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INTERNATIONAL GOVERNMENT CONTRACTOR

Information and Analysis on Legal Aspects of International Public Procurement

Vol. 3, No. 12 December 2006

Analysis

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Beijing Court Orders Ministry Of Finance To Rule On Supplier's Complaints, But Skirts Broader Issue Of Schism In China's Procurement Supervision

In what is likely the first judicial interpretation of China's 2002 Government Procurement Law (GP Law), a court in Beijing has ordered China's Ministry of Finance to carry out its administrative obligations and affirmatively handle and respond to complaints by an unsuccessful bidder. The order—made twice, under separate judicial opinions covering solicitations related to the same overall project—was issued on December 8. *Beijing Modern Wo'Er Trading Co. Ltd. v. Ministry of Finance of the People's Republic of China*, No. 1 Intermediate People's Court of Beijing Municipality, First Level Administrative Division Decision No. 432 (2005) (*Modern Wo'Er 432*) and *Beijing Modern Wo'Er Trading Co. Ltd. v. Ministry of Finance of the People's Republic of China*, No. 1 Intermediate People's Court of Beijing Municipality, First Level Administrative Division Decision No. 433 (2005) (*Modern Wo'Er 433*). Attention to Modern Wo'Er's grievances was overdue, as the contract awards at issue date back to autumn 2004.

Modern Wo'Er 432 pertains to a contract award for the purchase of 286 blood gas analyzers through a bidding process entrusted to a tender intermediary known as GuoXin Tenders Ltd. (Guo Xin translates as National Trust). *Modern Wo'Er 433* pertains to a contract for 300 portable blood gas analyzers, for which the procurement process was entrusted to a different intermediary, China Far East International Trading Co. Beyond these differences, the facts of each case are largely the same and mostly undisputed, with the Court addressing identical questions of law in each opinion. The plaintiff's limited victory is cause for some optimism, but the cases highlight many unsettling aspects of China's purchasing regime.

Factual Background—The Chinese government's purchase of blood testing equipment was part of a larger national endeavor to establish a medical rescue and treatment system throughout China. This larger program is managed by China's National Development and Reform Commission (NDRC), also known as the State Development and Reform Commission, and the Ministry of Health, pursuant to express appointment by China's executive-branch State Council. See Notice of the Office of the State Council Turning Over Planning and Construction of a Public Health Rescue and Medical Treatment System to the National Development and Planning Commission and Ministry of Health (2003) (State Council Office Document No. 82). State Council Office Document No. 82 is a relatively detailed directive outlining a three-year plan to establish new medical facilities throughout China and improve response to medical emergencies. The blood testing equipment procurements of which Modern Wo'Er complains are meager components of this major project.

In *Modern Wo'Er 432*, upon learning that the contract was awarded inexplicably to the highest-priced bidder, the plaintiff submitted a timely inquiry to the NDRC and Ministry of Health (GP Law Articles 51–52). The plaintiff also submitted its inquiry to the intermediary (GP Law Article 53). Such "initial queries" from an aggrieved supplier are mandatory under China's government procurement protest procedures. See GP Law Articles 51–53, requiring supplier inquiries to be submitted to the purchaser or intermediary within seven business days after the supplier knows or should know that its rights and interests were violated during the procurement process. See also 1 IGC ¶ 38.

In the first query, Modern Wo'Er alleged that (1) the solicitation did not spell out the concrete evaluation method, the standards for awarding points and how overall scores were determined; (2) it was the lowest bidder, but somehow did not win the bid; (3) the contract award did not adhere to the legislative aim of the GP Law; (4) the bid evaluation experts did not follow legal stipulations; and (5) the procurement process was not transparent because the purchaser simply announced a winner without disclosing the names of the experts on the evaluation committee or other details, which made

it difficult for the plaintiff to submit an effective inquiry. In *Modern Wo'Er 433*, the plaintiff added allegations that (6) some content of the solicitation's technical standards limited competition among suppliers, in violation of the GP Law; and (7) there was a conflict of interest between an evaluation expert and a supplier, but no withdrawals from decision-making.

