行政契约缔结论

施建辉◎著

XINGZHENG QIYUE
DIJIELUN

法律出版社
LAW PRESS·CHINA

行政契约缔结论

施建辉◎著

法律出版社
LAW PRESS·CHINA

图书在版编目(CIP)数据

行政契约缔结论/施建辉著. —北京:法律出版社,2011.5
ISBN 978-7-5118-2192-8

Ⅰ.①行… Ⅱ.①施… Ⅲ.①行政法:契约法—研究
Ⅳ.①D912.104②D913.04

中国版本图书馆CIP数据核字(2011)第101464号

行政契约缔结论	施建辉 著	责任编辑 潘洪兴 装帧设计 汪奇峰

开本 720×960 毫米 1/16　　**印张** 11.25　　**字数** 200千
版本 2011年6月第1版　　**印次** 2011年6月第1次印刷
出版 法律出版社　　**编辑统筹** 独立项目策划部
总发行 中国法律图书有限公司　　**经销** 新华书店
印刷 永恒印刷有限公司　　**责任印制** 张宇东

法律出版社/北京市丰台区莲花池西里7号(100073)
电子邮件/info@lawpress.com.cn　　销售热线/010-63939792/9779
网址/www.lawpress.com.cn　　咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)
全国各地中法图分、子公司电话:
第一法律书店/010-63939781/9782　　西安分公司/029-85388843
重庆公司/023-65382816/2908　　上海公司/021-62071010/1636
北京分公司/010-62534456　　深圳公司/0755-83072995

书号:ISBN 978-7-5118-2192-8　　**定价**:26.00元

前　言

伴随着现代国家职能的扩张、福利国家思想的兴起以及给付行政领域的拓展，行政契约作为一种灵活而富有弹性的新型行政管理手段，因充分体现了现代行政民主思想而受到行政法学者的极大推崇，并已为多数国家行政立法所确立。行政契约是行政主体为了达到维护与增进公共利益，实现行政管理目标之目的，在平等协商的基础上就相关内容与相对人达成一致的协议。与普通私法契约相比，行政契约兼具有行政性和契约性的双重特点，是行政权力的强制性与契约的意思自治原则的有机结合，从而淡化了行政权力的命令与服从色彩，增添了行政法人情、理性的光辉，通过合意弱化了行政活动中的对抗与冲突色调，通过强调和谐消除了行政关系中的怀疑和不信任意识，丰富了行政主体的行政管理手段，亦推动了行政执法观念的转变和行政法理论的发展。

正因为如此，利用契约的方式推行国家政策、实施行政管理，已经成为一种世界化的潮流。例如，在代表大陆法系国家立法潮流的德国和法国，均已形成了内容丰富且发展成熟的行政契约理论和完善的法律制度建设；英美法系国家虽未形成专门的行政契约理论和立法，但亦在适用普通契约法规则时充分考虑到了行政契约的行政性而适用特别规则。受整体法治发展水平的影响，我国行政契约制度尚处于启蒙和发展阶段，尽管行政法学者在比较借鉴的基础上对行政契约的基本概念与适用范围、原则、价值和功能有所认识，但尚未形成完善的理论体系和制度框架构想，以至于在多数中国学者的眼里，行政契约仍然是一个巨大的问号。发生在20世纪90年代的民法学者和行政法学者之间的猛烈碰撞，余音缭绕至今，其给行政契约留下的太多皱褶，似乎仍未烫平，行政契约尚未得到学术界与实务界的普遍承认。这也在很大程度上影响到了我国在立法层面上构建行政契约制度的进程。

尽管如此，随着我国政府管理体制改革的不断深化，行政契约也日益成为政府行政管理的重要手段和方式，其应用范围越来越广泛，作用日益显现。此时，理论体系的欠缺和立法上的不完善在很大程度上限制了行政契约的价值功能的发

挥，更是无法周延、公平地保护作为契约相对方的行政相对人的利益。实践的需要呼唤理论的发展，更需要完善的制度构建提供有力保障。基于此，作者致力于对行政契约的基本理论加以探讨，以期能够为行政契约的理论发展尽绵薄之力，早日实现行政契约制度的规范化、明朗化，对行政契约实践起到积极的促进作用。

