

# PEOPLE'S REPUBLIC OF CHINA

## THE FOUR INTO ONE PLATFORM: NEW REFORM INITIATIVES COMPOUND CHINA'S DISSECTED PUBLIC PROCUREMENT GOVERNANCE

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### 1. Introduction

For over ten years now, supervision and implementation of public purchasing activities in China has largely been divided among government agencies that jealously guard their share of their regulatory pie and covet the regulatory province of other agencies. Yet vested interests are now on the defensive, as a reform process seeks to collapse the segregated regulatory regimes into a more centralized governance structure. The idea is to combine construction tendering and bidding, government procurement, public land-use auctions and public asset exchanges under one management structure called the "Public Resources Exchange Center."<sup>2</sup> Hence, some refer to the reforms as the "four into one platform."<sup>3</sup>

This reform challenge seeks to reorder China's public procurement regulatory system, and the reforms have already gained traction in local government experiments.<sup>4</sup> More recently, pushed nationally by anti-corruption departments, the reforms are gaining some attention at China's central government level.<sup>5</sup> This article offers a description and analysis of the current governance structure for most Chinese

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<sup>1</sup> The author would like to thank Ms. SONG Ci for her assistance in gathering and interpreting research for this article. Any error or omissions, however, are mine alone.

<sup>2</sup> Wang Huai Jun, "Reflections On the Establishment and Development of the Public Resources Exchange Center" Transcendent Development: The Superior Paper Collection of the 10<sup>th</sup> 7 Provinces and Cities Construction Market and Tender and Bidding Union Conference (2010)(in Chinese) available at <http://www.cncrcc.com/news/xueshujiqialiu/xsjl/2010029/6089.shtml>

<sup>3</sup> The term "four into one platform" is cited by the Government Procurement Information Newspaper in a special report entitled "Why is Government Procurement Supervisory Power Being Passed in to Other's Hands," Government Procurement Information Newspaper, September 23, 2011 (in Chinese) available at [http://www.caigou2003.com/new/local/news/20110923/news\\_197171.html](http://www.caigou2003.com/new/local/news/20110923/news_197171.html). On October 26, 2011, Government Procurement Information Newspaper held a special expert's roundtable discussion on the subject in Beijing in which this author participated. Proceedings of the roundtable (in Chinese) are available at [http://www.caigou2003.com/news/local/news/20111104/news\\_204783.html](http://www.caigou2003.com/news/local/news/20111104/news_204783.html).

<sup>4</sup> On July 25, 2011, various provincial and local departments of supervision (China's administrative compliance and counter-corruption regulator) convened a conference in Wuhan to discuss local reform experiences and promote the new model. A report on that conference can be found in a new monthly magazine, Public Procurement, August 8, 2011, page 20 (in Chinese).

<sup>5</sup> Two national level policy documents are cited as proof of Chinese central level support for the establishment of unified Public Resource Exchange Centers. These are the October 21, 2007 "Work Report of the 17<sup>th</sup> Conference of the Central Discipline Inspection Commission of the Communist Party" available

public procurement and the reforms underway, identifying some issues implicated by with the reforms. Despite the promise of reform, unification of Chinese public purchasing management remains distant. As demonstrated in this article, China continues to embrace a dispersed, fluid and arguably experimental framework for public procurement governance. The burdens of such uncertainty and administrative flexibility continue to fall on market participants.

## 2.0 The Dominant Institutional And Regulatory Framework For China's Public Procurement Regime

### 2.1 Dissected Governance and Institutional Complexity: Vertical Regulation

Suppliers wishing to sell to the Chinese government must wade into the morass that is China's bifurcated, indeed multiarticular, regulatory environment for public procurement. Different Chinese government agencies jealously guard their specific regulatory spheres in an effort to maintain their ability to self-regulate their activities with little interference from other government agencies.<sup>6</sup> Comically, while guarding their own turf, Chinese regulators occasionally claim the turf of other departments. At other times, administrative departments soberly fear treading on the purchasing world of other Chinese agencies. Such timidity may also be shared by Chinese courts.<sup>7</sup> Sadly, tensions among various national agencies often debilitate China's reform process. One glaring example is the demise of plans to amend China's 1995 Construction Law. Turf battles among the myriad of agencies empowered to supervise construction in one form or another caused the collapse of the redrafting efforts and the enterprise has been shelved since 2008.<sup>8</sup>

The problem lies in China's administrative system being divided into "*xitong*" (系统--pronounced sheetong), a Chinese term delineating a line of administrative power emanating from a national level ministry down vertically (the *tiao*, 条) through lowers levels in the Chinese polity. A number of these vertical structures monopolize certain public development activities, including project approval, project design, project/contract award, even administrative resolution mechanisms for project-related disputes.

Key vertical structures for the management of China's public procurement include, but are not limited to, the Ministry of Finance ("MoF") *xitong* for the management of purchases of goods and services for government departments and other public agencies;<sup>9</sup> the National Development and

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at [http://news.xinhuanet.com/newscenter/2007-10/26/content\\_6953648\\_2.htm](http://news.xinhuanet.com/newscenter/2007-10/26/content_6953648_2.htm); and The Work Report of the 5<sup>th</sup> Meeting of the 17<sup>th</sup> Conference of the Discipline Inspection Commission of the Chinese Communist Party (January 11, 2010) (in Chinese) available at [http://news.xinhuanet.com/politics/2010-02/09/content\\_12960507\\_10.htm](http://news.xinhuanet.com/politics/2010-02/09/content_12960507_10.htm). This documents speak in generalities, so it is assumed that more forceful arguments are being aired internally within the Chinese polity.

<sup>6</sup> See Mitterhoff, Daniel, "Grappling with the Regulatory Environment for Chinese Public Procurement," 3 *International Government Contractor* ¶ 17 (West Publishing, March 2006) available at [http://works.bepress.com/daniel\\_mitterhoff/5/](http://works.bepress.com/daniel_mitterhoff/5/).

<sup>7</sup> See discussion of *Beijing Modern Wo'Er Trading Company v. Ministry of Finance of the People's Republic of China*, at page 6, *infra*.

<sup>8</sup> Interview with member of Construction Market Management Division, Ministry of Housing and Urban/Rural Construction (formerly China's Ministry of Construction), August 2009.

<sup>9</sup> Readers are cautioned to avoid confusion engendered by Chinese nomenclature. Although China's 2002 Government Procurement Law, Article 2, defines government procurement as encompassing the purchase of goods, construction and services, most construction procurement lies outside the Ministry of Finance (and local finance departments) *xitong*. Hence, in practice, the term "government procurement" in China relates largely to the public purchase of goods and services. Indeed, soon after the passage of the government procurement law, the Ministry of Finance passed its own tender and bidding rules for the procurement of goods and services. "Management Measures for the Government Procurement of Goods and Services through Tender and Bidding," Ministry of Finance Document No. 18 (2004). Outside the reach of the Ministry of Finance *xitong*, public purchasing largely falls under the provisions of China's 1999 Tender and Bidding Law, a regulatory sphere claimed by many *xitong* depending on the nature of the procurement at issue. See footnote 13, *infra*.

Reform Commission (“NDRC”) *xitong* for the management of centrally funded large scale infrastructure projects; the Ministry of Housing and Urban and Rural Construction (“MOHURD”) *xitong* for the management of general construction procurements; the Ministry of Transportation *xitong* for the procurement of the nation’s roads and highways; the Ministry of Commerce *xitong* for purchases of imported equipment and the Ministry of Railroad’s *xitong* for the construction and maintenance of the nation’s rail system. This deeply segmented administrative power structure imposes a very high compliance burden for those who want to take advantage of China’s public procurement market opportunities unless of course one wishes to operate solely within one vertical regulatory structure (within one *xitong*). Even then, poorly defined regulatory overlaps present hazards for the unwary, as in the case where a procurement intermediary who thought it was in compliance with the requirements of a local municipal construction department got blindsided by a fine from a provincial level office of the NDRC.<sup>10</sup>

The drafters of China’s 1999 Tender and Bidding Law punted on issues of system governance, leaving it to China’s State Council (the Chinese executive) to later name “the relevant department of administration and supervision” that would have to power to hear complaints and impose sanctions under the law.<sup>11</sup> The following year, the State Council established a rather flimsy division of supervision and implementation for public (and many private) construction-related project biddings--along functional lines as infrastructure, general construction, transportation construction, railway construction, waterworks construction, communications and information infrastructure, airport construction and the import of large electrical and mechanical machinery as follows:

According to the *Tender and Bidding Law of the People’s Republic of China* (referred to as “Tender and Bidding Law” below) ... the following opinions are now submitted for the work division of the administrative/supervisory functions and responsibilities of the relevant State Council Departments implementing tender and bidding activities (referred to as “tendering and bidding” below):

1. Personnel from the National Development and [Reform] Commission shall guide and coordinate tender and bidding work for the whole country, and in coordination with relevant administrative regulatory departments establish a set of rules for the Tender and Bidding Law, comprehensive policies, and the concrete scope of projects that must be carried out through tendering—size and scale standards as well as those projects not suitable for carrying out tendering--reporting [the same] to the State Council-- and setting the publications for advertising tenders, as well as other media and websites. According to the Tender and Bidding Law and nationally relevant regulations and policy, relevant administrative regulatory departments can jointly or separately stipulate concrete implementing measures.
2. Project approval departments, when carrying out required research reports on the feasibility of a tender project, will determine the tendering methods for the project (entrusted tendering or self-tendering) as well the scope of national funding for the tender project (issuing initial plan). After project approval, [there must be] timely reporting to the relevant administrative regulatory department regarding the situation of the decided tender method and scope, etc.
3. As to supervision and enforcement of illegal activities, like a leak of confidential information, a leak of the base price, collusive tendering, collusive bidding, discriminatory elimination of bidders, etc. in the course of

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<sup>10</sup> Hebei Yanzhao Engineering and Construction Management Company v. The National Development and Reform Commission of Hebei Province, Intermediate Court of Shijiazhuang Municipality (First Level Administrative Division Decision No. 00011)(2005)(on file with author).

<sup>11</sup> 1999 Tender and Bidding Law, Articles 61 and 65.

tendering and bidding (which includes bidding, opening of bids, evaluation of bids and award), complaints by bidders and other interested persons should be accepted and handled by the relevant administrative regulator department responsible according to division of work now in force. According to this principle, the supervision and enforcement of tender and bidding activities on Industrial (including the State Economic), Water Resources, Transportation, Railways, Civil Aviation, Information Industries etc. business and industrial projects, are divided among the responsible administrative departments for Economics, Water Resources, Transportation, Railways, Civil Aviation and Information Industries, etc. The supervision and enforcement of tender and bidding activities on all building projects, including carrying out subsidiary installation construction and placement of complete wiring, piping and equipment projects, is the responsible of the administrative regulatory departments for construction. The relevant administrative regulatory departments must, upon finding problems in the process of their supervision, timely notify the project approval department. According to the situation, the project approval department should either temporarily stop prosecution of the project or temporarily stop payment of funds according to law.

4. Certifications for the qualifications of tender agent enterprises engaged in tender agency business for various construction projects will be determined by the administrative regulatory department(s) for construction. Certifications for the qualifications of tender agent enterprises engaged in tender agency business for the import of construction-related mechanical and electric equipment will be determined by the administrative regulatory department(s) for international trade. Determination of certification for the qualifications of tender agency enterprises engaged in other tender agency business, shall be set by the relevant administrative regulatory departments according to the division of functions and responsibilities now in force.
5. The National Development and [Reform] Commission is responsible for appointing special supervisory personnel for the organization of important large scale national construction projects and carries out supervision and inspection of construction tender and bidding in the process of construction of important large scale national construction projects.

Each relevant department should perform their separate duties, closely coordinate and jointly, positively perform the supervision and management work of tender and bidding, strictly in accord with the above division of functions and responsibilities. According to the provisions of the Tender and Bidding Law, the People's Government of each Province, Autonomous Region and Self-Administered Cities should formulate tender and bidding management measures according to local realities.<sup>12</sup>

See "Opinions on Implementing the Divided Functions of Administrative Supervision of Tender and Bidding Activities for the Concerned Departments of the State Council," State Council Office of Legal Affairs, Document No, 34 (2000)(hereinafter referred to as "State Council Document No. 34 (2000)).<sup>13</sup>

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<sup>12</sup> The closing clause of the State Council Opinion authorizes only the highest level of local government, namely provincial level governments, to formulate management measures for tendering and bidding. (Mainland China has four autonomous regions--Inner Mongolia, Xinjiang, Tibet and Guangxi—and four self-administered cities--Beijing, Shanghai, Chongqing and Tianjin--each the same in political status as a province). No lower levels of Chinese government are so empowered, which raises questions about the legality of municipal governments (other than the self-administered cities) enacting four into one platform reforms. See discussion Section 5.2, *infra*.

