioners have different views on the identification of the employer of labor dispatching.<sup>86</sup> The author believes that if the relationships of the “Illustration of the triangular relationships of dispatched labor contract” can be consistent with the concept in Japan and China, the employer can be regarded as the dispatching agency. In terms of “indirect exploiting,” it can be judged by the wage. The wage is given by the dispatching agency instead of the client company. If the worker is exploited, the dispatching agency should bear the responsibility. Therefore, in order to keep their jobs, the workers might surrender under the

83. See Labor Dispatching Act of Japan, *supra* note 14; Labor Contract Act of China, *supra* note 32.

84. See CHENG-GUAN HUANG, LAOTUNGFA [LABOR ACT] 285 (1996).

85. See Chin-Chin Cheng, *Paichien Laotung chih Falu Kuanhsi yu Hsiangkuan Falu Wenti chih Yenchiu* [A Study on the Related Legal Problems and Connected Questions of Labor Dispatching Act], 2 KUOLI CHUNGCHENG TAHSUEH FAHSUEH CHIKAN [NAT'L CHUNG CHENG U. L.J.] 237, 248 (1999).

86. Taoyuan Difang Fayuan [Taoyuan Dist. Ct.], Civil Division, 94 Lao-Su No. 5 (Oct. 13, 2005) (Taiwan) (stating that the dispatched labors shall not prosecute the client company with the employer responsibility provisions of Article 59(1) of the Labor Standards Act).

command of the client company. To see the management of the client company from a legal point of view, the transferring, dismissal, wage reduction or discontinuation of a dispatched worker's contract should be examined again to see whether it is related to the client company. Therefore, the dispatching agency will have no excuse to evade their responsibilities. To avoid controversy, the dispatching labor legal provisions of Japan and China require the client company to give explanation and reason for any action that the client company undertakes in regards to dispatched workers. The workers right of appeal is also protected.<sup>87</sup> Hence, it is a pity for the practitioners to concentrate on legal interpretation when our country is not even contemplating on enacting the Labor Dispatching Act. According to the abovementioned provisions of the Labor Contract Act of China, both the dispatching agency and the client company should explain in detail the work required in order to prevent the situation of compelling workers to do work. The legal device of Japan and China is designed for this purpose.

7. Some practitioners even claim that under no condition can the dispatched worker demand for "equal wage for equal job" because the labor dispatching contract implies an unequal status between the dispatched worker and the formal employee; as there is no employment or working relationship between the dispatched worker and the client company.<sup>88</sup> This seems to mean that the unequal treatment is naturally permissible in the relationship created by the labor dispatching contract; and it also seems to imply that the core idea of the labor dispatching contract is for a client company (employer) to obtain dispatched workers at a lower cost easily. However, the legal provisions in both Japan and China all stipulate that the dispatched worker must receive the same wage as the formal employee.<sup>89</sup>

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87. See Labor Dispatching Act of Japan, *supra* note 14, arts. 26-28; Labor Contract Act of China, *supra* note 32, arts. 60-63.

88. Cheng, *supra* note 85, at 248.

89. See Labor Dispatching Act of Japan, *supra* note 14, art. 44(1); Labor Standards Act of Japan, *supra* note 14, art. 3 (stipulating equal wage for equal work); Labor Contract Act of China, *supra* note 32, art. 63. Though the dismissed worker in the issue of the Nichibou Kaiduka factory is a communist, the dismiss reason does not violate the Constitution, Article 14 and the Labor Standard Act, Article 3 which both provided the principle of equality. That is to say it is not involved in social status issue. In the "Mitsubishizushi" verdict made by Supreme Court of Japan on Dec. 12, 1973, the Court stated that even under the condition of "equal treatment", whether a worker is being employed shall not be explained by the Labor Standard Act, Article 3. See Shyuben Katou, *Kintou Taiguu [Equal Treatment]* in ROUDOU HANREI HYAKUSEN DAIYONHAN [SELECTED CASES OF LABOR AFFAIRS] 28-29 (Ogisawa Kiyohiko ed., 1981). In "Maroko Horn" verdict made by the Ueda Branch of Nagano District Court on Sept. 3, 1996, it stated that the wage gap between "formal employee" and "temporary worker" doesn't violate the "equal treatment", "equal wage for equal job" and even the "public order" because the difference between "formal employee" and "temporary worker" comes from the content difference in the contract. It is not resulted from the "social status" in Labor Standard Act, Article 3. Moreover, there's no legislation of "equal wage for equal job" and the annual merits system also reflects the situation of "unequal wage for equal job". And this kind of situation never violates the public order in Japan from the very beginning. See HIROSHI TOI, KAISEI ROUDOU KIJUNHOU [THE AMENDMENT OF LABOR STANDARDS ACT] 42 (1999). See also HIROSHI TOI, KAISEI ROUDOU KIJUNHOU [THE