行政契约的缔结制度是行政契约制度的重要组成部分。行政契约的缔结不仅是建立行政契约法律关系的首要步骤，而且关系到契约的成立及效力，还直接涉及行政契约双方当事人权利义务的平衡以及契约目的的实现。无疑，在行政契约的行政性与契约性双重属性中，行政性是占主导地位的，这不仅是因为行政主体在行政契约中的主导地位，更是因为行政契约内容中所承载的公益性。这必然导致行政契约的缔结与普通私法契约的缔结在制度构建和规则适用上存在较大的差异，这种差异性恰恰又是构建行政契约制度需要充分把握的部分。正因为如此，作者将探讨行政契约缔结制度的基本思路界定为：在行政法基本原则的指导下，以私法契约缔结理论和规则为主线，通过充分的利益平衡和价值判断，着重探讨行政契约缔结制度的特殊性，最终勾勒出既具有外在的系统性，又具有内在的逻辑性的行政契约缔结理论体系。

基于以上研究思路，本书将研究内容划分为四个部分。第一部分主要包括第一章和第二章的相关内容，着重介绍行政契约的基本特性、理论基础和指导原则，对后面内容的论述起到纲领性和指导性的作用。第二部分主要包括第三至五章的相关内容，着重介绍行政契约区别于普通私法契约而适用的特殊规则，如公开缔结程序、回避制度等；至于缔结步骤，与私法契约适用的要约邀请、要约与反要约、承诺等阶段并无二致。第三部分主要包括第六章和第七章的相关内容，着重探讨了行政契约按照缔结步骤完成后所可能发生的法律效果、契约双方的权利义务设置等。第四部分主要包括第八章的相关内容，着重对行政契约缔结所引起的缔约过失责任的性质、承担主体与责任方式作了探讨。

在研究方法上，本书并不局限于从行政法的角度考察，而是集公法与私法关系、行政契约与行政程序关系、理论与实务相结合等多视角对行政契约缔结的原则、效力、程序、内容以及缔约过失责任等问题展开了具体讨论。这不仅是本书研究的创新之处，同时也为结论的科学性、合理性、实践指导性打下了坚实的基础。

当然，尽管行政契约与私法契约在很大程度上具有共通性，其区别也是显而易见的。作为一个过去主要从事民法研究的学者，对行政契约这一陌生领域进行探索研究，无疑是困难重重的，加之作者学识和能力有限，虽在研究过程中慎之又慎，仍难免有错漏之处，恳请读者赐教。

摘 要

在依法行政、服务行政和参与行政的背景下，以契约手段达成行政目的已成为我国实现行政方式转变的重要手段。近些年来，我国法学界虽然在理论上认可了行政契约的存在，并开始对行政契约进行研究，实践中行政主体也大量运用契约方式解决现实问题，但学界对于行政契约的研究仍处于起步阶段，研究内容主要局限于行政契约运用于行政管理的必要性、行政契约概念及性质的界定、行政契约与私法契约的关系等方面，对行政契约缔结的研究还相当粗浅，立法上亦缺少专门的规定。行政契约的缔结是建立行政契约法律关系的首要步骤，不仅关系到契约的成立及有效，而且直接涉及行政契约双方当事人权利义务的平衡和契约目的的实现。为此，本书在考察国外行政契约理论及立法现状，并对我国行政契约实践作深入研究的基础上，侧重于行政契约缔结的理论和相关制度的构建，旨在填补我国行政契约法研究领域的空白，并对我国行政契约立法和行政管理实践起到积极的促进作用。