<sup>13</sup> "Opinions on Implementing the Divided Functions of Administrative Supervision of Tender and Bidding Activities for the Concerned Departments of the State Council," State Council Office of Legal Affairs, Document No, 34 (2000) available at . [http://www.hljsl.gov.cn/website/ZBNr.aspx?ID\\_XwFb=3526&XWTYPE=ZCFGCX](http://www.hljsl.gov.cn/website/ZBNr.aspx?ID_XwFb=3526&XWTYPE=ZCFGCX). Since China often changes the names of administrative departments names shift sectoral oversight between departments, readers may find it easier to focus mor

While the failure of the State Council to more pointedly define power balances among the agencies designated to regulate tender and bidding activities is troubling, the State Council's repeated reference to abstract "relevant departments" is downright disturbing.<sup>14</sup>

State Council Document No. 34 (2000) unleashed a process of both competition and cooperation among various *xitong* to develop overarching rules for implementation of the tender and bidding law, but also rules particular to specific construction sectors, which remain jealously guarded by government agencies that claim a regulatory monopoly over the same.<sup>15</sup> Hence the plethora of departmental rules under the Tender and Bidding Law, issued jointly or individually by interested agencies and local governments. The reasons why the State Council embraced, and continues to embrace in the face of system dysfunction, such rent-seeking and competition among its departments remains a mystery.<sup>16</sup>

Notably, State Council Document No. 34 (2000) is silent about the role of China's Ministry of Supervision and local supervisory departments in the oversight of the country's tender and bidding activities. Nevertheless, such oversight follows easily from the broad investigative powers granted the supervision departments pursuant to China's 1997 Administrative Supervision Law.<sup>17</sup> This power is recognized by other *xitong*. When a group of ministries issued Tender and Bidding bid protest rules, they advised that if in the process of handling bid complaints, regulators discover actions by government departments and/or personnel in violation of laws, regulations and/or discipline, they should refer such matters to the Supervision Departments or Discipline Inspection Commissions for penalty.<sup>18</sup> Now, in places adopting the four into one platform reforms, primary authority for investigating and handling of bid challenges may shift to the Supervisory Departments, with the

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on the functional role, rather than the title of *xitongs*.

<sup>14</sup> The uncertainty of Chinese laws and regulations maybe intentional as to ensure administrative flexibility in responding to a quickly and rapidly changing environment, but the downsides are quite obvious. See Peerenboom, Randall, China's Long March toward Rule of Law (Cambridge University Press 2002) at page 251 ("Regardless of the reason, the excessive generality and vagueness of PRC laws give local authorities great leeway in interpreting and implementing them, often undermining the predictability and certainty of law. At a minimum, it typically increases transaction costs by making it more difficult, time consuming and expensive to figure out just what the rules are at any given time or at any given place. At worse, it breeds corruption and a reliance on connections that erodes the normative force of law.") Chinese public procurement rules are also "deliberately ambiguous." Wang, Ping "China's Evolving Legal Framework on Public Procurement," 6 P.P.L.R. 285, 302 (2004).

<sup>15</sup> China's National Development and Reform Commission remains the titular head of China's Tender and Bidding System, but as this author notes in a previous article, the NDRC's power in this area is more akin to a "king among autonomous princes." Mitterhoff, Grappling With the Regulatory Environment, *supra* note 6.

<sup>16</sup> This author has long held an untested theory that since agencies in China are very powerful, and the State Council needs them to solve pressing problems (of which there are many in China), the State Council chooses not to create animosity by clearly designated one agency over another for administrative management of less pressing matters. Why give administrative departments additional, but seemingly unnecessary, reasons to resist cooperation in solving more important issues? Another reason to explain the dynamic is provided by George Washington University Law School Professor Donald Clarke who once opined that an unwritten rule of Chinese constitutional law is that one Chinese administrative department cannot tell another administrative department what to do. No matter the reason, exploration of this important political question is well beyond the scope of this article.

<sup>17</sup> 1997 Administrative Supervision Law of the People's Republic of China (as amended), Articles 2 and 6.

<sup>18</sup> "Measures for Handling Complaints Regarding Tender and Bidding Activities on Construction Projects" Order No. 11 (2004) issued jointly by the National Development and Reform Commission, Ministry of Construction, Ministry of Railways, Ministry of Transportation, Ministry of Information Industry, Ministry of Water Resources and China Civil Aviation Administration (In Chinese) available at

[http://www.sdpc.gov.cn/zcfb/zcfbqt/zcfbqt2004/t20050526\\_4329.htm](http://www.sdpc.gov.cn/zcfb/zcfbqt/zcfbqt2004/t20050526_4329.htm) and available in English with subscription at [www.lawinfochina.com](http://www.lawinfochina.com). C.f., "Measures for Handling Complaints of Government Procurement Suppliers, Ministry of Finance Order No. 20 (2004) at Article 25 where investigation and administrative handling of violations of law and discipline are to be referred to abstract "relevant departments," without specifying the Supervision Departments or the Discipline Inspection Commissions. Available in Chinese at

<http://vip.chinalawinfo.com/NewLaw2002/SLC/SLC.asp?Db=chl&Gid=55142> and English with subscription at <http://www.lawinfochina.com/Display.aspx?lib=law&ID=3706>.

traditional *xitong*'s role subordinate, if not eliminated.<sup>19</sup>

The emergence of China's 2002 Government Procurement Law on the heels of the 1999 Tender and Bidding Law also reflects competition among *xitong*. China's Ministry of Finance belatedly realized that, although the impetus behind the Tender and Bidding Law was a response to poor construction quality and related issues of public safety, it was essentially a public procurement law with implications for public finance and best value procurements. Such began the drive for a Chinese government procurement law modeled on those of advanced economies. During the drafting process for the China's 2002 Government Procurement Law, the construction supervision *xitongs* (identified in State Council Document No. 24 (2000)) lobbied hard to limit the definition of "government procurement" to the purchase of goods and services only, with construction excepted. Indeed, this author was designated to debate with an NDRC representative at a government procurement law drafting conference on this exact issue, arguing successfully (at least as goes the final text of the law) that the generally accepted international definition of government procurement, which includes the purchase of "goods, services and construction," should prevail. It proved a rather limited victory, however, as while the government procurement law designates the Ministry of Finance and local finance departments as the supervisory departments for broadly defined government procurement, the finance department *xitong* has been unable or unwilling to assert regulatory authority over most public construction in China.<sup>20</sup> Consequently, very little public construction falls within its jurisdiction.<sup>21</sup> Practically then, when one refers to "government procurement" in China, it generally means only the procurement of goods and services.<sup>22</sup> And that too may find limits, as some goods purchasing (e.g., medical devices for public hospitals and the import of electrical and mechanical equipment) remains out of the reach of financial department oversight.<sup>23</sup>

The 2002 Government Procurement Law shares some of the general ambiguity found in State

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<sup>19</sup> See discussion Section 4, *infra*.

<sup>20</sup> Confusion over the proper supervisory department for "government procurement of construction" in China is due in part to Article 4 of China's 2002 Government Procurement Law which states that: "Where government procurement of construction takes the form of public bidding, then the tender and bidding law should be used." It is not clear whether this is a reference to use the procedural mechanisms in the 1999 Tender and Bidding Law when administering bids for government procurement of construction, or a substantive referral to the 1999 Tender and Bidding Law which shifts oversight of government procurement of construction to a regulator other than the Ministry of Finance. For a more detailed analysis of the implications of 2002 Government Procurement Law, Article 4, see Wang, Ping and Xinglin Zhang, *Chinese Public Procurement Law: An Introductory Textbook*, pages 88-90 (in English) available at <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/chinesepublicprocurementlawintroduction.pdf>.

<sup>21</sup> A recent sop to the Ministry of Finance, and further evidence of the ever-shifting sands of Chinese procurement regulation, can be found in the newly issued "Implementing Regulations for the Tender and Bidding Law" which suggests a greater oversight role for Ministry of Finance as regards budgetary control and overall policy in the government procurement of construction. "Implementing Regulations for the Tender and Bidding Law," State Council Order No. 613 (issued December 20, 2011, effective February 1, 2012) at Article 4, discussed further in Section 6, *infra*. With history as a guide, however, the more dominant regulators of bidding activities in China will endeavor to prevent any real oversight of public construction by Chinese finance departments.

<sup>22</sup> See footnote 10, *supra*. See also European Union Chamber of Commerce in China, *Public Procurement in China: European Business Experiences Competing for Public Contracts in China* (2011), Section 3 (in English) available at [http://www.eurochamber.com.cn/images/documents/marketing\\_department/beijing/publications/2011/PP%20Study%20EN%20Final\\_0421.pdf](http://www.eurochamber.com.cn/images/documents/marketing_department/beijing/publications/2011/PP%20Study%20EN%20Final_0421.pdf) (which estimates government procurement under the finance *xitong* at a value of ¥7 Billion, but China's "overall public procurement market" reaching a value of ¥6.8 Trillion).

<sup>23</sup> Cao Fuguo, "Developments in China: The Regulations Implementing the Chinese Government Procurement Law and Progress to GPA Accession" 6 P.P.L.R NA205, note 14. Professor Cao views the Ministry of Finance's limited remit as the Ministry of Finance intentionally yielding to avoid conflict with the regulatory spheres of other departments. Another view, however, and one to which this author subscribes, is that despite the 2002 Government Procurement Law broadly covering, the purchase of goods, construction and services, the Ministry of Finance faces administrative and power balance realities, even possessing a fear of other power centers, that prevents it from asserting its institutional interest for greater control over China's public purchasing regime.

Council Document No. 34 (2000). For example, after highlighting the key regulatory role for the finance departments, the law also muddles about unspecified “other relevant departments” carrying out the supervisory and administrative functions in connection with government procurement.<sup>24</sup> Additionally, the law designates a general oversight role for both China’s supervision and auditing departments, failing, however, to specifically delineate or reconcile the specific supervisory roles of the supervision and audit department vis-à-vis the financial department’s primary supervisory role over “government procurement.”<sup>25</sup>

The 2002 Government Procurement Law does, however, inventively separate government procurement supervision from purchasing, the former vested in the Ministry of Finance and lower finance department(s) *xitong* and purchasing power vested elsewhere.<sup>26</sup> Ironically, this may have blunted the effect of the law, designed to strengthen the power of the finance department *xitong*, by weakening the same in relation to other *xitong* that hoard power related to public procurement. Indeed, a large segment of the public procurement market is still managed by departments that serve as both “player and referee” thus rendering fair and transparent procurement processes difficult to establish.<sup>27</sup> And while there have been some attempts to divide supervisor from purchaser under the Tender and Bidding Law, the results so far have been less than adequate.<sup>28</sup> Hence, those advocating the four into one platform reforms wisely claim the reforms serve further separation of supervision from implementation in public procurement and asset management, arguably reducing opportunities for high level government officials to intervene in procurement processes for illegitimate ends.<sup>29</sup>

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<sup>24</sup> 2002 Government Procurement Law of the People’s Republic of China, Article 13, Paragraph 2 and Article 67.

<sup>25</sup> Compare Articles 13, 67, 68, 69 and 70 of the 2002 Government Procurement Law. Article 13 states that “the financial departments of the people’s governments at various levels are in charge of supervision and administration of government procurement and shall perform their supervisory and administrative functions pertaining to government procurement according to law. Other *relevant departments* of the people’s governments at various levels shall, according to law, perform their supervisory and administrative functions in connection with government procurement activities” (emphasis added). Article 67 states that “the government administrative departments responsible for government procurement in accordance with laws and administrative regulations shall, in accord with the division of their duties, strengthen supervision over government procurement activities.” Article 68 states that “the audit department shall supervise government procurement by means of audit. The government procurement supervisory and administrative department and all government procurement parties shall accept the supervisory audit by the audit department with respect to their government procurement activities.” Article 69 states that “the supervision departments shall strengthen supervision over government organs, state civil servants and other personnel of state administrative organs who participate in government procurement activities.” Article 70 states that “any entities and individuals have a right to make complaints and accusations about illegal actions in government procurement activities and the *relevant departments and organs* should timely handle [the same] according to their respective functions and responsibilities (emphasis added). Further compare Articles 51-58 of the 2000 Government Procurement Law which provides a distinct, staged process for supplier complaints under the management of the finance departments and the courts.

<sup>26</sup> 2002 Government Procurement Law, Article 60.

<sup>27</sup> Qin Wei Bin, Considerations on Forging a Public Resources Exchange Platform By Relying on A Formal Construction Market, 3 *Construction Market and Tender and Bidding* 13 (2009)(in Chinese) available at <http://www.equip.com/Main/Detail.aspx?id=30573046> (noting that the operational method where the referee and implementer are in the same body lacks a system of mutual constraint and so it’s hard to realize the exchange principles of openness, fairness and justice). Mr. Qin is from the Chongqing Municipal Construction Exchange Center so, unsurprisingly, advocates the use of this pre-existing municipal construction center as the foundation for the new centralized platform. *Id.* at Page 15, Section 4.2.

<sup>28</sup> For example, starting in 2005, in order to distance supervisors from purchasers, Sichuan province required the mandatory use of purchasing intermediaries on projects where the bid inviting agency also had primary supervisory functions over the subject project. “Sichuan Provincial Measures for Tender Agents on Construction Projects,” 56<sup>th</sup> Sichuan Provincial People’s Congress, May 1, 2005 available at <http://wenku.baidu.com/view/fda1412a3169a4517623a305.html>. Of course, the inherent conflict of interest problem is not really solved by the false front of an intermediary, when that intermediary’s principal (the purchaser) and regulator are essentially the same office.