As the purchasers, the NDRC and Ministry of Health did not respond to Modern Wo'Er's timely inquiries. (Under Article 53 of the GP Law, a procuring department must reply to an inquiry within seven working days after its receipt.) The intermediaries in each case replied by fax (GP Law Article 54), but the responses lacked substance. Unsatisfied, Modern Wo'Er filed complaints with the Ministry of Finance (GP Law Article 55). Under Article 56 of the GP Law, the Ministry of Finance is required to provide responses to a plaintiff within 30 working days. The ministry never formally responded to Modern Wo'Er's complaints, but called a meeting with the NDRC and the Ministry of Health and referred the complaints to an NDRC investigation office that handles major national construction project issues. Modern Wo'Er alleged that it never received a response to its complaint from any office.

The Ministry of Finance proffered a number of legal arguments to justify its failure to formally respond to Modern Wo'Er's complaints: (a) because the relevant equipment purchases were part of a larger procurement of a national medical rescue and system program throughout China, the plaintiff's complaints were not within its sphere of regulation—i.e., not covered by the GP Law; (b) because the *Modern Wo'Er* cases involved bidding procedures, the cases were subject to Article 2 of the 1999 Tender and Bidding (T/B) Law, which applied to all bidding activities within China; (c) the medical rescue and treatment program constituted a "major national construction project" (guojia zhongda jianshe xiangmu), over which the State Council expressly delegated supervisory powers to the NDRC; and (d) by referring the matter to the NDRC for resolution, the Ministry of Finance adequately performed any applicable statutory duty and avoided the risk of administrative duplication in the handling of complaints.

As legal support for its arguments, the Ministry of Finance cited Article 65 of the 1999 T/B Law, which allows the State Council to delegate supervision of bidding activities, and the subsequent delegation to the NRDC of oversight responsibilities for "major national construction projects." State Council Opinion on the Division of Responsibilities for Administrative Supervision Among the Relevant Administrative Departments Carrying Out Tender and Bidding Activities, Office of the State Council, Document No. 34-2000 (2000 State Council Opinion), and Temporary Measures for Supervision of Tender and Bidding on Major National Construction Projects, NDRC Document No. 18, Jan. 10, 2002. (A detailed analysis of the 2000 State Council Opinion and the resulting chaotic regulation of bidding activities in China can be found at 3 IGC ¶ 17.) For some observers of the Chinese public procurement system, the Ministry of Finance defense represents a remarkable abdication of the regulatory supremacy granted to it under the express terms of the GP Law. To others, the Ministry of Finance arguments simply follow an unwritten understanding—about which the Beijing judges should have been well aware—between two regulatory giants, the NDRC and Ministry of Finance, delineating their respective supervisory spheres of supervision. The truth, albeit hard to determine, is probably somewhere in the middle.

The Court rejected the position that, by referring the complaint to the NDRC, the Ministry of Finance had satisfactorily performed its administrative duties. Finding that the GP Law applied to the case, the Court determined that the Ministry of Finance was statutorily obligated to respond to the complaint. The Court reaffirmed that the law applied to purchases of goods, construction or services (huowu, gongcheng, he fuwu) by state organs, social institutions or public organizations (zhengfu jiguan, shiye danwei, shehui tuanti) using fiscal funds (shiyong caizhengxing zijin). The Court then found that the relevant procurements represent simple purchases of goods under the GP Law (expressly citing Article 2 Clause 5, which defines "goods") and that, pursuant to GP Law Article 13, supervision over such purchases rests with Finance (citing Measures on the Administration of Tender and Bidding for Government Procurement of Goods and Services Article 10, Ministry of Finance Document No. 18, effective September 2004). Accordingly, the Court held that Finance failed in its duty to respond to Modern Wo'Er's complaints, pursuant to Article 56 of the GP Law, and ordered Finance to provide responses by Dec. 21, 2006, although the ministry could choose to appeal the rulings. In its rulings, the Court never directly addressed the ministry's characterization of the relevant purchases as belonging to a "major national construction project and, as such ... properly subject to the oversight of the NDRC, not the Ministry of Finance."

A Missed Opportunity to Rule on More Fundamental Issues—This author applauds the Beijing Court's decisions. Considering the general barriers

to procedural justice in China, the Court's opinions certainly advance the cause of contractor rights in China—although the prospects for adequate justice for Modern Wo'Er itself remain in doubt; see discussion below. While Court rulings do not create precedent, judicial opinions can highlight core issues and problems in the Chinese legal system. In this sense, the *Modern Wo'Er* cases may influence the course of development of China's public purchasing regime. However, the cases, if handled differently, could have had an even greater impact, particularly on overlapping jurisdiction of Chinese government agencies that supervise public construction. In this sense then, *Modern Wo'Er* represents a lost opportunity for the Court to rule on fundamental issues plaguing public procurement in China.