The Labor Dispatching Act of Japan provides that all businesses shall not give unequal treatment to dispatched workers and to allow the situation of compelling workers to do work or indirectly exploiting. The Labor Contract Act of China obligates equal treatment even clear, stipulating that the dispatched worker should get equal wage while providing the same services as the employee who does the same job. Where there is no employee doing the same job, the wage should be the same as an employee who works in a similar work-place or who has a similar work position.<sup>90</sup> Moreover, the provisions of China also strictly stipulate that a business shall confirm the timeframe with the dispatching agency by the actual necessity<sup>91</sup> and shall not establish several successive dispatched agreements by way of dividing the term. China also provides that work not belonging to the dispatched job shall not be counted as dispatched work.<sup>92</sup> After studying the provisions of these two countries, it can be construed that labor dispatching can be used in unforeseeable circumstances and to obtain professional workers. Once the task is done, the relationship will be over. Government authorities would not deviously seek to decrease cost by allowing people to use dispatched laborers; and all government authorities would prohibit unequal treatment to protect the rights of dispatched workers. As “the illustration of the triangular relationships of labor dispatching” shows, the relationship of labor dispatching cannot be controlled by the current labor legal system. It would be hard for the current labor legal system to regulate the responsibilities of the client company. However, it would be possible to resolve the twisted triangular relationships and the shortcomings of our labor legal system by contemplating the provisions of other countries and also by using common law/precedents to identify the “employer” responsibilities of the client company. Essentially, it is the biggest fault of our country to allow the unequal treatment in the labor dispatching contract.

8. Finally, I believe that researching the labor dispatching legal systems in different countries is needed. Take China—another country which adopts the civil legal system countries—as an example; though China promulgated the labor dispatching law a little bit later than other countries, the effect of its provisions in other countries as seen in legal reviews is impressive. Out of

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AMENDMENT OF LABOR STANDARDS ACT] 42-45 (1999) (stating that both jurisdiction of Japan and China adopted the idea about “equal wage for equal job”, and the former part of Article 6 of the Labor Contract Act of China mandated that dispatching workers enjoying the right of receiving the equal wage while doing the equal job); BAO-HUA DONG, SHIHDA JETIEN SHIHCHIHEN TOUSHIH LAOTUNG HETONG FA [TO STUDY THE LABOR CONTRACT ACT THROUGH THE 10 HOT ISSUES] 471 (2007) (claiming that eliminating the fault though this paper only takes reference of China’s legal system).

90. See Labor Dispatching Act of Japan, *supra* note 14, art. 44(4); Labor Contract Act of China, *supra* note 32, art. 59(2).

91. See Labor Contract Act of China, *id.*

92. Taoyuan Difang Fayuan [Taoyuan Dist. Ct.], Civil Division, 94 Lao-Su No. 5 (Oct. 13, 2005) (Taiwan).

eleven articles written in other countries, only one article criticized the provisions of China. It is surprising that the order of labor dispatching management can be established with such provisions. However, the effects of the labor dispatching provisions of China still needs to be observed as its long-term effects is still to be seen. China categorized the labor contract into three types. First is a “non-fixed-term type,” the second is one a “fixed-term type” and the last one is a type of a term which is “based on the completion of a certain job.” The labor dispatching contract falls into the last category. In other words, China regards the labor dispatching contract as the contract that exists from the beginning of that relationship different from Japan. To be more specific, in addition to the labor contract (fixed-term and non-fixed-term) as provided in the Labor Standard Act, Japan also provided for dispatched labor contracts in Labor Dispatching Act. The labor dispatching contract of Japan is an “extended” contract which is extended from a fixed-term contract. On the contrary, a dispatched labor contract of China coexists with a fixed-term and a non-fixed-term contract. The labor dispatching contract of China does not only address the temporary or long-term problems but also focuses on the function and the future performance of labor dispatching. Furthermore, the labor dispatching legal system has protected the wage and all the rights of dispatched workers. It seems that the labor dispatching legal system of China has met the need of the current situation in China, such as social mobility, convenience and the needs of professional workers. However, in Taiwan, all aspects of labor dispatching are still vague. All the efforts that society contributes seem to fall short of giving justice to the purpose of the Labor Standards Act. In practice, workers are being treated badly; even the foreign workers are accepted to do dispatching works.<sup>93</sup> China’s standard of labor justice seems unachievable for Taiwan now.