<sup>29</sup> Liu Chang Bao, “The Marketization of the Public Resource Exchange,” 19 *China State Finance* 70 (2009)(in Chinese) available at <http://www.cnki.com.cn/Articles/CJFDTotal-ZGCE200919030.html>; Wang Yan Lun, “Exploration of the Standard Operation and Management Situation of a Local Public Resource Exchange,” 19 *Management and Tender and Bidding* 7, 9

Splintered governance also takes a toll on the regulated. Nonsensically, there are at least four different licensing regimes for the qualification and licensing of commercial purchasing intermediaries.<sup>30</sup> (Both the 2002 Government Procurement Law, Article 19, and 1999 Tender and Bidding Law, Article 12, contemplate that end-user purchases will entrust their tender/bidding and other procurement activities to the commercial intermediaries). Consequently, to ply their trade across China's whole procurement system, they need to satisfy the demands of different *xitong*. As noted earlier, one unwary intermediary who thought it had met the requirements of a local municipal construction department *xitong* was unexpectedly fined by the provincial level NDRC *xitong* (and lost in court challenging the fine).<sup>31</sup> Then there is the amazing case of *Beijing Modern Wo'Er Trading Company v. The Ministry of Finance of the People's Republic of China*,<sup>32</sup> where the Ministry of Finance refused to rule on a supplier's bid protest on the grounds that the subject project belong to the regulatory province of another *xitong*. The Beijing first level instance court, however, applying the definition of "goods" purchasing under the 2002 Government Procurement Law, rejected the Ministry of Finance's attempt to evade supervisory responsibility, finding instead that the "goods" purchase at issue fell clearly within the purview of the government procurement law.<sup>33</sup> Affirming that the Ministry of Finance was legislatively tasked with hearing complaints related to government procurement, the Court ordered the Ministry to rule on *Modern Wo'Er's* complaints. Instead of ruling on the complaints as ordered, however, the Ministry of Finance appealed the first level ruling. Outrageously, that appeal has remained pending for nearly six years.<sup>34</sup> It's no stretch then to conclude that China's framework for public procurement management engenders two forms of maladministration; enabling regulators to assert power in fields where they lack a strong jurisdictional remit or proper competence, yet shirk responsibility for carrying out public duties when they should otherwise legally be assumed.<sup>35</sup>

## 2.1 Management By Committee: Horizontal Regulation

Confusing matters further, Chinese public administration also has a line of authority reaching horizontally

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(2009) (in Chinese) available at <http://www.hnzbcc.org.cn/hk/showArticle.asp?ArticleID=564>. See also, "Grasp the Primary Contradictions of 'Supervision,' Carry Out System Innovation: A Conference on Innovations of the Tender and Bidding Supervision System of Some Provinces, Districts and Cities in the Country Convened in Wuhan," *Public Procurement*, August 8, 2011, Page 20 (in Chinese).

<sup>30</sup> "Measures for Certification as a Government Procurement Agency Organization," Ministry of Finance Order No. 61 (2010) (in Chinese) available at [http://tfs.mof.gov.cn/zhengwuxinxi/caizhengbuling/201011/t20101105\\_346129.html](http://tfs.mof.gov.cn/zhengwuxinxi/caizhengbuling/201011/t20101105_346129.html); "Measures for Certification of Tender Agency Organizations for Engineering and Construction Projects," Ministry of Construction, Order No. 124 (2007) (in Chinese) available at <http://vip.chinalawinfo.com/NewLaw2002/SLC/SLC.asp?Db=chl&Gid=88285>; "Measures for the Qualification Examination of International Tender Organizations for Electrical and Mechanical Products," Ministry of Commerce Order No. 6 (2005) (in Chinese) available at [http://www.gov.cn/zwgk/2005-08/15/content\\_22946.htm](http://www.gov.cn/zwgk/2005-08/15/content_22946.htm); and "Management Measures for Certification of Tender Agent Organizations on Nationally Invested Projects," National Development and Reform Commission, Order No. 36 (2005) (in Chinese) available at <http://vip.chinalawinfo.com/NewLaw2002/SLC/SLC.asp?Db=chl&Gid=60106>. The above documents are also available in English, with subscription at [www.lawchina.info](http://www.lawchina.info).

<sup>31</sup> See *supra*, Note 11.

<sup>32</sup> Beijing First Intermediate Court, Administrative Division First Level Judgment No. 432 (2005) (on file with author). See also, Mitterhoff, Daniel, "Beijing Court Orders Ministry of Finance to Rule on Supplier's Complaints, But Skirts Broader Issue of Schism in China's Procurement Supervision," *3 International Government Contractor* ¶ 98 West Thompson 2006) available at [http://works.bepress.com/daniel\\_mitterhoff/2/](http://works.bepress.com/daniel_mitterhoff/2/).

<sup>33</sup> *Id.*

<sup>34</sup> See Li Gang, "It's Difficult to Finally Adjudicate China's Top Government Procurement Case [Even After] Six Years" *Beijing Youth Daily* (April 19, 2010) (in Chinese) available at <http://news.163.com/10/0419/07/64K9G9S50001124J.html>.

<sup>35</sup> Wang, Ping and Xinglin Zhang, *Chinese Public Procurement Law: An Introductory Textbook* at Page 148 (in English) available at available at

<http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/chinesepublicprocurementlawintroduction.pdf>.

(the *kuai*, 快) from provincial and local governments across the descending vertical (*xitong*) line.<sup>36</sup> The horizontal governance structures are represented at the central, provincial, prefectural, municipal and even some county levels of Chinese government. The vertical *xitong* regulators run perpendicular down across the horizontal levels of government to as low as the municipal level. Consequently, a provincial construction department is answerable both to the national construction ministry, MOHURD, as well as the local provincial people's government. Similarly, a provincial finance department is answerable to China's Ministry of Finance and the relevant (horizontal) local provincial people's government. This "matrix" is replicated at lower levels of the Chinese polity to the extent that a municipal level construction department is answerable to the people's government of the municipality as well as the provincial construction department, etc.<sup>37</sup> At its lowest level, China's dissected procurement government manifests in different tender and bidding centers, and separate government procurement centers, in any given locality. These centers are instrumentalities of the horizontal level of government where a descending vertical *xitong* may terminate. The "centers" provide purchasing process implementation services. They also serve as general information outposts, central repositories for the filing of contract related documents and fora for opening of bids with attendant services for the certification/notarization of bidding processes. They may also provide centralized purchasing for various government departments at the same level.<sup>38</sup> A purchaser's use of these centers may be required by law (see 2002 Government Procurement Law, Article 18) or pursuant to other rules and regulations.

Local governments are faced head-on by the debilitating dynamics of competition among agencies for regulatory share. The battle lines for "departmentalism" as it is called in China may be fixed first at the national level *xitongs*, who write rules and policy documents to serve as instructions or guidance for their lower level counterparts. From there, subordinate level departments both write more rules (of dubious legislative character under China's 2000 Law on Legislative) and implement the rules emanating from all higher levels of the relevant *xitong*. They also follow rules issued by their respective local people's government (the horizontal regulator) which, incorrigibly, often issue their own local administrative regulations (by local legislatures) or local government rules (by local people's governments) on the same subject as those emanating from the central government.<sup>39</sup> Amazingly, as if to perpetuate these dynamics (but more a reflection of the polity trying to reconcile competing power centers), China's 2000 Law on Legislation treats departmental rules (emanating from national *xitong*) and local government regulations (issued from local *kuai* people's governments) as equal in the legislative hierarchy, with conflicts to be resolved by the State Council, not the Chinese courts.<sup>40</sup>

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<sup>36</sup> This creates some fascinating public management (regulatory "matrix") problems, a good description of which can be found in Lieberthal, Kenneth, Governing China: From Revolution Through Reform, Norton & Co. (2<sup>nd</sup> Edition 2004), pages 186-187.

<sup>37</sup> A horizontal *-kuai-* also runs along China's central government, at the level of China's State Council, tethering all national ministries and commissions to the Chinese Executive.

<sup>38</sup> While tender and bidding centers formed rather organically, Government Procurement Centers for handling centralized procurement for all agencies at a particular level of government are a creature of statute. 2002 Government Procurement Law, Article 16. Any items on the annual government procurement catalogue issued by finance departments must be purchased by centralized procurement organs. Id. at Article 18. All other procurements can either be purchased unilaterally by agencies (via hiring a commercial intermediary or otherwise) or the procurement voluntarily entrusted by the public purchaser to the government procurement center in the same jurisdiction. The list of projects for which procurements must be entrusted to the government procurement centers continues to grow. See e.g., "80 Types of Service Projects Recently Enter the Government Centralized Procurement Catalogue," 172 Government Procurement Newspaper 1 (February 24, 2012) (in Chinese) available at <http://www.gpnews.cn/zctt/9108.htm>.

<sup>39</sup> For example, most provinces and big cities in China have written their own comprehensive regulations for Tender and Bidding. See e.g. "Tender and Bidding Regulations For Tianjin Municipality," Tianjin People's Congress (November 12, 2004) available in English with subscription at [www.lawinfochina.com](http://www.lawinfochina.com).

<sup>40</sup> 2000 Law on Legislation of the People's Republic of China, Articles 82 and 86. Similarly, departmental rules issued by different national level *xitong* are also of equal authority. Id.

Project funding normally derives at the horizontal level of government, heightening competition among *xitong* at the same level, be it central, provincial or city. The *kuai*, being the forum for contest, can either allow the problem to fester or take action to reign in the wrangling *xitong*. Conversely any particular *xitong* can lobby its commensurate horizontal government in order to increase its power, relative to the other *xitong* in the relevant jurisdiction. Consequently, the power balance among *xitong* may actually differ from local government to local government. Alternatively, local governments may try to impose discipline over local *xitong* by usurping the power of all. Hence, added to the tension among *xitong* in any jurisdiction is the tension between horizontal government on the one hand and vertical regulatory structures on the other.<sup>41</sup> When suppliers complain that Chinese public contract management is dispersed and to succeed they have to engage a variety of purchasing regimes-- a costly endeavor for which such suppliers lack adequate resources<sup>42</sup>--they have unwittingly entered China's administrative matrix. Among the chaos of rules emanating from both vertical and horizontal regulatory agencies, an interested bidder is best served by trying to discover which specific regulator is ultimately tasked with responsibility for the project. This, in the absence of a more rational regulatory framework, offers the best instruction to determine which compliance structures will dictate the ultimate award of any contract.

While the maddening graphics of Chinese governance bedevils contractors, lawyers and compliance officers alike, it drives some horizontal levels of Chinese government to devise coordination schemes to rationalize supervision. One often finds departmental rules for specific project initiatives, or even tender and bidding generally, issued by multiple *xitong* (perhaps simply disguising the dominant *xitong* for a particular project, not a genuine attempt at coordination).<sup>43</sup> For project implementation, and to corral *xitong*, local (horizontal) governments sometimes create "leadership groups" made up of officials from various local *xitong* to supervise procurement projects. The introduction of the leadership group mechanism or other "management by committee" project initiatives adds yet another layer of confusing administration over Chinese public procurement, whereby the government may set up one committee to supervise the project and another committee to manage the project, the latter which then hires a commercial intermediary to carry out the bidding for the project as well as other project related activities. Tender and bidding service centers, in turn, provide the institutional forum for implementation of project-relevant procurement procedures. With so many entities stacked around the procurement process, messy problems of agency abound.<sup>44</sup> When trouble arises, the ultimate responsible party may be hard to identify and the different layers of project management and decision-making may try to distant themselves from, or even blame, each other.<sup>45</sup>

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<sup>41</sup> Relations between the central and local (horizontal level) governments in China can prove more horrendously dysfunctional than competition among *xitong*. For example, China's national government has been ordering certain local governments to stop building golf courses and to tear down redundant highway toll collection booths for years to no avail. See "Golf, Toll Stations and the Remnants of Feudalism," 29 *Oriental Outlook* (July 18, 2011) (in Chinese) available at <http://news.sohu.com/20110718/n313756160.shtml>.

<sup>42</sup> European Union Chamber of Commerce in China, *Public Procurement in China: European Business Experiences Competing for Public Contracts in China* (2011), Section 4, at footnote 22, *supra*.

<sup>43</sup> For example, the awkwardly named "standard construction of the Golden Sun model project and application solar energy light and electricity" program regulatory document was issued by four agencies, the Ministry of Finance, Ministry of Science and Technology, MOHURD and National Energy Department. See "The Ministry of Finance, Ministry of Science and Technology, Ministry of Housing and Urban and Rural Construction and National Energy Department Notice Regarding Strengthening the Standard Construction Management for the Golden Sun Model Construction and for the Application of Solar Energy Light and Electricity," Ministry of Finance, Economic Construction Division, Document No. 662 (2010). Given that the Ministry of Finance is listed first on Document 662, and that the document emanates from a division within that ministry, one might assume that the finance departments are the key implementers for this project, but that assumption needs to be tested, especially since the 2002 Government Procurement Law, at Article 60, prohibits the finance department from directly engaging in purchasing activities.

<sup>44</sup> See discussion, Section 5.4, *infra*.