第一章是行政契约及其缔结之意义。在这一章，作者首先对行政契约的概念进行了界定，认为行政契约是行政主体为实现行政目的，与行政相对人意思表示一致而缔结的关于设立、变更、终止行政法律关系的协议。作者还将本书所述之行政契约限定为行政契约中最典型之形态——在行政主体与相对人之间达成的契约。关于行政契约的范围，作者认为应当坚持行政契约只适用于公共事务领域，必须是出于公共利益的需要，不适用于平等主体交易的范围。其次，作者对行政契约的地位作了分析，认为行政契约是一种行政性和契约性、公法性和私法性兼顾的特殊契约形态，但就其根本属性而言，仍然具有公法的性质。最后，作者着重阐述了行政契约的缔结对于行政契约制度的重要意义，认为行政契约的缔结过程确保了契约合意的实现，行政契约缔结的效果决定契约的效力及责任，等等。

第二章是行政契约的缔结原则。作者首先提出了对行政契约缔结原则的认识，阐述了行政契约缔结原则对私法契约缔约原则的扬弃，并将行政契约缔结原

则分为共通性原则与特殊性原则。接着，本书分析了行政契约缔结原则在解释和补充成文法、解释和弥补行政契约的内容、平衡行政契约当事人的权利义务关系、指导当事人的缔约行为以及控制行政权力行使等方面的重要功能。最后，作者对适用于行政契约缔结的共通性原则与特殊性原则分别作了分析，认为共通性原则包括公开原则、公平原则、诚实信用原则；特殊性原则包括平等原则、竞争原则、有限契约自由原则。在此，作者还特别对平等原则的适用作了重点讨论，认为虽然在行政契约关系中，行政主体居于相对主动的地位，且往往享有一定特权，但行政契约中的双方当事人都是平等的人格主体，应当相互平等对待，在法律适用上平等。

第三章是行政契约的缔结规则。作者以为，行政契约虽然与私法契约存在一定的联系，私法上关于契约行为的一般规定得准用于行政契约；但无保留地适用私法规则，势必会与政府公共政策与行政管理的需求、实现公共利益的契约目的相冲突。因此，必须对私法契约规则作若干修正，以排除不相容之内容。作者在此章详尽论述了专门应用于行政契约缔结程序的特殊规则。作者认为，公告规则是一项应用于行政契约缔结、履行、救济等全部过程的程序规则，除了行政契约缔结程序之外，还应适用于行政契约成立之后；竞争规则是竞争原则的下位概念，行政主体选择相对人的权力受到该规则的限制；回避规则要求与缔结的契约有利害关系的行政主体工作人员不得参与缔约工作，并应当予以回避；不单方接触规则要求行政主体在处理涉及两个以上相对人的，且具有相互排斥利益的事项时，不得在一方不在场的情况下单独与另一方接触；说明理由规则要求行政主体对其最终决定所作的依据作出解释，或者对行政特权的行使进行书面阐述；听证规则要求行政主体在作出影响相对人权利义务的决定之前，应当听取相对人的陈述、申辩和质证；关于代理规则，作者重点研究了无权代理和表见代理规则适用于行政契约的特殊要求。

第四章是行政契约的形式与缔结方式。作者指出，行政契约应当以书面形式为原则，并对书面形式作了进一步的解析，认为行政契约以书面形式虽属必要，但书面形式不应成为对于行政契约生效的过当的苛求。关于行政契约缔结的方式，作者参考法国、德国、美国和我国台湾地区的做法，结合我国行政契约实践，提出了招标、邀请发价、竞争性谈判、拍卖和直接磋商等方式，并对各种具体方式的优劣和具体适用作了详细的探讨。

第五章是行政契约的缔结程序。在该章，作者研究了行政契约缔结程序与行政契约制度及当事人权利义务关系之价值，并对行政契约缔结程序作了界定，认为行政契约的缔结实为一种行政程序，因而该程序与私法契约相关程序存在很大的不同。其后，作者指出，行政契约的发动者一般为行政主体，且在很多情况下，行政主体向另一方当事人发出的并非要约而系要约邀请，这也是行政契约进入缔

结程序前的准备步骤。至于要约，则意味着行政契约缔约的启动，也是行政契约缔结的正式程序，因此其在内容上必须具体确定，符合实质要件、形式要求。本书在此还讨论了行政契约之要约的生效和失效规则。最后，作者主张，承诺是行政契约成立的决定性阶段，也应符合法定的要件和形式要求；作者还根据行政契约的特殊性，研究了行政契约的强制承诺问题，指出行政主体在特定情况下对相对人应负有承诺的义务。