By characterizing the *Modern Wo'Er* procurements as simple goods purchases under the sole oversight of the Ministry of Finance and by implicitly rejecting the Finance characterization that the procurements belonged to a broader "major national construction project" (guijia zhongda jianshe xiangmu), the Beijing Court avoided addressing tensions between the 1999 T/B Law and 2002 GP Law. This may have facilitated an easy disposition of the *Modern Wo'Er* cases, but it was not necessarily in the best interest of healthy evolution of the Chinese public procurement regime.

If the Beijing Court had agreed with the Ministry of Finance characterization that the subject procurements are part of a "major national construction project," a whole set of important issues could have been raised for consideration. Interestingly, such a finding would not automatically have sanctioned Finance's attempt to disown regulatory authority over the subject purchases. To the contrary, under the express terms of Articles 2 and 13 of the GP Law, the ministry has jurisdiction over "the purchase of construction using fiscal funds" (shiyong caigouxing zijin caigou ... gongcheng). This conflicts with the NDRC's role as key regulator for "major national construction projects" (guojia zhongda jianshe xiangmu). See 2000 State Council Opinion. This conflict desperately needs resolution to correct nagging confusion in China's regulation of public construction.

In previous editions of International Government Contractor, this author explained how the seeds for conflict between the 1999 T/B Law and 2002 GP Law were planted during compromises made in the drafting of the GP Law. 1 IGC ¶ 38; 3 IGC ¶ 17. During the drafting process, NDRC representatives took the position that the definition of government procurement in China should not include the purchase of construction. Such an argument conflicts with both the traditional and emerging international definition of government procurement, which uniformly includes the purchase of goods, construction and services by public agencies. Hence, this more inclusive definition is used in Article 2 of the GP Law. However, a compromise was reached for Article 4 of the GP Law, which states without elaboration: "Where government procurement construction is carried out through tender and bidding, the Tender and Bidding Law should be used."

This seemingly benign clause in the short-term may have facilitated the drafting of the 2002 GP Law, but it later created uncertainty as to what agency holds regulatory supremacy over public construction using fiscal funds. Was GP Law Article 4 merely referring to T/B Law procedure for bidding on construction using fiscal funds, or was it wholly transferring the regulatory regime for public construction to the T/B Law system managed by the NDRC and other agencies? If the former, how should the respective powers of the NDRC, Ministry of Finance and other agencies be delineated? If the latter, why include construction in the definition of government procurement in the GP Law at all, and muddle the relationship between the two purchasing regimes?

A broad reading of the 2002 GP Law reveals further mixed messages. For example, the definition of "supplier" in Article 21 refers to "legal persons, other organizations or natural persons providing goods, *construction* or services" (emphasis added), but many provisions that spell out various procurement methods include the purchase of goods and services, or "procurement," but conspicuously make no reference to construction. See GP Law Articles 33–40.

While this problem originates in the law's drafting, it has been exacerbated by the behavior of government agents. The NDRC consistently engages in propaganda to entrench the notion that the T/B system is distinct from government procurement—a position detrimental to uniformity in China's public purchasing system that not only affects efforts to improve the system, but also complicates China's promise to join the Government Procurement Agreement of the World Trade Organization. See 3 IGC ¶ 45. In turn, the Ministry of Finance has never formally dispelled the notion that its regulatory authority in some cases may extend to, or evolve to cover, government-financed construction. To the contrary, a provincial-level finance department officer repeatedly has asked this author to write a book in Chinese describing how public construction is regulated in the U.S. and how public construction regulation might

practically be incorporated into the Chinese "government procurement" system.

At the same time, however, the Ministry of Finance muddles its message by issuing separate regulations on tender and bidding for the government procurement of goods and services (suggesting retrench from the possibility of its regulating public construction), and shying away from any regulatory role in the *Modern Wo'Er* cases. No wonder Chinese suppliers, intermediaries, academics and the public at large are at a loss for identifiable boundaries on this issue. Moreover, if there is, as some believe, a gentleman's understanding between the NDRC and Ministry of Finance about the supervision of construction funded by government budgets, then there is no reason to keep the public guessing. Clarity could be achieved by a simple, low-level regulation on the subject issued jointly by the two departments.