<sup>45</sup> *Id.*

### 3.0 The Problem of Corruption in Chinese Public Procurement

Understanding the motivations behind the “four into one platform” reforms also requires an understanding of the operational challenges faced by China’s overall public purchasing system. Of late, things do not look so good. A growing chorus of public dissatisfaction with Chinese public procurement floods the internet. Increasingly there are reports of malfeasance and corruption on even the most high profile of China’s public projects. Even China’s Ministry of Finance admits that there is a problem of low quality high cost procurement, a phenomenon that has triggered the lyrical slogan “zhi mai gui de, bu mai dui de” which translates as “just buying expensively, not buying correctly.”<sup>46</sup> On the tender and bidding side, similar disgust is expressed through the catchwords “mingzhao anding,” meaning “open tender, block box award” reflecting general belief that China’s procurement processes are theater, with contract awards fixed behind the scenes.<sup>47</sup> The public airing shows progress, but repeated scandal and an inadequate administrative response sustains public dismay.

Much of the shenanigans have become the focus of some embarrassing media reports and telling public audits. Many laughs were generated when a group of officials from Liaoning Province purchased Apple’s I-Pad Touch 4 units under the justification that the items could serve as flash disks to move documents from computer to computer (one journalist mocked that the purchase could just as well be justified as flashlights).<sup>48</sup> Similarly, police in Suzhou felt compelled to justify why the technologies of the I-Phone were necessary for ensuring public safety.<sup>49</sup> And just months before China suffered a July 2011 crash on its widely heralded new high speed train network, it had sacked the Minister of Railways for “skimming off 1 billion yuan (U.S.\$ 152m) in bribes and keeping 18 mistresses,”<sup>50</sup> a connection not lost on the public.

China’s Ministry of Supervision recently circulated 20 classic cases of corruption in the construction field,<sup>51</sup> while China’s State Auditor increasingly reports of projects where bidding was evaded, where construction is commenced before bidding instituted, where biddings are carried out but in violation of the required procedures and controls, and where significant project funds are diverted by the use of false invoicing.<sup>52</sup> All this on China’s premier projects; namely the Beijing Olympics Construction,

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<sup>46</sup> Zhao Jian Hua, “The Finance Department Will Solve The Prominent Problem of ‘Low Quality High Price’ in Government Procurement” (China News Press February 12, 2007) (in Chinese) available at [http://finance.ce.cn/macro/gdxw/200702/12/t20070212\\_10405839.shtml](http://finance.ce.cn/macro/gdxw/200702/12/t20070212_10405839.shtml).

<sup>47</sup> Jie Guo Ren et. al., “Problems Existent in Construction Tendering and Bidding and the Exploration of Counter Strategies, Alliance of Project Managers, October 27, 2011 (in Chinese) available at <http://project.newssc.com/2011-10-27/95020.html>.

<sup>48</sup> Han Cong, “Government Tendering: The Wholesale Price Exceeds The Retail Price,” *Oriental Outlook* (April 21, 2011) pages 33-34 (in Chinese) available at [http://focus.news.163.com/11/0418/18/71UNA7A300011SM9\\_4.html](http://focus.news.163.com/11/0418/18/71UNA7A300011SM9_4.html).

<sup>49</sup> “Government Procurement Scandals Occur Frequently: Is There Any Supervision?” (in Chinese) available at <http://www.tianya.cn/publicforum/content/free/1/2066874.shtml>.

<sup>50</sup> “The new middle classes rise up,” *The Economist*, September 3, 2011, page 23. See also Li Ming San, “Ministry of Railways Liu Zhijun Falls Off The Horse,” *Phoenix Weekly* Hong, Kong (March 5, 2011) pages 20-27(in Chinese).

<sup>51</sup> Zhou Ying Feng, “The Supreme People’s Procurate and Ministry of Supervision Expose 20 Classic Cases in the Area of Construction and Engineering,” (Xin Hua News Agency May 2011) (in Chinese) available at <http://wenku.baidu.com/view/3232b777f46527d3240ce0e4.html>.

<sup>52</sup> State Auditor Office of the People’s Republic of China, “Audit Findings of the Beijing-Shanghai High-Speed Railway Construction Project in 2010”(March 23, 2011) (in English) available at [http://www.cnao.gov.cn/main/articleshow\\_ArtID\\_1132.htm](http://www.cnao.gov.cn/main/articleshow_ArtID_1132.htm); State Auditor Office of the People’s Republic of China, “Follow Up Audit Results of the 2<sup>nd</sup> West-East Gas Pipeline Project for 2010,” (February 1, 2011) (in English) available at [http://cnao.gov.cn/main/articleshow\\_ArtID\\_1124.htm](http://cnao.gov.cn/main/articleshow_ArtID_1124.htm); State Auditor Office of the People’s Republic of China, “Follow-up Audit Findings on the Revenues and Expenditures of the Beijing Olympics and the Construction of Olympic Venues,” (June

the West to East Gas Pipeline Project and the Beijing to Shanghai High Speed Rail.<sup>53</sup> Then again, China's State Auditor found only 19.7% of 10 randomly selected airport construction projects suffered irregularities in bid competitions.<sup>54</sup>

Local procurement scandals also make headlines. Officials in Changsha, Hunan province were detained pending investigation as to why an air-conditioning project on a government building ultimately cost ten times a similar project at a four star hotel (while, during official investigation, contractor gifts to an official's wife suspiciously get returned).<sup>55</sup> In yet another Hunan municipality, a mayor once praised for his expeditious provision of multi-lane roads to a remote travel/nature district now faces the vigil of a local policeman who has gone public with the suspiciously high cost and crumbling low quality of the once marveled access roads.<sup>56</sup> Unusual media attention followed a bid protest through the Courts in Guangdong province, on a project where a higher priced bidder won under questionable circumstances, until the matter was mysteriously moved off the Court's docket for "mediation."<sup>57</sup>

Despite all the open reporting—a very positive development—there remains a lingering sense that many wayward officials and manipulating contractors are not being adequately punished. Although each year officials are removed from office and prosecuted for corruption, yet those numbers seem miniscule compared to the overall sense that public procurement suffers from widespread fraud and abuse.<sup>58</sup> While the State Auditor increasingly describes misdeeds and estimates the cost of the same for society, its suggested remedies appear too light for any real deterrent effect (and, in any event, the state auditor lacks powers of enforcement). The number of published administrative penalty decisions debarring unethical contractors also appears small in relation to perceived incidents of corruption (most related to the submission of fabricated documents in bids and sometimes bid collusion).<sup>59</sup> Indeed prosecutions seem selective, as suggested by one unlucky official

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19, 2009 (in English) available at [http://cnao.gov.cn/main/articlesshow\\_ArtID\\_1057.htm](http://cnao.gov.cn/main/articlesshow_ArtID_1057.htm).

<sup>53</sup> *Id.*

<sup>54</sup> State Auditor Office of the People's Republic of China, "Results of an Audit and Examination of the Airport Construction Situation of Some Provinces, Districts and Cities," (February 14, 2011)(in Chinese) available at <http://www.audit.gov.cn/n1992130/n1992150/n1992500/2647672.html>

<sup>55</sup> Bo Tian Ming, "More Secrets Revealed on the Tender and Bidding of Changsha's Industrial and Commerce Building," *Oriental Outlook*, 31, 33 (August 18, 2011) (in Chinese) available at <http://news.sina.com.cn/c/sd/2011-08-15/114022992722.shtml>.

<sup>56</sup> Wei Yiping, "Gong Houqin: From Hero Cop to Challenger of Officialdom," 34 *Lifeweek* 80-82 (2011) (in Chinese) available at <http://lifeweek.qikan.com/ArticleView.aspx?titleid=slzk20113409>.

<sup>57</sup> Television Interview of Professor Wang XiXin, Beijing University Law School, available at <http://xiyou.cntv.com/v-3b67936a-d211-11de-bb43-001e0bbafb46.htm> (in Chinese).

<sup>58</sup> In 2010, employees at IBM were caught securing public contracts through offering "training trips" for officials to select European locations, causing the company to swiftly fire a number of employees." Wang Lin et al., "IBM's Storm of Clean Government," *CBN Weekly* (June 17, 2010) (in Chinese) available at [http://finance.ce.cn/macro/gdxw/200702/12/t20070212\\_10405839.shtml](http://finance.ce.cn/macro/gdxw/200702/12/t20070212_10405839.shtml). Notwithstanding this quick action, an internet survey found that 97% of Chinese netizens believed IBM, the company, engaged in bribery in China. See <http://www.techweb.com.cn/news/2010-06021/625070.shtml>. Unsurprisingly, there is no record of any punishment in China related to the incident, but IBM quickly settled a U.S. Foreign Corrupt Practices Act violation claim related to this and other incidents. Ando, Ritsuko et al., "IBM Pays 10 Million to Settle Foreign Corrupt Practices Claim," *Claims Journal* (March 23, 2011) available at <http://www.claimsjournal.com/news/national/2011/03/23/180894.htm>.

<sup>59</sup> One is able to find administrative decisions debarring contractors, available on line, but considering widespread stench of corruption in Chinese public procurement, one would expect more such decisions. Moreover, the decisions are largely conclusory, lacking any detailed analysis of facts or law. See e.g., "Punishment Decision Regarding Boade Trading Company Ltd.'s Actions Violating Law" Finance Department of Zhejiang Province Penalty Decision No. 3 (2011)(in Chinese) available at <http://www.zjzfcg.gov.cn/new/bgt/302793.htm>; Development and Reform Commission of Zhejiang Province, Administrative Penalty Decision No. 5 (2006)(in Chinese) available at <http://www.zjbid.cn/dzzw/zwt/cf2006/zfgfz2006-6.htm>; Construction Committee of Hangzhou City Administrative Penalty Decision No. 1 (2005)(in Chinese) available at <http://www.zjbid.cn/dzzw/zwt/cf2006/zfgfz2006-5.htm>. Occasionally news reports also advise of debarment actions: "The Ministry of Finance Penalizes Two Government Procurement Suppliers,"

who, upon his six-year conviction for taking kickbacks from suppliers for the public purchase of automobiles, decried that such kickbacks were not an aberration in the system, but rather an “open rule.”<sup>60</sup> Public perception remains that the system suffers deep rot with no end in sight; a monster gap between ever-growing reports of corruption and the Chinese state’s unwillingness and/or incapacity to sufficiently correct matters.<sup>61</sup>

#### 4.0 Herding the *Xitong* Into A Single Regime

Dysfunctional results from China’s dissected public procurement governance and the seemingly uncontrollable problem of procurement corruption are the key drivers of the “four into one platform” reforms. Indeed, experiencing the governance problem first hand, some local Chinese governments have been experimenting with collapsing the *xitong* responsible for public asset management and procurement into a single regulatory structure for some time. (Zhejiang province, somewhat incredibly, claims that such reforms go back to 2002 and the province prides itself as allegedly being the first to establish the new regime at the Chinese provincial level).<sup>62</sup> In turn, China’s central anti-corruption offices—namely the Chinese Communist Party’s Discipline Inspection Committee and its civilian counterpart the Ministry of Supervision—have embraced the idea of a single implementation platform, eager to merge the splintered regulatory regimes under their primary authority.<sup>63</sup> This has sharpened the debate between the reformers seeking to centralize the management of public assets and the traditional *xitong* struggling to maintain regulatory share.

The most radical reforms have come to be known as the “Hefei Model,” an honor bestowed by China’s Discipline Inspection Commission on Hefei Municipality, capital of Anhui Province, for combining dispersed procurement and public asset exchange centers into one platform under the local horizontal government with a key role for the local Supervision Bureau (the civil counter-corruption agency).<sup>64</sup> Hefei city also represents one of the bigger sized jurisdictions to opt for a fundamental restructuring of the system. Comparison with other jurisdictions, namely Wuxi city in Jiangsu Province and Zhuzhou City in Hunan Province, provides a useful backdrop for understanding the different centralized platform reform models.

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November 2, 2009 (In Chinese) available at <http://finance.stockstar.com/JL2009110200002047.shtml> and “Ministry of Finance for the First Time Penalizes Four Government Procurement Evaluation Experts,” October 16, 2009 (in Chinese) available at [http://www.ccg.gov.cn/cggt/201009/t20100929\\_1263642.shtm](http://www.ccg.gov.cn/cggt/201009/t20100929_1263642.shtm). Surprisingly, research has uncovered only one available written judicial opinion evaluating a case where a supplier challenged its debarment, The supplier lost. Yunnan Te’Anna Medicine Manufacturing Company Inc. v. Board of Health of Jiading District, Shanghai Municipality, Shanghai No. 2 Intermediate Court, Administrative Final Decision No. 81 (2003) (on file with author).

<sup>60</sup> Zhou Wei, “Eating Kickbacks Becomes an *Open Rule* in Some Local Governments,” Economic Reference Newspaper (September 8, 2011) (in Chinese) available at <http://business.sohu.com/20110908/n318699737.shtml>.

<sup>61</sup> Successful procurement reform requires a proper “procurement environment,” meaning the political will and capacity to enforce the procurement rules. See Arrowsmith, Susan, Donald Wallace and John Linarelli, Regulating Public Procurement: National and International Perspectives, (Kluwer Law International, The Hague 2000), pages 18-20.

<sup>62</sup> Cheng Guang Yao, “Zhejiang is the First in Our Country to Establish a Public Resources Exchange Platform,” Zhejiang Today (December 2010) (in Chinese) available at <http://cpc.people.com.cn/GB/68742/162856/12230953.html>.