第六章是行政契约缔结的效果——成立和生效。在这一章，作者对行政契约的成立和生效的概念作了探讨，并指出了两者的区别。关于行政契约成立的要件，作者认为应围绕着契约当事人的合意而确定；作者还根据行政契约的特点，围绕行政主体的意思表示，讨论了行政契约成立要件的特殊性，指明行政主体独立且受到特别限制的意思表示，以及双方当事人基于平等地位的合意。关于行政契约生效的要件，既应当包括适用于所有行政契约的一般生效要件，即行政契约适法、当事人意思表示无瑕疵等，也包括法律的特别规定或当事人特别约定的一些特殊的生效要件。

第七章是行政契约的权利义务设置。该章讨论了行政主体和相对人在契约中并不对等的权利义务关系。作者首先从行政契约的公共目的性、行政法律关系的特点以及公共行政效率等角度说明了行政契约中行政主体享有特权的必要性，论证了特权与契约自由原则和平等原则共存于一体的可能性，并提出行政主体应当享有指导权、强制执行权、单方变更权和解除权、制裁权等特权。为平衡行政主体的特权，作者不仅认为行政主体负有依法缔结行政契约的义务、依法履行契约的义务，以及依法行使特权的义务，而且相对人还享有缔约程序参与权、要求行政主体履行契约的权利、对行政主体行使特权的抗辩权、行政主体特权行使的补偿权、不可预见的情况的补偿权、损害赔偿请求权等权利。

第八章是行政契约的缔约过失责任。作者在此章首先结合私法契约规则以及大陆法系和英美法系国家之行政契约适用缔约过失责任的理论和实践，论证了缔约过失责任引入行政契约的可行性，指出在行政契约缔结的一系列过程中，双方当事人要遵守依法行政和诚实信用原则等法律原则的约束，否则应承担缔约过失责任。作者进而对缔约过失责任作了分析，认为行政契约缔约过失责任是一种行政法律责任，承担缔约过失责任的主体既包括行政主体，也包括相对人。但行政契约的缔约过失责任在构成要件、责任形式等方面呈现出与私法缔约过失责任不同的特点。其次，作者论述了行政契约缔约过失责任的基础——诚实信用原则和信赖保护原则，讨论了行政契约缔约过失责任的构成要件。最后，作者认为承担缔约过失责任的范围既包括直接损失，也应当包括间接损失，承担责任的方式既有私法契约的损害赔偿，也包括行政契约特有的强制履行和行政处罚。

Abstract

Achieving the administrative purpose through contract measures under legal administration, service administration and participation-style administration has become an important measure for China to realize the transfer of administrative methods. In the recent years, although the legal circle of China approves the existence of administrative contract in theory and begins to study administrative contract, and the administrative subject also applies the method of concluding administrative contract a lot to solve actual problems in practice, the research of the circle on administrative contract is still in its initial stage, with the contents of research limited to the necessity of administrative contract applying to administrative management, definition of the concept and nature of administrative contract, the relationship between administrative contract and civil contract, etc. , and the research on the conclusion of administrative contract is rather shallow and superficial, and there is still no special legislative provisions. The conclusion of administrative contract is the first step in establishing the administrative contract legal relationship, not only related to the establishment and effectiveness of contract, but also directly involving the balance of rights and obligations of both parties of administrative contract and achievement of the purpose of contract. For this purpose, this work gives prominence to the construction of the theory and related systems of conclusion of administrative contract after reviewing the actuality of overseas administrative contract theory and legislation and thoroughly investigating Chinese administrative contract practice, to fill the blank of the field of administrative contract law research in China and actively promote the administrative contract legislation and administration practice of China.