Much of the problem here stems from the nature of public funds in China. The appearance of centralized control over public monies suggested by the language of the GP Law does not accurately explain the Chinese condition. The GP Law, in this sense, is a document prepared for a future China in which the distribution of public monies emanates from a single institution. For now, Chinese public agencies have access to independent sources of funding and other ways to surreptitiously bind the public fisc. In addition, there are multiple categories of public monies in China. These gradations are represented in both the GP and T/B laws, with the GP Law applying to purchases with fiscal funds (caizhengxing zijin) and the T/B Law covering projects financed by the state (shiyong guoyou zijin huozhe guojia rongzi de xiangmu). This expanse of public monies explains the long reach of the T/B Law, which applies to nearly every construction project in the country and a host of other projects for which other laws or local regulations make public bidding mandatory. Consequently, the T/B Law touches projects that in most non-socialist countries would be considered private commercial transactions, but because the use of state money is involved or the public interest is otherwise implicated, become heavily regulated transactions under the T/B Law.

At the other end of the spectrum, the T/B Law bumps into the GP Law in its governance of construction funded by fiscal funds. The *Modern Wo'Er* cases present this exact scenario. The court had before it proof that the relevant "major national construction project" was being financed with fiscal funds. (See Notice of the Office of the State Council Turning Over Planning and Construction of a Public Health Rescue and Medical Treatment System to the National Development and Planning Commission and Ministry of Health, Chapter 5 (State Council Office Document No. 82 (2003).) Since the procurement was conducted by a government agency, and fiscal funds were being used, Modern Wo'Er logically filed its complaints with the Ministry of Finance.

Consequently, the *Modern Wo'Er* cases presented a fine opportunity for the Court to comment on the boundary between application of the T/B and GP laws, or, in light of GP Law Article 4, to determine the interaction between the two laws. By choosing to characterize the transactions as "goods" purchasing, however, the Court found an easy escape valve—inadvertently or otherwise—to pass on ruling on these more fundamental issues.

The Long Race to the Starting Line—Under most legal standards, Modern Wo'Er's wait of approximately 50 months after contract award in October 2004 for a judicial ruling on its protests seems extreme, especially considering that its cases lack any factual complexity. More notable, however, is how this long wait has, Kafkaesque, returned Modern Wo'Er to the beginning of the process, with the Court simply ordering the Ministry of Finance to do what it should have done in January 2005.

The Beijing court was justifiably hesitant in intervening in what Chinese commentors, both before and after the *Modern Wo'Er* rulings, view as a "kicking of the ball" (passing the buck) between two administrative giants. But, alas, the case now has been thrown back to the sparring titans and, to make matters more tantalizing, is back in the lap of the more reluctant contender, the Ministry of Finance. The power granted by the GP Law to Finance to overturn purchasing decisions made by other Chinese agencies is quite radical, and, judging from the nature of the Finance arguments in *Modern Wo'Er*, is one it would prefer not to wield. (Chinese agencies generally view each other as equal constituents before the State Council and jealously guard their traditional power to self-regulate their activities). It will be interesting to watch as this case is replayed at the administrative level.

But why is it being replayed at all? Why didn't the *Modern Wo'Er* Court simply make a substantive decision on the supplier's complaints? The answer lies in a quirk of Chinese administrative law that is proving to be a major impediment to delivering adequate justice to aggrieved suppliers.

Chinese administrative law subscribes to the notion that an agency commits a legal wrong when it does not carry out an administrative act prescribed by law (xingzheng bu zouwei). See Administrative Litigation Law of the People's Republic of China Article 11(5) (1989). Therefore, if an agency does not perform a duty such as ruling on a complaint as required by statute, it can be compelled to do so by court order. Chinese courts are, however, not empowered to rule on the substantive issues underlying the administrative complaint, i.e., to substitute its judgment for the agency's; they may only determine whether the agency failed in its duty or, if a decision on a complaint was issued, whether the decision comports with law. Hence, Modern Wo'Er's long wait simply brings it back to the Ministry of Finance's doorstep. This process conceivably can be repeated ad infinitum if the ministry neglects to provide an adequate ruling on the complaint. For example, if Modern Wo'Er is dissatisfied with the pending ministry ruling due on December 21, it may choose to again run the administrative litigation course, only to find itself once more before the door of Finance, which may again be ordered to revise its decision, and on and on.