<sup>63</sup> Anti-corruption regulators in Zhejiang Province—namely the provincial Discipline Inspection Committee and the Provincial Department of Supervision—seem quite keen on solidifying “gains” in Zhejiang’s four into one platform experiments. See Ma Guang Ming, “Must Strengthen the Uniform Centralized Management of the Public Resources Exchange,” 9 Policy Outlook 15-16 (2010) (in Chinese) available with subscription at <http://wuxizazhi.cnki.net/Article/ZCLW201009007.html>. Mr. Ma is the Vice Chairman of the Zhejiang Provincial Discipline Inspection Commission and Head of the Zhejiang Provincial Bureau of Supervision.

<sup>64</sup> Promotional Video Prepared by the Hefei Municipality Tender and Bidding Center, April 10, 2011 available at

#### 4.1 Scope of Jurisdiction and Activities of the New Public Resources Exchange Platform

Hefei City's new rules require that the following activities be entrusted to the center platform (which is still referred to as a Tender and Bidding Center, not the more fashionable "Public Resources Exchange Center"):

1. All survey, design and construction of new building, renovations, and expansion projects (including areas such as housing, water treatment, transportation, roads, city government, parks, information, reconstruction, citizen safety, public electricity, public water, public gas, public heat and piping and wire installation, etc.), that according to law must use tender and bidding, as well as the selection of construction management entities and the project-related purchase of important equipment and materials;
2. The selection of suppliers for various centralized procurement projects at the municipal level; open bidding government procurement for the selection of suppliers on projects in the four districts of the municipality; new development districts; government services, cultural and lake districts; and the selection of suppliers on centralized procurement of pharmaceuticals;
3. The transfer of state or collectively owned asset rights or share rights;
4. The transfer of rights in land use management and industrial land use; as well as the transfer of exploratory or excavation mining rights; through biddings, auctions, and public price competitions;
5. Transfers of rights for managing city stations, roads/canals and railways; special industry management rights; naming rights for bridges and roads; and rights for billboard advertisements;
6. Transfer of rights in public bonds or bank mortgages: auction of seized assets by judicial and administrative enforcement departments, and auction of assets of state-owned enterprises or bankrupt enterprises where the state is the majority shareholder; as well as auction of car license plates;
7. Building leases for government organs and state institutions;
8. Bidding determinations for the services of construction consultants, evaluators and commercial bidding intermediaries on projects using fiscal funds in whole or majority part;
9. Selection of project entities for comprehensive agriculture development, scientific innovation, and high technology industrial projects using fiscal funds; as well as the selection of project entities for construction projects using BT and BOT financing methods;
10. Selection of entities for the design, construction and construction management of small scale construction projects under a limited value that entirely used state-owned investment funds or state investment in part, and well as project-related procurement of important equipment and materials; and,
11. Any other matters pertaining to the exchange of social and public resources or state assets where

other laws require tendering and bidding.<sup>65</sup>

Accordingly, the Hefei example of the single platform reforms represents a substantial concentration of power within one implementation structure. Beyond broad jurisdiction, comprehensive work tasks are assigned to the Center, such as 1) to enter into an agency entrustment contract with the [end-user] bid inviter; 2) to compile the solicitation documents and after confirmation with the bid inviter, to report up to the [supervisory] office; 3) to publish the bid invitation advertisement; 4) to accept the registration materials of bidders; 5) to check bidders qualifications and distribute/sell solicitation documents; 6) to respond to inquiries; 6) to accept bid cash security; 7) to organize bid openings and evaluations; 8) to publicize bid awards and issue bid award notices; 9) to return bid cash deposits and 10) to forward the written contract to the municipal [supervisory] office for checking and filing.<sup>66</sup> This extensive remit is mirrored in other jurisdictions that have adopted the single, centralized exchange platform.<sup>67</sup>

## 4.2 Supervision of the New Centralized Platform

Understanding the revamped oversight structure for supervision of the activities of the new “four into one centralized platform” is a bit more complicated. Three distinct management frameworks appear to be emerging,<sup>68</sup> although with the reforms so fluid, jurisdictions may be mixing and matching models:

4.2.1: Kuai Dominant Model: Under this model, the relevant local people’s government establishes a whole new Public Resources Exchange Center (or, as in Hefei, still calling it a “Tender and Bidding” Center) which is directly supervised by an entity equal in status to other high level administrative departments within that people’s government (provincial, prefectural or municipal level). At the top, a supervision committee is established for which the mayor or vice-mayor serves as committee chairman. Under that committee is a supervisory office (or secondary committee) whose directorship is staffed by a vice-secretary of either the local Supervision Bureau (the counter-corruption/administrative malfeasance regulator) or a vice head-level official from the local office of the [National] Development and Reform Commission (this official retains his position at the department of supervision or local NDRC office, while at the same time as assuming leadership in the supervision office). Below the supervision office is the centralized implementation platform (the new Public Resource Exchange Center) which is staffed by employees who formerly worked at the originally dispersed exchange centers in the subject jurisdiction.

This framework (the “Hefei model”) prides itself on separating supervision (first tier committee), management (second tier committee) and operation (third tier exchange center).<sup>69</sup> However, rumors are that the first level committee may simply be a coordination

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<sup>65</sup> Supervision and Management Measures for Tender and Bidding in Hefei City, Municipal Order No. 126 (2007), Article 5 (in Chinese) available at

<http://www.hfzbtb.cn/hfzbtb/InfoDetail/Default.aspx?InfoID=0321966-0d58-42ec-99e6-1-e5a5ef4f096&CategoryNum=006005>.

<sup>66</sup> *Id.* at Article 8.

<sup>67</sup> See e.g., “Management Measures for the Public Resources Exchange Center of Yi Chun City (For Experimental Implementation),” Yi Chun Government Office, Document No. 82 (2011) (in Chinese) available at <http://www.ycgzy.gov.cn/articeWeb!view.action?article.id=920&resourcecode=sjwj&serch=>

<sup>68</sup> Descriptions of the three models is drawn from Wang Huai Jun, *supra* note 2, pages 40-41, but the nomenclature and categorization are provided by this author.

<sup>69</sup> “Break Through Department Barriers, Construct A Sunshine Platform—Jiazhou, Guangxi Applies Innovation to its Government Procurement and Tender and Bidding System,” (July 30, 2010) available at <http://www.zzg.gov.cn/publixh/portal10/tab447/info83386.htm> and Liu Chang Bao, “The Marketization of the Public

vehicle—a mere talking shop—in some jurisdictions.<sup>70</sup> The “*kuai* dominant model strives to supplant former regulators with an entirely new horizontal oversight structure, although a single local *xitong* (either the local supervision bureau or the local NDRC) appears to play a secondary day to day monitoring role.”<sup>71</sup>

**4.2.2 *Xitong* Coordination Model:** This model strives to impose a horizontal coordinating committee that includes all relevant local *xitong* regulators as members (i.e., a “leadership group”) which supervises the activities of the new centralized “Public Exchange Resource Center.” The second level supervisory office is staffed by a narrower group of representatives from interested *xitong*. At the third tier is the new centralized exchange center. In this model, both the new horizontal regulatory structure, as well as the originally empowered *xitongs*, retain the power to monitor and punish illegal activities in the procurement, bidding or asset use-rights transfer processes.

The “*xitong* coordination model” model is applied in the city of Wuxi in Jiangsu Province, which recently published rules which outline the composition and roles of the relevant regulators.<sup>72</sup> The first tier “Public Resource Exchange Supervision and Management Committee” is “responsible for [1] the supervision and administration of public resource exchange in the entire city, [2] for high level policy decisions in the work of the public resource exchange and [3] for leadership and coordination of important matters in public resource exchange.”<sup>73</sup> Its composition is intensely diverse (nearly all *xitong* are represented) with the committee director drawn from the city executive and a broad membership of functional departments such as the local NDRC, finance service office,<sup>74</sup> construction bureau, supervision bureau, finance bureau, city administration and law enforcement bureau, the organization bureau, the state asset committee, auditors bureau, land and resources bureau, water resources bureau, the transportation and shipping bureaus, the environmental protection bureau, the city parks and forest bureau, the civil defense bureau and pricing bureau, as well as the city’s intermediate court and the Wuxi customs bureau.<sup>75</sup> The second tier supervisory office is composed of a narrower set of *xitong* membership, with just the local municipal NDRC, finance service office, finance bureau, and supervision bureau represented.<sup>76</sup>

In Wuxi city, the second tier supervisory office is tasked generally with providing guidance, coordination and management for public resource exchange with enumerated responsibilities as follows: 1) To research and set the standards and management system for

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Resource Exchange,” 19 *China State Finance* 70 (2009)(in Chinese) (illustrating the application of the *kuai* dominant model in Suiping County, Henan Province) available at <http://www.cnki.com.cn/Articles/CJFDTotal-ZGCE200919030.html>.

<sup>70</sup> Interview with reporter from Government Information Newspaper, October 31, 2011.

<sup>71</sup> See chart on page \_\_, *infra*.

<sup>72</sup> “Wuxi Municipality’s Management Measures for Public Resource Exchange (For Trial Implementation), Office of the People’s Government for Wuxi Municipality, Document 236 (September 14, 2011) (In Chinese) at <http://baike.baidu.com/view/6840578.htm>.

<sup>73</sup> *Id.*

<sup>74</sup> The Finance Service Center is an entity that exists only at the horizontal- *kuai* level of Chinese provincial, prefectural and municipal levels of government and is charged with coordination of the financial industry in any given locality (and in some places supervises local guarantee and microcredit companies). It should not be confused with any finance bureau which is tied to the Ministry of Finance *xitong*, tasked with public finance management. See Website of the Beijing Municipal Finance Service Center (in Chinese) at <http://www.bjjri.gov.cn/jgis/c10-a15.html>.

<sup>75</sup> “Wuxi Municipality’ Management Measures, *supra* note 42, at Article 4.

<sup>76</sup> *Id.* at Article 5

the services of public resource exchange; 2) to carry out supervision and inspection as to whether various types of public resource exchange in the entire city are, according to rules, being brought within the center as required; 3) to compile and update the “List of Projects of Public Resource Exchange in Wuxi Municipality;” 4) to guide the business activities of the Public Resource Exchange Service Center and carry out supervision of public resource exchange activities; 5) to accept complaints about the resource exchange and check and handle [the same], and coordinate and handle disagreements and disputes related to public resource exchange activities and 6) handle any other matters referred by the [first tier] supervision committee.<sup>77</sup> Yet, simultaneously, the “functional departments” (i.e. certain *xitong*) retain their legally based power and responsibilities over the process (when it involves them or perhaps when they want to involve themselves), specifically to 1) entrust intermediaries or the center to carry out public resource exchange; 2) to supervise and manage all parts of the process, and accept complaints from exchange participants; 3) to examine and confirm the exchange procedures, exchange activities and exchange results; 4) to establish and manage the roster of evaluation experts for local activities, and the training assessment and management of evaluation experts, as well as guide and supervise the use of the roster of experts and 5) to apply to the supervisory office to start new resource exchange projects within their [the functional *xitong*] scope of authority.<sup>78</sup> As if to reinforce the dual oversight structure, the relevant Wuxi Municipality rules later emphasize that “if an interested party believes that the exchange activities are illegal, they can complain to the relevant functional department or the supervisory office for handling and the functional department (or the supervisory office) should timely organize an investigation and findings” (emphasis added).<sup>79</sup>

4.2.3 Loose Unification Model: Under this model, no new integrated “public resource exchange center” is established, but rather the dispersed centers are combined within one pre-existing center. Titular supervision may be tasked to a particular *xitong* (usually, but not necessarily, either the local supervision bureau or the local office of the NDRC).<sup>80</sup> The subordinate centers are attached to the overarching center, but still operate with a significant measure of independence from the combined structure. Despite the appearance of centralization, regulatory power still rests with the traditional vertical regulator (i.e., government procurement under the finance department *xitong*; general construction under the construction department *xitong*; etc.). This model is applied in Zhuzhou Municipality of Hunan Province whose relevant rules, although merging functions into one tender and bidding exchange center, make clear that the city “water resources bureau, transportation bureau, finance bureau, land resources bureau, housing and construction bureau and the commerce bureau separately supervise and manage tender and bidding activities for projects in their relevant industries.”<sup>81</sup> Additionally, however, the city’s anti-corruption regulator, the city supervision bureau, is empowered to carry out administrative supervision over all tender and bidding activities in Zhu Zhuo municipality.<sup>82</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at Article 7.

<sup>79</sup> *Id.* at Article 21.

<sup>80</sup> Wang Huai Jun, *supra*, note 2 at page 41.