The first part is the significance of administrative contract and conclusion. In

this part, the author first defines the concept of administrative contract, thinking that administrative contract is an agreement on establishing, altering and terminating administrative legal relationship concluded between the administrative subject and object through unanimous negotiation for the purpose of achieving the administrative purpose. The author also defines the administrative contract stated in this work to be the most typical form in administrative contract-contract concluded between administrative subject and object. As to the scope of administrative contract, the author thinks that we should insist that administrative contract be only applied to public affair field to meet the requirements of public interest, but be not applied to the scope under direct action of public authority or the scope of equal subject transaction. Thereafter, the author analyses the status of administrative contract, thinking that administrative contract is a special contract form that considers the natures of administration, contract, public law and private law, but as far as its fundamental attribute, it still has the nature of public law. Last, the author focuses on illustrating the important significance of the conclusion of administrative contract to the system of administrative contract system, thinking that the conclusion process of administrative contract ensures the realization of contract's desirability and the effect of concluding administrative contract decides the effectiveness and obligation of contract, and so on.

The second part is the conclusion principle of administrative contract. The author first proposes the awareness of the conclusion principle of administrative contract, illustrates the reference of the conclusion principle of administrative contract to the conclusion principle of private law, and divide the conclusion principle of administrative contract into the principle of community and particularity. Next, the author analyses the important function of the conclusion principle of administrative contract in interpreting and supplementing statute laws and interpreting and remedying the contents of administrative contract, balancing the rights and obligations relationship between administrative contract parties, guiding the conclusion behavior of parties and controlling the exercise of administrative authority and so on. Last, the author analyses the principle of community and particularity applying to the conclusion of administrative contract. In it, the author thinks that the principles of publicity, fairness and honesty and credit are principles of community while the principles of equality, competition and limited contract freedom are principles of particularity. The author also focuses on discussing the application of the principle of

equality, thinking that although administrative subject lies in a relatively active role in the administrative contract relationship and usually enjoys a certain privilege, the both parties of administrative contract still enjoy the equality prepared by laws and both parties are equal personal subjects and should treat each other equally and should be equal in terms of legal application.

The third part is the conclusion rules of administrative contract. The author thinks that although there exists a certain relationship between administrative contract and private law contract, and the ordinary stipulations of private law on contract behavior are permitted for use in administrative contract, the unreserved application of ordinary private law rules will undoubtedly conflict with the requirements of the government public policies and administrative management and the realization of the administrative contract purpose of public interest. Therefore, we must make numerous corrections to the rules of private law contract to eliminate the incompatible contents. In this part of the work, the author makes an exhaustive discussion of the special rules specially applied to administrative contract conclusion procedures. The author thinks that bulletin rule is a proceeding rule applied to the whole process from conclusion, fulfillment, relief, etc. of administrative contract. In addition to administrative contract conclusion proceeding, the rule should be also applied after the conclusion of administrative contract. The competition rule here is the sub-concept of competition rule. The authority of administrative subject choosing object is limited by this rule. The rule of evasion requires the workers of the administrative subject interested in the concluded contract to evade participate in the work of conclusion. The rule of non-unilateral contact requires administrative subject not to contact with another party independently when one party is not present when handling matters involving mutually-repellant interests of more than two objects. The rule of cause explanation requires administrative subject to make explanation to the basis for its final decision, or make written illustration of the exercise of administrative privilege. The rule of witness hearing requires administrative subject to hear the statement, averment and proof of object. As to the rule of agency, the author focuses on studying the special requirements of rules of unauthorized agency and agency of estoppel system applying to administrative contract.

The fourth part is the forms and conclusion methods of administrative contract. The author first points out that administrative contract takes written forms as its principle, makes further analysis of the written forms, thinking that although it is

necessary for administrative contract to be in the written form, the written form should not become the excessive exigency for the effectiveness of administrative contract. As to the method of concluding administrative contract, the author refers to the practice of France, Germany, America and the Taiwan area of China, and proposes such forms as bid invitation, invitation for offer, competitive negotiation, auction and direct negotiation, etc. in connection with the administrative contract practice of China, and also makes a detailed probe into the advantage and disadvantage and specific application of various specific methods.