## VII. CONCLUSION AND SUGGESTIONS

From the discussion above, the Government Procurement Act affects the labor legal system directly. A third party clearly intervenes in the labor contract of “services procurement,” and our government should not tolerate the injustice and the manner of indirect exploitation by obtaining supplementary workers to provide “chronic” or “regular” public services. Moreover, the Government Procurement Act should be reexamined by our country because, instead of providing justice, the Act only focuses on the procedures; and the “regular procurement” allowed has violated the labor legal system. The Council of Labor Affairs should contemplate on the

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93. See *Zuigao Hsingcheng Fayuan* [Sup. Admin. Ct.], 94 Pan No. 881 (June 23, 2005) (Taiwan).

problem. Furthermore, the flawed provisions in the Government Procurement Act have resulted in mismanagement by the government sectors. Also the faults that our Council of Labor Affairs created are not corrected, but which regulation leads to two problems. The first is the misapplication of labor dispatching when the government procure services; and the other is, the arbitrary hiring of supplementary workers by “employment” or “labor dispatching” by government sectors.

Contracted workers, temporary workers and dispatched workers are the main non-typical workers that the government obtains. If obtaining dispatched workers is the correct manner to obtain typical workers, why does the government not acquire contracted workers by the same manner since contracted workers and temporary workers do not need to be recruited by way of the Government Procurement Act? All kinds of manners are acceptable, as long as they could fulfill the openness and fair justice of the Government Procurement Act. Even though Taiwan has enacted the Government Procurement Act, the Taiwanese government does not obtain non-typical workers by following the procedures stipulated in the Act. Whether workers should be obtained by contracting or by dispatching is hard to decide yet because the standard is hard to define. At present, the contracted workers are non-typical workers; however, if the government obtains them by dispatching, the workers may receive more advantages. According to the provisions, labor and health insurances are required for dispatched workers and the insurance and retirement welfare are what contracted workers need immediately, so at least these problems would be addressed. I am the most reluctant one to suggest transforming contracting to dispatching, but I can only suggest this because this would bring the least impact and damage.

Moreover, I have to emphasize again that labor dispatching still has a lot of issues in Taiwan, let alone the bigger problems that services procurement might bring. This paper utilizes the understanding of the Taichung District Court to advocate terminating the unnecessary misconceptions.

The various ideas that the verdicts presented were extremely different. Using the provision of the Civil Code to regulate labor affairs is the core reason why labor justice cannot be fulfilled. In order to resolve the complicated problems, I suggest that before Taiwan enacts the Labor Dispatching Act, the Taiwanese government should prohibit obtaining workers for public services; and the government sector which hires the “dispatched” workers should be prosecuted for its violations. On the other hand, if the government sectors regard hiring the dispatched worker as necessary, the illegal successive hiring by the “contracted employment regulations” should otherwise be banned. Moreover, contracted employed workers should be regarded as in “services procurement” and their rights

should also be safeguarded as the rights of dispatched workers. The next step should be to urge the government, especially the Executive Yuan or the Council of Labor Affairs to make a draft of “government services procurement contract (a model)” for the public to follow. Furthermore, the rights of a dispatched worker contained in the model should be the same as the rights of a normal contracted worker; and it should apply to all the labor legal systems because the rights of dispatched workers in the foreign countries is safeguarded in this manner too. The Labor Contract Act of China also has the same provision.

In addition, if the government sectors cannot accomplish the above actions, the public prosecutors should exercise their power and authority to examine the government sectors for the misapplication of dispatched workers or the intentional acquisition of illegal benefit from certain suppliers. After all, the labor justice system is the workers’ last resort. However, under the services procurement, there are a great number of dispatched workers. They have been on trial for a long time because they try to appeal for protection on their own. The huge costs associated with lawsuits have become a terrible burden for them, and some of them are feeling excruciatingly helpless in the abject abyss. I hope that the government can offer help regularly and stop abusing the dispatched workers for convenience.

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## 論勞務採購與勞動法制之關係

鄧 學 良

### 摘 要

政府部門常以勞務採購方式，運用政府採購法獲得所需的人力。如此的勞動力取得方式，實已涉及違反勞動基準法第5條與第6條之問題。前述採購之作法，雖然狀似外國法制中之勞動派遣，然而在我國目前無勞動派遣法的情況下，是屬於遁逃勞基法規範的脫法行為。況且將勞動派遣人力一用十餘年，亦為外國法制明文禁止之行為。這些問題的發生源自於政府採購法對勞務採購的不當設計，次則因政府長期慣於使用臨時人力造成。準此，本文主張我國宜儘早檢討公務人力應有之完整制度。

關鍵詞：政府採購法、勞務採購、勞動法制、定期契約、勞動派遣