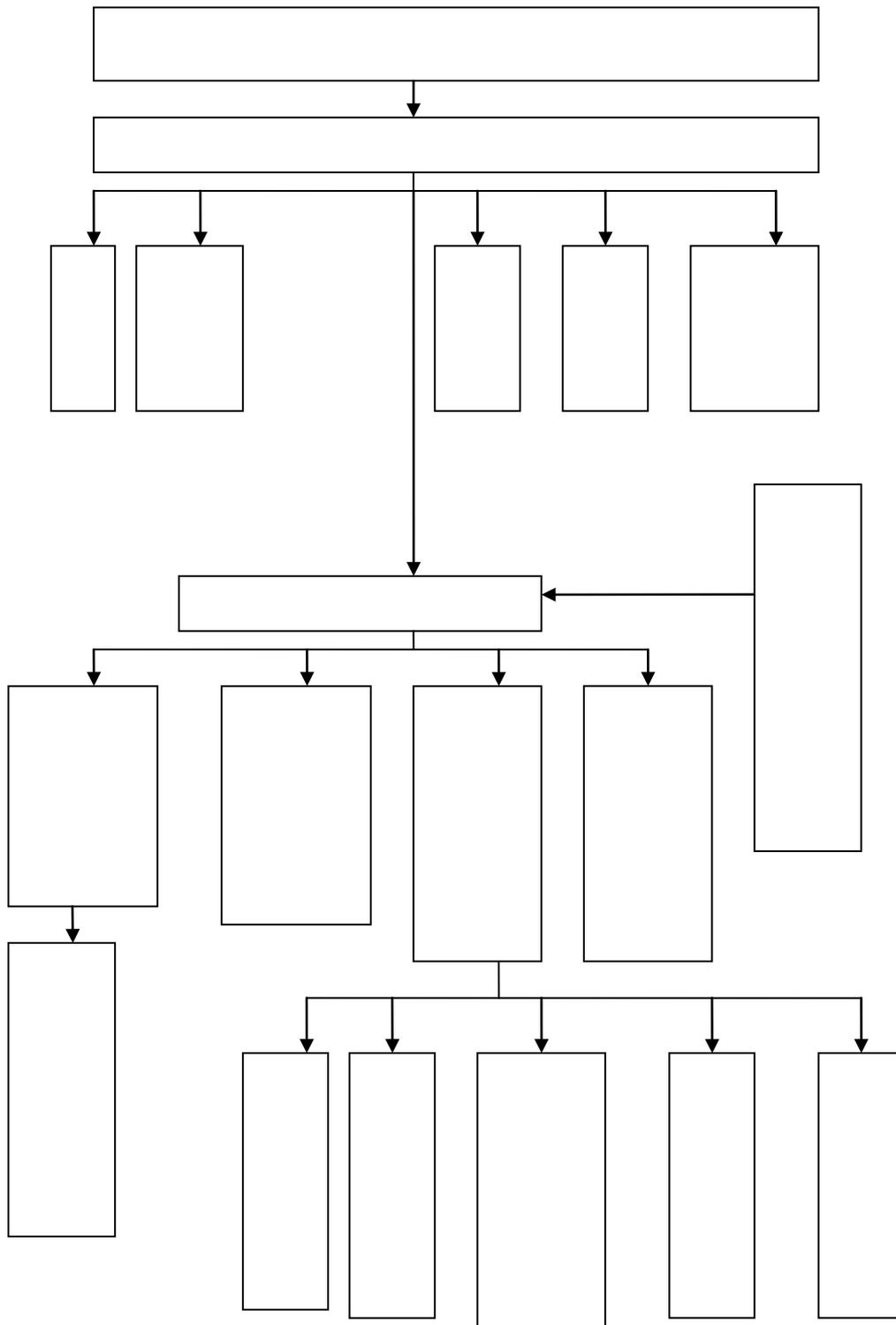
<sup>81</sup> Management Measures for Tender and Bidding in Zhu Zhuo Municipality, Zhu Zhuo Municipality Document No. 7

(2007), Article 6 (in Chinese) available at

<http://www/zsztb.net/zsweb/InfoDetail/Default.aspx?InfoID=3b20a3a2-159d-4be8-aae6-9854be11d7ce&CategoryNum=03003>.

<sup>82</sup> *Id.*, Article 7

Looking at the above systems, only the Hefei (Kuai Dominant Model) attempts to displace the traditional *xitong* regulator, but as shown in Section 5.1 below, this ouster has its limitations. As for the *Xitong* Coordination Model or Loose Unification Model, these reforms seem merely to isolate the problem of regulatory competition, not solve it.



Source: Hebei Tendering and Bidding Center Website (in Chinese) <http://www.hfztb.cn/HFZBTB/zwgk/001002>

## 5.0 Issues

The four into one platform reforms raise a number of interesting issues, many identified by those opposing the reforms.

### 5.1 Push Back By Vertical Regulators

In Hefei municipality, the new centralized platform was physically a merger of all the dispersed purchasing/resource allocation centers into the city's pre-existing Tender and Bidding Center, whose name is retained, but in all other respects, the reform is very much a "Kuai Dominant Model," where the city is trying to break the supervisory link of the traditional vertical regulators and assert the dominance of the city horizontal regulator. Indeed, a series of Hefei Municipal regulatory documents from 2006 to 2007 makes this intent quite clear.<sup>83</sup> However, the effort to completely banish traditional vertical regulators from the process appears to be weakening. By 2010, a role for the traditional *xitong* reemerges in yet another municipal regulatory document, the "2010 Management Measures for Joint Action in Cases of Violations in Tender and Bidding in Hefei Municipality" that puts the local supervision bureau as the head department for handling complaints—with a leading role of calling meetings about, determining measures for, and coordinating the joint investigation and handling of such complaints—yet enumerating, and reaffirming the traditional role of, vertical regulators in their respective spheres of power, much like Zhu Zhou city's primary regulatory document.<sup>84</sup> Moreover, for certain administrative penalties related to violations in tender and bidding, such as cancellation of licenses<sup>85</sup> and withholding of budget funds, the primary role of the *xitong* is confirmed.<sup>86</sup> This strongly suggests that vertical regulators are able to push back against efforts to centralize management of public procurement and public asset exchange, slowly undermining a "*kuai* dominant model" and refashioning the same akin to a "*xitong* coordination model."<sup>87</sup>

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<sup>83</sup> See e.g., "Opinions Regarding Establishing a Unified Market in Hefei's Tender and Bidding and the Further Strengthening and Standardization of Tender and Bidding Management Work," Hefei Document No. 20 (2006) at Article 3 ("After the organization of Hefei's Tender and Bidding Center, the city's construction exchange center, government procurement center, asset rights exchange center will be separated from their original supervisory departments"); "Hefei Municipality Measures for the Supervision and Management of Tendering and Bidding", Municipal Government Order, No. 126, Article 17 (2007)("if a unit or individual violates laws, regulations and rules of asset rights exchange, government procurement or tender and bidding, and there is a need to assess an administrative penalty, then the relevant departments should entrust the office of the [first tier supervisory committee of the city] to carry out [the assessment of the penalty]; and "Temporary Measures for the Handling of Tender and Bidding Complaints in Hefei Municipality," Hefei City Government General Office, Document No. 57; Article 3 (2007)(other relevant regulatory department should assist the [first tier city supervisor's office] in the latter's handling of complaints).

<sup>84</sup> "2010 Management Measures for Joint Action in Cases of Legal Violations in Tender and Bidding in Hefei City," No Document Number Listed (March 3, 2010), Article 4 (in Chinese) available at <http://www.hfztb.cn/hfzbtb/infodetail/Default.aspx?infoid=d70898ac-352c-43e2-b3f5-aaa0b25f7eac&siteid=1&categoryNum=006001003>.

<sup>85</sup> Local governments are prohibited from independently creating certain penalties, including revocation of business licenses. 1996 Administrative Penalty Law of the People's Republic of China, Article 11. This presents one barrier to a local horizontal government seizing full regulatory control over its regional public procurement regime.

<sup>86</sup> *Id.*, Article 7(3) and 7(4). For revocation of licenses and certificates, the construction bureau, parks and forest bureau, transportation bureau, water resources bureau, and business registration bureau are specifically mentioned. For withholding or cancellation of budget allocations, the finance bureau is specially mentioned. *C.f.*, Supervision and Management Measures for Tender and Bidding in Hefei City, Municipal Order No. 126 (2007), the key document originally establishing the "Hefei Model," at Article 17 ("Penalties should be imposed on any entity or individual who violate the law, regulations and rules for asset exchange, government procurement and tender and bidding. Relevant departments should entrust [the Tender and Bidding Center Supervisory and Management Committee] office to carry out [the penalties].

<sup>87</sup> The centralized platform reforms also raise the issue of which agency or agencies should have the power to debar

Interestingly, and unusually, the “2010 Management Measures for Joint Action in Cases of Violations in Tender and Bidding in Hefei Municipality” specifically expire at the end of five years, indicating that the document is a compromise among regulators, not a permanent settlement of regulatory boundaries, which are clearly still in flux. It is likely that further temporary regulatory compromises among interested power centers (vertical and horizontal) will show shifting boundaries in various jurisdictions for the foreseeable future. Indeed, as one knowledgeable commentator advises, the reconfiguration of local systems likely hides particular *xitong* vying to capture full regulatory share in process of reform, and that the particular *xitong* that succeeds in dominating may prove different in each jurisdiction.<sup>88</sup>

## 5.2 Legality of the New Centralized Platform Reforms

Push-back by vertical regulators is buffeted by some strong arguments that the centralized platform reforms are simply illegal. Strongest among them is that China’s 2002 Government Procurement Law already designates China’s financial department *xitong* as the primary regulator for such things as setting policy, approving choice of procurement procedures, and handling complaints in the government procurement process.<sup>89</sup> On what basis then, ask critics, may local governments transgress the law by placing broad supervision of government procurement activities with other regulators, especially when many of the reforms are grounded in local people’s government rules-- which stand a lowly fifth in China’s legislative hierarchy<sup>90</sup>-- national legislation standing first in the hierarchy, after of course China’s 1982 Constitution.<sup>91</sup> Similarly, according to one commentator, China’s 2009 State-owned Assets and Enterprise Law requires asset transfers to be handled at the provincial level, not the municipal level, calling into question other aspects of the four into

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contractors and suppliers who violate the relevant rules. For example, the “Management Measures for Public Resource Exchange of Yichun City,” Yichun Municipal Office Document No, 82 (2011) (see footnote no. 67, supra) suggests that this power rests with the Exchange Center proper, although its language is vague. Id. at Article 23.

<sup>88</sup> Interview with member of Henan Province Tender and Bidding Association, October 27, 2011.

<sup>89</sup> 2002 Government Procurement Law of the People’s Republic of China, Article 13. See also Ma Hai Rui, “Constructing the Uniform Platform, The Finance Departments Supervision Power Is Placed Elsewhere, Government Procurement Information Newspaper, September 23, 2011 (in Chinese) available at [http://www.caigou2003.com/new/local/news/20110923/news\\_197171.html](http://www.caigou2003.com/new/local/news/20110923/news_197171.html); Wang Wei, “Displacement of Supervision Power Over Government Procurement Is Neither Legal or Practical,” Government Procurement Information Newspaper, September 23, 2011 (in Chinese)The illegality of the reforms was also argued at the roundtable held by the Government Procurement Information Newspaper paper on October 26, 2011 (attended by the author). This is not surprising since the paper is recognized as official media for the government procurement system, with close connections to the Ministry of Finance *xitong*.

<sup>90</sup> China’s 2000 Law of Legislation recognizes five types of legislation/regulation: National laws, State Council Regulations, Local People’s Congress’s Regulations, Departmental Rules (emanating from national level *xitong*) and Local People’s Government Rules. There is actually a sixth type, treated more as policy statements than rules (although they find enforcement when applicants go for local project approvals) called Normative Documents. See generally, Chen, Jianfu, Chinese Law: Context and Transformation (Martin Nijhoff Publishers, Boston 2008) at Chapter 5.

<sup>91</sup> Indeed some power transfers are recorded in documents of even lower ranking. For example, the “Document of Baohe District, Hefei City on Construction Projects and Government Procurement Activities Entering the Hefei Tender and Bidding Center,” Hefei Tender Office Document No. 1 (2007), Section 2, says that that the Hefei’s first tier supervision office [for the new platform] will determine the choice of procurement procedure. In Chinese and available at <http://www.hfztb.cn/hfzbtb/InfoDetail/Default.aspx?InfoID=0d5b42c4-db9a-49ff-927b-cdb7c1e9175c&CategoryNum=006005>

one “public resource exchange” reforms at lower government levels.<sup>92</sup>

It would appear then that only new national legislation, passed by the National People’s Congress or its Standing Committee, could diminish the finance department *xitong*’s supreme power over policy, procedure, and disputes in China’s government procurement system (again, “government procurement” already limited to purchasing of goods and services by public departments and organizations, and not necessarily extending to public construction, import of mechanical and electric machinery, and/or health-related procurements). Moreover, the 2002 Government Procurement Law already establishes government procurement centers to mandatorily handle certain “government procurements” within a certain jurisdiction,<sup>93</sup> although there is no reason why such legislatively-created “government procurement centers” cannot be merged with other purchasing and asset exchange centers in a particular local jurisdiction—as long as supervision of the same remains with the Ministry of Finance and local finance departments. This is true despite the fact that, as a practical matter, the Ministry of Finance and financial departments hesitate in asserting their legislatively granted regulatory authority to assume the full control of public purchasing supervision.<sup>94</sup>

Inexactitude in the oversight of Chinese “tender and bidding,” in contrast, arises less from the timidity of any legally designated regulator, but rather because the relevant primary legislation, the 1999 Tender and Bidding Law, is silent as to any key regulator.<sup>95</sup> Upon that omission, the State Council beget a decade’s worth of chaotic public construction management, by imprecisely spreading tender and bidding management among multiple government departments, cultivating a fortress mentality whereby government departments cling to poorly defined, overlapping, functional roles.<sup>96</sup> In turn, indeed in reaction to the chaos, local governments have now embarked on their own structural and institutional reforms (namely consolidating supervision and management of public procurement activities), driven by yet other power centers, absent clear delegation of power from higher authorities to do so.<sup>97</sup> Accordingly, for the four into one platforms to really take hold, assuming they ultimately prove a better supervision model, China will be best served by eventually passing national legislation restructuring, and hopefully rationalizing, the regulatory framework for management of all Chinese public procurement. In the near term, however, a clearer statement of the preferred regulatory model, or detailed specification of distinct acceptable models, would go some ways to legitimizing and properly guiding any experimental reforms already underway.