The fifth part is the conclusion procedure of administrative contract. In this part, the author studies the value of administrative contract conclusion procedure in administrative contract system and the rights and obligations relationship between parties, and makes definitions of administrative contract conclusion procedure, thinking that administrative contract conclusion procedure is in fact an administrative procedure and so this procedure is quite different from relevant procedure of private law contract. Thereafter, the author points out that the initiator of administrative contract is generally administrative subject, and under many circumstances, what administrative subject issues to another party is not offer but invitation for offer, which is the preparatory step for administrative contract to enter the conclusion procedure. Offer means the initiation of the conclusion of administrative contract as well as the formal procedure of the conclusion of administrative contract, so its contents must be specific and definite and must conform to the substantial important conditions and formal requirements. Here the thesis also discusses the effectiveness and ineffectiveness rules of important conditions. Last, the author points out that commitment is a decisive stage for the establishment of administrative contract, and should also conform to the statutory important conditions and formal requirements. The author studies the obligatory commitment of administrative contract according to the particularity of administrative contract and points out that administrative subject has the obligation to make commitments to the object under special circumstances.

The sixth part is the effect of the conclusion of administrative contract-establishment and effectiveness. In this part, the author probes into the establishment of administrative contract and the concept of effectiveness and points out the difference between the two. As to the important conditions of the establishment of administrative contract, the author thinks that the important conditions of establishment of administrative contract should be determined on the basis of the

desirability of the contract parties and discusses the particularity of the important conditions of establishment of administrative contract and points out the indication of the intent of independence and being specially limited of the administrative subject, and the desirability of both parties on equal status. As to the important conditions of effectiveness of administrative contract, the author thinks that they include not only the general important conditions of effectiveness applying to all administrative contracts, namely the application of administrative contract, the indication of the intent of the parties that there is no fault, etc. , but also the special stipulations of laws and the special agreements of the parties and some special important conditions of effectiveness.

The seventh part is the rights and obligations setup of administrative contract. This part discusses the unequal rights and obligations relationship between administrative subject and object in contract. The author first illustrates the necessity of administrative subject enjoying privilege in administrative contract from the perspective of the public purpose of administrative contract, the characteristic of administrative legal relationship and public administrative efficiency, etc. , demonstrates the possibility of the co-existence of the principle of privilege and contract freedom and the principle of equality, and proposes that administrative subject should enjoy the rights of choosing object, guidance and supervision, interpretation of contract, compulsory enforcement, unilateral alteration, termination, sanction and other privileges. To balance the privilege of administrative subject, the author not only thinks that administrative subject bears the obligations of legally concluding administrative contract, notifying privilege, giving the object material damage compensation or atonements and fulfilling the contract legally, but also the object enjoys the right to participate in conclusion procedure, the right to require administrative subject to fulfill the contract, the right to make pleas to the privileges exercised by the administrative subject, the right to ask for compensation for the privileges exercised by the administrative subject, and for the unpredictable circumstances, the claims for damage compensation, etc.

The eighth part is the conclusion default obligations of administrative contract. In this part, this work first demonstrates the feasibility of introducing conclusion default obligations to administrative contract in connection with the rules of private law contract and the concept and practice of the administrative contracts of the countries of continental law system and British and American and French system

applying the conclusion default obligations, points out that both parties should agree to be bound by the legal principles of the legal administration and honesty and credit principle, etc. in the series of processes of the conclusion of administrative contract, otherwise they should undertake conclusion default obligations, The author thinks that the default obligations of concluding administrative contract is a sort of administrative legal obligations. The subjects of undertaking conclusion default obligations include both administrative subject and the object, but the conclusion default obligations of administrative contract assume different characteristics from the conclusion default obligations of private law in constituent important conditions, obligation forms and other aspects. Next, the author discusses the basis of conclusion default obligations of administrative contract-the principle of honesty and credit and the principle of trust protection, discusses the constituent important conditions of conclusion default obligations of administrative contract. Next, the author thinks that the scope of undertaking conclusion default obligations should include not only direct losses but also indirect losses, and the methods of undertaking obligations should include not only the damage compensation of private law contracts but also the obligatory fulfillment and administrative punishment unique to administrative contract.

目 录