This disheartening process has been demonstrated in other Chinese bid protest cases. For example, in the case of *XinMi Construction Bureau et al. v. Xinmi Shuangfu Constr. Co.*, High People's Court of Henan Province, Final Administrative Division Decision No. 15 (2000), the protester Xinmi Shuangfu Construction Co. (Shuangfu) challenged the award of a construction contract to XinMi Yong'An Construction Co. (Yong 'An). The basis of Shuangfu's complaint was that Yong 'An did not place its corporate seal on its bid and, therefore, that the award was illegal. Shuangfu twice submitted its complaint to the local construction department, but received no reply.

Shuangfu then filed a lawsuit asking the Court to cancel the award to Yong 'An and award the contract to Shuangfu. The first level court bravely obliged, ordering the Yong 'An contract canceled, the contract in turn awarded to Shuangfu, and Shuangfu to pay Yong 'An the value of the work that Yong 'An already had performed. Thereafter, the original defendants, Xinmi Construction Bureau, the XinMi Construction Tender and Bidding Office and Yong 'An, appealed the decision.

On appeal, the higher court ruled that the lower court lacked the power to rule substantively on Shuangfu's complaint and that its fashioning of a specific remedy represented an excess of judicial power. Instead, the appellate court held that any decision on the validity of the bidding process could only be made by the local construction bureau. Accordingly, it ordered the local construction bureau to act on Shuangfu's complaint within seven days of the ruling.

Shuangfu, after enjoying the thrill of victory in the lower court and the agony of defeat in the appellate court, was brought back to the start, serving its complaint at the door of the relevant, but originally unresponsive, local administrative department. To make matters worse, by the time the case had run its first judicial course, the local construction contract essentially was complete.

Like Shuangfu in *XinMi Construction,* Modern Wo'Er is at risk of a circular journey. Therefore, Modern Wo'Er's victory may be short-lived and certainly is bittersweet. Yes, it received some satisfaction from the Court's admonition that the Chinese government owes it a response on its claims. But even if it ultimately secures a government ruling in its favor, it may again journey up the long ladder in appeals, and even find itself at the Ministry of Finance starting line once again. Its desired medical supply contracts have long been completed, and the prospect of an adequate remedy for Modern Wo'Er remains in doubt.

The Remedies Question—Is there any adequate remedy for Modern Wo'Er if its complaints are proven as fact? This is an important issue, implicating the true value of Chinese bid protests as an effective mechanism of public procurement supervision. Will the costs of protesting bids in China outweigh any benefits and dissuade future bidders from protesting to protect their legitimate rights and interests in the process?

Chinese procurement law does not provide for an automatic stay of procurement proceedings in the event a protest is filed. Rather, under GP Law Article 57, if a complaint is filed with the relevant finance department, that department has discretion to order cessation of the bidding process, but such a stay cannot exceed 30 working days. See also "Measures for Handling Complaints by Government Suppliers," Ministry of Finance Document No. 20 Article 22, effective September 2004 (Ministry of Finance Protest Rules). In contrast, the T/B Law is silent on specific protest procedures, but is supplemented by "Measures for Handling Complaints on Tender and Bidding Activities in Engineering and Construction," NDRC Document No. 11, effective August 2004 (NDRC Protest Rules). Unfortunately, the NDRC Protest Rules also are silent on whether the procurement process can be stayed pending a supplier complaint. The absence

of this prescription, however, is not fatal to the prospects of staying the bidding process or a newly signed contract under the T/B Law. Chinese administrative agencies wield considerable power and have tools at their disposal to effectively command a stay if they are so inclined. Ironically, the express power granted to the Chinese finance departments to stay the contract process pending a dispute might be less empowering than it seems at first glance. That any finance department-ordered stay cannot exceed 30 working days may prove a limit on power not imposed on any other Chinese agency regulating public purchasing activities.