### 5.3 Role of Counter-Corruption Departments

The prevalence of corruption in China’s procurement processes naturally justifies a greater

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<sup>92</sup> Qiao Jiao, “The Asset Rights Market Does Not Accord With The Public Resource Exchange Center,” *Property Rights Guide* (September 2009), Page 44 (in Chinese) available at <http://finance.jrj.com.cn/200910910308375967534.shtml>.

<sup>93</sup> 2002 Government Procurement Law, Articles 16 and 18. See also, footnote no. 37, supra.

<sup>94</sup> This is especially true vis-à-vis the National Development and Reform Commission, often referred pejoratively by other Chinese government departments as the “Little State Council.” The Treasury Department of China’s Ministry of Finance, largely tasked with management of the government procurement system, is a third tier level office of the Ministry, ill-positioned and thus too timid to take on the NDRC. This seems to be confirmed by the Ministry of Finance’s refusal to rule on the bid protests in the *Modern Wo’Er* cases discussed at pages 6-7, supra. The NDRC, along with the Ministry of Health, were the purchasers at issue in the *Modern Wo’Er* cases.

<sup>95</sup> 1982 Constitution of the People’s Republic of China (as amended), Article 89(1).

<sup>96</sup> See discussion pages 4-6, supra.

<sup>97</sup> That is, until very recently. See discussion, Section 6, infra.

regulatory role for China's counter-corruption departments, namely the Ministry of Supervision and lower level supervision departments and their Chinese Communist Party counterparts, the national and local Discipline Inspection Commissions. But do they bring anything new to the process as to justify the sidelining of the other vertical *xitong*? Moreover, is their growing role a product of strengthening horizontal supervision of public asset management, supported by local governments tired of the maladministration of other *xitong*,<sup>98</sup> or are they themselves just another rent-seeking *xitong*? If the former, can they serve as a disciplined coordinator of other wrangling departments? And if they want to replace the other *xitong*, do they have the skilled personnel to supervise the technical aspects of public procurement, skills very different from those required to control corruption?<sup>99</sup>

China's counter-corruption apparatus has never been excluded from oversight over China's public purchasing processes. Quite the contrary, as previously noted, Article 69 of the 2002 Government Procurement Law states that "the Supervision Departments retain supervisory powers over government organs, state civil servants and other personnel authorized by state administrative departments to participate in government procurement activities."<sup>100</sup> In turn, under Article 70 of the law, the supervisory departments, while not specifically mentioned in the article, arguably retain some power to hear complaints alleging violations of law in the procurement process<sup>101</sup> (although operation of the formal, detailed complaints process under the government procurement law is delegated to the finance department *xitong*).<sup>102</sup> In any event, China's 1997 Administrative Supervision Law (last amended in 2010) broadly empowers China's Ministry of Supervision and lower level supervision departments to police and administratively punish any violations of law and discipline by other Chinese government departments and/or government personnel.

A critical problem lies instead in the ongoing failure of the Chinese polity to properly define, balance and coordinate concurrent supervisory functions and associated processes. The case of Television Broadcasting Bureau of Huaihua Municipality v. Construction Bureau of Huaihua Municipality demonstrates the negative outcomes of such uncoordinated public management, specifically showing how a rule-based disputes process can be significantly undermined when an unsatisfied bidder files a complaint with a coincidental regulator.<sup>103</sup>

In Television Broadcasting, the project at issue was the construction procurement of a public broadcasting facility by a local public broadcaster. The primary supervisory department responsible for the procurement was a local construction bureau. Local rules governing the project provided specific bid challenge procedures as follows: Within 15 days of a bidding process the bidding results should be reported by the project owner or by the owner's tender agent to the local construction bureau. After such filing, bidders then have five days to submit complaints alleging any illegalities in the process. If no complaints are raised within the five days, then the project owner is authorized

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<sup>98</sup> See The Work Report of the 5<sup>th</sup> Meeting of the 17<sup>th</sup> Conference of the Discipline Inspection Commission of the Chinese Communist Party (January 11, 2010) available at

[http://news.xinhuanet.com/politics/2010-02/09/content\\_12960507\\_10.htm](http://news.xinhuanet.com/politics/2010-02/09/content_12960507_10.htm) which advocates for the creating of a unified, standard exchange center that avoids "conflicts of interest," meaning, arguably, one that avoids conflicts among *xitong*.

<sup>99</sup> Du Zi Yue, "Supervision Power of Government Procurement Should Not Be Detached From The Finance Departments," Government Procurement Information Newspaper, September 23, 2011 available at [http://www.caigou2003.com/news/Local/news/20110923/news\\_197168.html](http://www.caigou2003.com/news/Local/news/20110923/news_197168.html).

<sup>100</sup> 2002 Government Procurement Law of the People's Republic of China, Article 69. Similarly, Article 68 of the law retains China State Auditor's power to conduct audits of government procurement projects.

<sup>101</sup> Id., Article 70.

<sup>102</sup> Id. Articles 51-58.

<sup>103</sup> Intermediate Court of Huaihua Municipality, Hunan Province, Administrative Division First Level Decision No. 7 (2004)(on file with the author).

to make formal contract award, allowing the project to proceed.<sup>104</sup> If a complaint is timely filed, then the construction department has 30 days to dispose of the complaint, making a decision as to whether the project may proceed with the contract as awarded or corrective action needs to be taken by the project owner.

Three bidders submitted offers to build the broadcasting facility. Upon award, one unsuccessful bidder promptly filed a complaint, but not with the relevant construction bureau per the above-referenced procedures. Instead, the aggrieved bidder filed its complaint with the local Chinese Communist Party Discipline Inspection Committee (hereinafter referred to as DIC).<sup>105</sup> Following the rule-based procedures, the project owner's tendering agent proceeded to file the bid results with the local construction department. However, the statutory filing was rejected on repeated occasions.<sup>106</sup> The claimed basis for rejecting the filing was that a bidder on the project had complained to the DIC.

The DIC, in turn, spent months trying to mediate the dispute (there were about four mediations over five months), and even recruited the local construction bureau to help with the investigation and resolution.<sup>107</sup> However, during this time, the dismayed project owner was unable to get any guidance from the construction bureau (the supposed primary supervisor) on how to proceed. The project was placed in limbo. Frustrated, and obviously suffering delay damages, the project owner sued the construction bureau seeking compensation for harm arising from the latter's failure to carry out its legal duty to handle the complaint and make a decision within the required 30 days.

The Court rejected the project owner's claim, finding that since the construction bureau did not actually receive a formal complaint from the aggrieved bidder, it did not have the administrative duty to act on the complaint.<sup>108</sup> Yet the Court simultaneously found that the construction bureau, "as the supervisory department for tendering and bidding activities" was correct in staying the procurement procedure when it learned that a complaint was pending with the DIC.<sup>109</sup> It also found that the DIC's recruitment of the local construction bureau to assist was just that—a request for assistance—and not removal/referral of the complaint from the DIC to the construction department.<sup>110</sup>

The entire process, from original bid award to the construction bureau finally making a justiciable decision, and then administrative appeals to that decision, forced the project owner to wait almost a year before reinstating the bidding, the Court seemingly ignorant to the Kafkaesque plight of the owner stemming from the poorly defined regulatory roles of relevant government agents. Logic would indicate that if the Court acknowledged the local construction bureau "as the supervisory department for tender and bidding activities," that it, not the DIC, should be primarily responsible for the complaint, with the local bid protest procedures controlling, thus requiring a ruling on the Complaint in 30 days. The Court's attempt to reconcile the concurrent complaint processes, as grounds to avoid government liability, was not only illogical, but unwise for the health of the overall system. Preferably, the Court should have affirmed the primacy of the more detailed bid protest rules, highlighted the failure of the local construction department to comply with such rules, and

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<sup>104</sup> Id.

<sup>105</sup> Id. at page 7.

<sup>106</sup> Id. at page 8

<sup>107</sup> Id.

<sup>108</sup> Id. at page 9.

<sup>109</sup> Id. at pages 8- 9. An interesting aside, the project owner argued, albeit unsuccessfully, that the local DIC, as a instrumentality of the Chinese Communist Party, was not a government department with the status to hear complaints. Id. at pages 3 and 9.

<sup>110</sup> Id.

awarded damages to the Plaintiff sending the message that such administrative inefficiencies as manifested in the case would not be tolerated.

Similar scenarios are predictable under China's 2002 Government Procurement Law as well. Article 70 of that law provides that "any enterprises or individuals have the right to make a complaint and charge relating to any illegal activities in government procurement and the concerned departments and organs shall handle the same in accord with their individual responsibilities."<sup>111</sup> Akin to rules at issue in Television Broadcasting, this general complaints provision is not reconciled with the prescribed step-by-step complaints procedures found in Articles 51-58 of the government procurement law.<sup>112</sup> Overall, the law simply provides no guidance on the proper relationship between multiple identified regulators, abstract "relevant departments, and their attendant investigative powers and complaints procedures."<sup>113</sup>

Commendably, the Hefei "Kuai Dominant" model of the four in one platform reforms attempts to address this situation. The Hefei Municipal Measures for the Supervision and Management of Tendering and Bidding, particularly Article 17, seeks a hierarchy of sorts by instructing "relevant departments" to assist the first tier supervisory office of the new combined bidding center in handling complaints and to entrust that office to assess any penalties [against parties in the procurement process].<sup>114</sup> However, that hierarchy easily unravels when the traditional *xitong* push back reasserting their authority.<sup>115</sup> For those jurisdictions adopting the "*xitong* coordination model" or the "loose unification model," they simply repeat the drafting mistakes of the Chinese legislature and the State Council by acknowledging commensurate roles for different regulators without properly reconciling the same through some rationale ordering.<sup>116</sup>

#### 5.4 The Role of Implementing Agents

China also needs greater clarity with respect to the roles played by agents involved in carrying out procurements. As described earlier, numerous agents are often stacked above and around individual procurement projects, with the roles and responsibilities of each often unclear to suppliers and the public. Such entities include leadership/monitoring groups, tender and bidding centers, government procurement centers and commercial tendering intermediaries. They present a project management scheme not only redundant, but also of multiple character—e.g., the supervisor is distinctly public, project implementing agents largely quasi-public, and tender intermediaries often commercial.<sup>117</sup> Positively, the four into one platform reforms hold promise to reduce the number of implementing arrangements, and in turn implementing entities. But that still begs the need to identify the governmental, public, quasi-public or commercial character of the players involved, and to better formulate the responsibility and the legal relationships among them.

Leadership committees and tender and bidding centers often lack formal administrative capacity, and/or a status as legal persons, so are not proper subjects of administrative law.<sup>118</sup> Consequently,

<sup>111</sup> 2002 Government Procurement Law, Article 70.

<sup>112</sup> Id. at Articles 51-58.

<sup>113</sup> See footnote 25, supra.

<sup>114</sup> See footnote 80, supra.

<sup>115</sup> See discussion page 17, supra.

<sup>116</sup> See discussion page 15, supra.

<sup>117</sup> Considering extensive public ownership in the Chinese economy, it's better to juxtapose "public" with "commercial," than "public" with "private."

<sup>118</sup> Whether an entity is subject to administrative law often turns on an inquiry as to whether the entity has been properly "delegated" or merely "entrusted" with public power, only the former which confers the status of a "subject of administrative law" on the empowered entity. See 1989 Administrative Litigation Law of the People's Republic of China, Article 25.

some other recognized government agency must be responsible for their actions.<sup>119</sup> If multiple regulators are atop the process, it may not be easy to determine the most responsible regulator and, conversely, some government agency may find itself sued for the actions of an entity that it really does not control.<sup>120</sup> Foremost among these problems is determining the proper respondent(s) in a bid protest. Due to confusion, commercial tendering agents often find that they must independently defend lawsuits, only to argue, and for the Courts to agree, that they are mere agents of the purchaser bearing no liability for problems in the process.<sup>121</sup> Then there are recurring issues of the role of Tender and Bidding Centers and their legal status and authority. As quasi-public entities, such centers may assume powers they do not have, unnecessarily complicating disputes in the procurement process.<sup>122</sup> Conversely, those responsible may try to distance themselves for the actions of their subordinates. In one bid protest turned civil law tort case, the ultimate purchaser/project owner, an airport authority, incredulously tried to claim it was not responsible for the actions of the subordinate committee managing the project on its behalf.<sup>123</sup> Project implementation frameworks, like the power balances between procurement regulators, often differ from jurisdiction to jurisdiction. So far, the four into one platform reforms offer little in terms of clarifying the legal character of project implementation instrumentalities or the legal relationship among and between such entities.

## 5.5 Recent History Repeated

The final issue to consider is whether the Four Into One Platform Reforms are simply repackaging of failed earlier efforts to centralize management of China's public purchasing regime. After all, China's 2002 Government Procurement itself represents a so far unsuccessful attempt to centralize supervision and management of China's public procurement under the leadership of the finance departments, justifying pessimism that current efforts to create a unified management structure portend no better outcome. The slogans associated with the current reforms are reminiscent, arguably identical, to the effort attempted by the finance department *xitong* to bring all public

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<sup>119</sup> *Id.*

<sup>120</sup> See Du Zi Yue, footnote no. 99, *supra*. Journalist Du creatively divides the government procurement process into 12 distinct steps, all linked to the public budgeting process, arguing that breaking any of the links will lead to poorer government procurement management.

<sup>121</sup> See e.g., Beijing Yineng LiDa Technology Company Ltd. v. Guodian Longyuan Electric Power Technology Construction Ltd., XuanWu District Basic People's Court of Beijing Municipality, First Level Civil Decision No. 03547 (2010)(on file with the author) finding that the commercial tendering enterprise a mere innocent agent of the purchaser and thus not liable for claims related to wrongful forfeiture of bid bond. Of course, if a commercial tendering agency engages in misconduct independent of its principal purchaser, it should bear liability. See e.g., Hunan Chuangyuan Air Conditioning Ltd. v. Hunan Province Tendering Co. Ltd. et al., High People's Court of Hunan Province, 3<sup>rd</sup> Civil Division Final Decision No. 85 (200)(on file with author).

<sup>122</sup> In Xixian Bureau of Urban and Rural Construction v. Xixian Construction Company, High Court of Shanxi Province, Administrative Final Decision No. 5 (1999), the court found that a local tendering and bidding center lacked the authority to make a decision on a supplier's complaint, ordering instead, that the local construction bureau rule on the matter. *Id.* at page 2 ("only the administrative department for construction is authorized to carry out supervision and administration, as well as make decision of administrative punishment over tendering and bidding for construction. The Tendering and Bidding Office cannot make the administrative decision and punishment over tendering and bidding for construction, unless it is authorized by the administrative department for construction to do so.")(Case opinion on file with author).

<sup>123</sup> See Dalian Xinsheng Fire Engineering Company Co. v. Dalian M&E Engineering Equipment Company et al., Shenyang Municipal Intermediate People's Court, Civil Division No. 3, First Instance Decision No. 7 (2005)(where the court determined that award to a dishonest bidder amounted to collusion between the owner, the management committee, the intermediary and the awardee, thus infringing on the protesters right to fair competition. The court specifically ruled that the project owner was legally responsible for the actions of the underlying management committee)(case opinion on file with author). Interestingly, the project in Dalian Xinsheng proceeded under the local China Civil Aviation Administration *xitong*. The plaintiff pursued administrative [bid protest] litigation under the bid protest rules for that *xitong*, simultaneous with tort litigation in the civil decision of the Court.

procurement under its public budget management powers nearly a decade ago.<sup>124</sup> Articles heralding the new four into one platform reforms cite it as the breakthrough to “openness, fairness and justice,” “transparency,” “corruption prevention” and best use of public funds expenditure, much the same as the fanfare that accompanied the advent of China’s now decade old, finance *xitong* driven, “government procurement” reforms.<sup>125</sup>

Moreover, centering public procurement supervision within broader public finance management arguably makes sense, since the primary mission of China’s 2002 Government Procurement Law, like that of some other countries is to foster competition to purchase items on the best monetary terms for the public agencies, balanced of course with issues of quality.<sup>126</sup> So far, there is no indication that China’s departments of supervision and/or horizontal levels of government can better quiet the jostling *xitong* than any other Chinese government department. And grounding public procurement regulation primarily in a counter-corruption framework seems dangerously defeatist. After all, even with China’s relatively high levels of corruption, public procurement law is much more than punishing wayward officials. To the contrary, like all procurement regimes, it’s about getting best value for goods, services and construction to fulfill administrative and public needs and welfare.

## 6.0 Clarity Denied: The State Council’s New Implementing Regulations for the 1999 Tender and Bidding Law

Over the last decade, observers of Chinese public procurement reform, including this author, remained optimistic that the chaos of Chinese public procurement reform would gradually evolve towards uniformity, if not harmony.<sup>127</sup> This optimism appears misplaced, especially given China’s State Council very recent reiteration of a dissected regulatory framework for Chinese public procurement set along ill-defined administrative boundaries. See “Implementing Regulations for the Tender and Bidding Law of the People’s Republic of China” (State Council Order No. 613, Issued December 20, 2011, Effective February 21, 2012) (hereinafter T/B Implementing Rules”) Worryingly, Articles 4 and 5 of the T/B Implementing Regulations embraces, even expands, the loose regulatory boundary scheme first adopted by State Council Document No. 34 (2000).

Article 4: The Development and Reform Commission of the State Council guides and coordinates the work of tender and bidding in the whole country and carries out supervision and

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<sup>124</sup> Yan Lihua, “Government Procurement Law is the Legal Guarantee of Standardizing Operations in Government Procurement,” 1 *Sichuan Finance* 50 Z(2003) (in Chinese) available with subscription at <http://www.cnki.com.cn/Article/CJFDTotal-SCCZ200301022.htm>; Li Jianbo, “Zone of Sunshine: A Simple Analysis of the Government Procurement System,” 10 *Economic Tribune* 30 (2003) (in Chinese) available with subscription at <http://cnki.com.cn/Article/CJFDTotal-JJLT200310014.htm>; Wang Yuping et. al., “Realizing the Significance of Government Procurement and the System’s Establishment,” 2 *Theoretical Exploration* 73 (2003) (in Chinese) available with subscription at [http://d.wanfangdata.com.cn/Periodical\\_lts200302033.aspx](http://d.wanfangdata.com.cn/Periodical_lts200302033.aspx); Zhang Jungui, “Government Procurement: A Must Choice for the Benefit of People and Country,” 7 *Finance, Tax and Accounting* 29 (2001) available with subscription at <http://dlib.edu.cnki.net/kns50/detail.aspx?dbname=CJFD2001&filename=CSKJ1200107010>; and Hu Fengcheng, “Implementing the Government Procurement System is a Necessary Measure for Improving the Management of Fiscal Expenditures,” 21 *Jiangxi Politics Report* 32 (1998) (in Chinese) available with subscription at <http://www.cnki.com.cn/Article/CJFDTotal-HXZB199821022.htm>.

<sup>125</sup> See e.g., Lian Wei, “Thoroughly Carry Out the Construction of the Public Resource Exchange Market in the Spirit of the 17<sup>th</sup> Conference,” *Property Rights Guide* December 2007 available with subscription at <http://wuxizazhi.cnki.net/search.CQDK200712020.html>. (Article Author is the CEO of Xiamen Asset Management Center)

<sup>126</sup> See Arrowsmith et. al., footnote no. , *supra*, pages 28-31.

<sup>127</sup> See Wang Ping, “China’s Evolving Legal Framework on Public Procurement” 6 P.P.L.R. 285, 299 (2004)(“it could be argued that the Government Procurement Law is just a new episode instead of the final curtain of the development of China’s public procurement regime, since it provides a temporary compromise solution, rather than a uniform and harmonized regime.)

investigation for tender and bidding activities for important large scale construction projects. The Industry and Informationization, Housing and Rural/Urban Construction, Transportation and Cargo, Railways, Water Resources, Commerce, etc. Departments of the State Council carry out supervision of relevant tender and bidding activities, according to the stipulated divisions of work functions and responsibilities

Development and Reform Commissions of Local People's Governments at the level of county or above guide and coordinate the tender and bidding work for local administrative areas. The relevant departments of the Local People's Governments above the county level carry out supervision of tender and bidding activities according to stipulated division of work functions and responsibilities, and check and handle illegal actions in tender and bidding activities according to law. If any Local People's Government above the county level has separate provisions for the division of work functions and responsibilities for supervision of relevant tender and bidding activities by its subordinate departments, then [proceed] from those provisions.

The finance departments carry out supervision on matters of budget implementation and the implementation of government procurement policies for tendering and bidding on government procurement construction projects according to law.

Supervision organs carry out investigations of targets of investigation related to tender and bidding activities according to law.

Article 5: Local People's Government at the level of cities with districts or higher may establish unified standard platforms for tender and bidding exchange per practical needs, in order to provide services for tender and bidding services. Tender and bidding exchange platforms must not be under the command of administrative supervision departments, and must not have the goal of making profit.

Paragraph 1 of Article 4 of the T/B Implementing Regulations essentially restates the intentions of State Council Document No, 34 (2000) in more abrupt form. Even reading the two documents together, and liberally in the drafter's favor, China's procurement regulatory environment remains one where multiple administrative departments are invited into the fray; to assert themselves over regulatory provinces best suitable to others, and to disclaim responsibility for matters that they should otherwise be primarily responsible for.

Moreover, Paragraph 2 of Article 4 of the new T/B Implementing Regulations sanctions alternative power balances among *xitong* as they may be rearranged by local governments. This, sadly, will encourage further competition among *xitong* from jurisdiction to jurisdiction. In turn, those wishing to participate in the market (be they intermediaries wishing to carryout procurements on behalf of public owners or suppliers wishing to submit bids) will have to understand the internal, and often opaque, administrative dynamics of essentially different public purchasing markets in China increasing 1) the costs of compliance, 2) the risk of administrative punishment from seemingly more distant agencies that assert themselves into the process, and 3) the disconnect between complaint systems which serves to slow down project implementation and/or delay justice while administrative agents jostle.

Paragraph 3 of Article 4 of the new T/B Implementing Regulations thickens the mystery over which agency holds primacy over the regulation of the tender and bidding of "government procurement of construction." Score one for China's Ministry of Finance and local finance department, with the State Council nod that the finance *xitong* should have greater influence over public construction when it comes to public budget management and government procurement policy. Whether this really portends any greater role for the Ministry of Finance *xitong*, given its behavior in the *Modern Wo'Er* cases and practical exclusion from most public construction oversight, remains to be seen.<sup>128</sup>

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<sup>128</sup> Another victory for China's Finance *xitong* can be found in the fact that an earlier draft of the T/B Implementing Regulations broadly defined tender and bidding activities as "the use of tendering for the procurement of construction, goods and services." Implementing Regulations for the Tender and Bidding Law of China (Draft for Soliciting Opinions), Article 2 available at [http://yijian.chinalaw.gov.cn/lismsPro/law\\_download/fulltext/1254272026641.doc](http://yijian.chinalaw.gov.cn/lismsPro/law_download/fulltext/1254272026641.doc). This definition

Paragraph 4 of the 2011 T/B Implementing Regulations also expands upon State Council Document No. 34 (2000) by setting out, albeit tersely, that the supervision departments can carry out investigations related to tender and bidding laws. (State Council Document No. 34 (2000) was silent on the role of the Ministry of Supervision and local supervision departments in the Tender and Bidding process). Unfortunately, no effort is made in the 2011 T/B Implementing Regulations to prioritize or reconcile the oversight powers and complaints process of China's supervisory departments with that of other departments, as to avoid the administrative inefficiencies reflected in the Television Broadcasting judicial decision. In turn, nothing in the 2011 T/B Implementing Regulations suggest a State Council preference for the supervisory departments replacing other *xitong* as the key regulator for and expanded four into one public resource exchange/tender and bidding system.

Finally, Article 5 of the 2011 T/B Implementing Regulations does, however, add the new four into one platform reforms into the chaotic regulatory mix; tossed in as a discretionary option to accompany whatever *xitong* or *kuai* power balance a local jurisdiction chooses to adopt. No particular model or key regulator is favored in the terms of the regulations, but clearly local governments now have greater cover if they want to corral *xitong* into a more unified management structures. Importantly, Article 5 embraces a framework where the unified center, (the purchasing instrumentality), should be separate to any administrative department (the supervision instrumentality), adopting, as this author interprets it, the basic idea that oversight and purchasing should not be in a single administrative hand. Whether that principle finds traction in China's broader practice of public procurement remains uncertain. The T/B Implementing Regulations offer nothing as to legal character of purchasing implementing instrumentalities, nor the legal relations among implementing instrumentalities and between implementing entities and supervisory departments, further complicating what should be simple issues of agency in China's public purchasing arrangements.

## 7.0 Conclusion

After years of public procurement reform, China's government still makes little effort to clearly define the roles of each authorized regulator vis-a-vis similarly situated departments. Moreover, it continues to embrace a procurement management framework of loosely defined and overlapping administrative roles, confounding market participants as to the respective power of the multiple agencies that claim to regulate public purchasing in one form or another. Instead of moving towards uniformity, additional management models proliferate, increasing competition among regulators and confusion among the regulated. The resulting vagaries suffered by all involved will thus remain an unfavorable feature of the system for the near future.

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was omitted in the final version of the 2011 T/B Implementing Regulations. Arguably, now, only "construction-related" purchases of goods and services are the subject China's Tender and Bidding, as compared to Government Procurement, regime.