It is conceivable then, that a non-monetary remedy for a protester, such as reinstitution of the procurement process, can be fashioned, and that, ultimately, the most suitable bidder will receive the contract (especially if protest proceedings do not drag on too long). However, to date, this looks like a rarity in China. Instead, most successful protesters must be satisfied with monetary damages. The sufficiency of such damages unfortunately remains a mystery for Chinese contractors.

The T/B and other Chinese laws speak of awarding damages, but in vague terms. T/B Law Chapter V, Legal Liabilities, states generally that "if losses are caused to others [by violation of provisions of the T/B Law], compensation liability shall be borne according to law." T/B Law Articles 50 and 53. The NDRC Protest Rules are even less helpful, stating simply that if the complaint is factually supported and shows an actual violation of the law, then punishment should be carried out according to the T/B Law and other relevant laws and regulations. NDRC Protest Rules Article 20. The GP Law and Ministry of Finance Protest Rules do not do much better in identifying the nature and extent of damages available in a successful protest, although their remedy provisions are written more clearly. See GP Law Article 73 and Ministry of Finance Protest Rules Articles 18 and 19; see also 1 IGC ¶ 38. Hence, there remains much uncertainty regarding the ultimate value of protesting contract awards in China.

Assuming Modern Wo'Er wins its protest (a result not pre-ordained), what should be the proper measure of compensable damages? This author has, so far, found only one case in China dealing with this important subject. In the case of *XiXian Bureau of Urban and Rural Constr. v. Xixian Constr. Co. et al.*, High People's Court of ShanXi Province, Finance Administrative Division Judgment No. 6 (1999), the appellate court overturned a damage award of RMB 34,210 against the local construction bureau (stemming from the XiXian T/B Office's proceeding with an illegal contract award). Although the basis for the original damage award is not fully articulated in the opinion, the award clearly exceeds mere restitution and appears to be based on expectation damages. In its review, the appellate court highlighted that the protester spent RMB 3,861 participating in the bidding, paid an industrial and commercial registration fee of RMB 255 and spent an additional RMB 300 for notarization. On this evidence, the Court reduced the award to RMB 4,416. As for the remainder of the damages granted by the lower court, the higher court, for lack of a more specific legal basis, ruled that there was no direct causal link between the relevant administrative act and the protester's additional losses.

Given the lack of legislative standards, the Court in *XiXian* certainly will not be the only Chinese court or agency to struggle with the proper measure of damages for a successful protester who misses the opportunity for a reinstitution of bidding procedures and another chance to win a contract. See Gordon, Constructing A Bid Protest Process: The Choices That Every Procurement Challenge System Must Make, 35 Pub. Con. L.J. 427 (2006).

This author has stressed to Chinese audiences that a real dilemma arises if a contract proceeds or is completed pending an ultimately successful protest. First, the system potentially has allowed performance of an illegal contract. Second, if the protester receives damages, then the Chinese government pays twice: once to the completing contractor, and again to the successful protester. Third, if the system only awards bid preparation and protest costs as damages in a successful protest, and protesters rarely get a second chance to win the subject contract, the burdens of protesting will exceed the benefits, and the protest system will wither from lack of participation. China needs to address this question forcefully if it wants to keep its protest system relevant.

Conclusion—There is no need to be wedded to preexisting notions of a best procurement system for China. A bifurcated system with the Ministry of Finance on one side and the NDRC and other agencies on the other can work as well as a unified framework, as long as the scope of the regulatory authority of each relevant agent is well-defined. Such an approach, however, would better serve the Chinese public if accompanied by a reliable and enforceable mechanism for resolving conflicts in regulatory authority, and a shift away from

Chinese agencies' tendency to flout efforts toward external oversight.

Similarly, there is no steadfast rule for the best way to deliver justice to wronged suppliers. Nevertheless, the Chinese procurement system would benefit from mechanisms to ensure swift, but fair, final determinations in bid protests. Moreover, leaving adjudicators without adequate standards for damage awards (especially considering that, in most circumstances, damages, not resolicitation or redirected contract award are the only remedy) unnecessarily creates uncertainty as to the overall value of the bid protest system and likely will lead to inconsistent results. Luckily, judges, in applying law to specific factual circumstances, send messages like the *Modern Wo'Er* opinions to remind society/people—inadvertently or otherwise—that these important issues need professional attention.

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